

The State of Copyright

This book seeks to make an intervention into the ongoing debate about the scope and intensity of global copyright laws. While mapping out the primary actors in the context of globalization and the modern political economy of information ownership, the argument is made that alternatives to further expansion of copyright are necessary. By examining the multiple and competing interests in creating the legal regime of copyright law, this book attempts to map the political economy of copyright in the information age, critique the concentration of ownership that is intrinsic in the status quo, and provide an assessment of the state of the contemporary global copyright landscape and its futures. It draws upon the current narratives of copyright as produced by corporate, government, and political actors and frames these narratives as language games within a global political project to define how information and culture will be shared and exchanged in the future. The text problematizes the relationship of the state to culture, comments on the global flows of culture, and critiques the regulatory apparatus that is in place to commodify culture and align it with the contemporary nation-state. In the end, the possibility of non-commodified and more open futures are explored.

The State of Copyright will be of particular interest for students and scholars of international political economy, law, political science, anthropology, sociology, cultural studies, library sciences, and communication studies. It also will appeal to a growing popular audience that has taken an interest in the issues of copyright.

Debora J. Halbert is an Associate Professor of Political Science at the University of Hawai'i at Manoa. She is the author of *Intellectual Property in the Information Age: The Politics of Expanding Ownership Rights* (Quorum, 1999) and *Resisting Intellectual Property* (Routledge, 2005), along with numerous articles on issues related to intellectual property.

RIPE Series in Global Political Economy

Series Editors: Jacqueline Best (*University of Ottawa, Canada*), Ian Bruff (*Manchester University, UK*), Paul Langley (*Durham University, UK*), and Anna Leander (*Copenhagen Business School, Denmark*)

Formerly edited by Leonard Seabrooke (*Copenhagen Business School, Denmark*), Randall Germain (*Carleton University, Canada*), Rorden Wilkinson (*University of Manchester, UK*), Otto Holman (*University of Amsterdam*), Marianne Marchand (*Universidad de las Américas-Puebla*), Henk Overbeek (*Vrije Universiteit, Amsterdam*), and Marianne Franklin (*Goldsmiths, University of London, UK*).

The RIPE series editorial board are:

Mathias Albert (*Bielefeld University, Germany*), Mark Beeson (*University of Birmingham, UK*), A. Claire Cutler (*University of Victoria, Canada*), Marianne Franklin (*Goldsmiths, University of London, UK*), Randall Germain (*Carleton University, Canada*), Stephen Gill (*York University, Canada*), Jeffrey Hart (*Indiana University, USA*), Eric Helleiner (*Trent University, Canada*), Otto Holman (*University of Amsterdam, Netherlands*), Marianne H. Marchand (*Universidad de las Américas-Puebla, Mexico*), Craig N. Murphy (*Wellesley College, USA*), Robert O'Brien (*McMaster University, Canada*), Henk Overbeek (*Vrije Universiteit, Netherlands*), Anthony Payne (*University of Sheffield, UK*), V. Spike Peterson (*University of Arizona, USA*), and Rorden Wilkinson (*University of Manchester, UK*).

This series, published in association with the *Review of International Political Economy*, provides a forum for current and interdisciplinary debates in international political economy. The series aims to advance understanding of the key issues in the global political economy and to present innovative analyses of emerging topics. The titles in the series focus on three broad themes:

- the structures, processes, and actors of contemporary global transformations;
- the changing forms taken by governance, at scales from the local and everyday to the global and systemic;
- the inseparability of economic from political, social, and cultural questions, including resistance, dissent, and social movements.

The series comprises two strands:

The *RIPE Series in Global Political Economy* aims to address the needs of students and teachers, and the titles will be published in hardback and paperback. Titles include:

Transnational Classes and International Relations

Kees van der Pijl

Gender and Global Restructuring:

Sightings, sites and resistances

Edited by Marianne H. Marchand and
Anne Sisson Runyan

Global Political Economy

Contemporary theories

Edited by Ronen Palan

Ideologies of Globalization

Contending visions of a new
world order

Mark Rupert

The Clash within Civilisations

Coming to terms with cultural conflicts

Dieter Senghaas

Global Unions?

Theory and strategies of organized
labour in the global political economy

Edited by Jeffrey Harrod and
Robert O'Brien

Political Economy of a Plural World

Critical reflections on power, morals
and civilizations

Robert Cox with Michael Schechter

A Critical Rewriting of Global Political Economy

Integrating reproductive, productive
and virtual economies

V. Spike Peterson

Contesting Globalization

Space and place in the world economy

André C. Drainville

Global Institutions and Development

Framing the world?

Edited by Morten Bøls and
Desmond McNeill

Global Institutions, Marginalization, and Development

Craig N. Murphy

Critical Theories, International Relations and "the Anti-Globalisation Movement"

The politics of global resistance

Edited by Catherine Eschle and
Bice Manguerra

Globalization, Governmentality, and Global Politics

Regulation for the rest of us?

Ronnie D. Lipschutz, with James K. Rowe

Critical Perspectives on Global Governance

Rights and regulation in governing
regimes

Jean Grugel and Nicola Piper

Beyond States and Markets

The challenges of social reproduction

Edited by Isabella Bakker and Rachel Silvey

The Industrial Vagina

The political economy of the global
sex trade

Sheila Jeffreys

Capital as Power

A study of order and creorder
Jonathan Nitzan and Shimshon Bichler

The Global Political Economy of Intellectual Property Rights, Second Edition

The new enclosures
Christopher May

Corporate Power and Ownership in Contemporary Capitalism

The politics of resistance and domination
Susanne Soederberg

Savage Economics

Wealth, poverty and the temporal walls of capitalism
David L. Blaney and Naeem Inayatullah

Cultural Political Economy

Edited by *Jacqueline Best and Matthew Paterson*

Gender and Global Restructuring, Second Edition

Sightings, sites and resistances
Edited by *Marianne H. Marchand and Anne Sisson Runyan*

Transnational Financial Associations and the Governance of Global Finance

Assembling wealth and power
Heather McKeen-Edwards and Tony Porter

The Making of Modern Finance

Liberal governance and the gold standard
Samuel Knafo

9. Anti-Immigrantism in Western Democracies

Statecraft, desire and the politics of exclusion
Roxanne Lynn Doty

10. The Political Economy of European Employment

European integration and the transnationalization of the (un)employment question
Edited by *Henk Overbeek*

11. Rethinking Global Political Economy

Emerging issues, unfolding odysseys
Edited by *Mary Ann Tétreault, Robert A. Denemark, Kenneth P. Thomas and Kurt Burch*

12. Rediscovering International Relations Theory

Matthew Davies and Michael Niemann

13. International Trade and Developing Countries*

Bargaining coalitions in the GATT & WTO
Amrita Narlikar

14. The Southern Cone Model

The political economy of regional capitalist development in Latin America
Nicola Phillips

15. The Idea of Global Civil Society

Politics and ethics of a globalizing era
Edited by *Randall D. Germain and Michael Kenny*

16. Governing Financial Globalization

International political economy and multi-level governance
Edited by *Andrew Baker, David Hudson and Richard Woodward*

17. Resisting Intellectual Property

Debora J. Halbert

18. Neoliberal Hegemony

A global critique
Edited by *Dieter Plehwe, Bernhard Walpen and Gisela Neunhöffer*

19. Global Standards of Market Civilization

Edited by *Brett Bowden and Leonard Seabrooke*

20. Beyond Globalization

Capitalism, territoriality and the international relations of modernity
Hannes Lacher

21. Images of Gramsci

Connections and contentions in political theory and international relations
Edited by *Andreas Bieler and Adam David Morton*

22. Global Public Policy

Business and the countervailing powers of civil society
Edited by *Karsten Ronit*

23. The Transnational Politics of Corporate Governance Regulation

Edited by *Henk Overbeek, Bastiaan van Apeldoorn and Andreas Nölke*

Routledge/RIPE Studies in Global Political Economy is a forum for innovative new research intended for a high-level specialist readership, and the titles will be available in hardback only. Titles include:

1. Globalization and Governance *
Edited by *Aseem Prakash and Jeffrey A. Hart*

2. Nation-States and Money
The past, present and future of national currencies
Edited by *Emily Gilbert and Eric Helleiner*

3. The Global Political Economy of Intellectual Property Rights
The new enclosures?
Christopher May

4. Integrating Central Europe
EU expansion and Poland, Hungary and the Czech Republic
Otto Holman

5. Capitalist Restructuring, Globalisation and the Third Way
Lessons from the Swedish model
J. Magnus Ryner

6. Transnational Capitalism and the Struggle over European Integration
Bastiaan van Apeldoorn

7. World Financial Orders
An historical international political economy
Paul Langley

8. The Changing Politics of Finance in Korea and Thailand
From deregulation to debacle
Xiaoke Zhang

First published 2014
by Routledge
2 Park Square, Milton Park, Abingdon, Oxon OX14 4RN

and by Routledge
711 Third Avenue, New York, NY 10017

Routledge is an imprint of the Taylor & Francis Group, an informa business

© 2014 Debora J. Halbert

The right of Debora J. Halbert to be identified as author of this work has been asserted by her in accordance with the Copyright, Designs and Patent Act 1988.

All rights reserved. No part of this book may be reprinted or reproduced or utilised in any form or by any electronic, mechanical, or other means, now known or hereafter invented, including photocopying and recording, or in any information storage or retrieval system, without permission in writing from the publishers.

Trademark notice: Product or corporate names may be trademarks or registered trademarks, and are used only for identification and explanation without intent to infringe.

British Library Cataloguing in Publication Data

A catalogue record for this book is available from the British Library

Library of Congress Cataloging in Publication Data

Halbert, Debora J. (Debora Jean), author.

The state of copyright : the complex relationships of cultural creation in a globalized world / Debora Halbert.

pages cm. — (RIPE series in global political economy)

Includes bibliographical references and index.

1. Copyright—Social aspects. 2. Culture and law. I. Title.

K1420.5.1135 2014

346.0472—dc23

2013030111

ISBN: 978-0-415-85738-3 (hbk)

ISBN: 978-1-315-81862-7 (ebk)

Typeset in Bembo
by Taylor & Francis Books

Contents

For my climbing Ohana, both near and far: Chris, Kelly, Lizz, Dan, Andy, Az, Joe, Bugman, Rob H., Rob B., and Zimran, for keeping me balanced and alive and never letting me hit the ground.

Also for Scott Bradley and the CaZan sailing crew, both past and present, for keeping me out of balance and alive by bringing the fluidity of the ocean into my life.

Contents

Acknowledgements

xiii

1 Introduction: the state of culture

1

The global political economy of information ownership 4

Copyright maximalism 11

The language game of intellectual property politics 13

Chapter overview 16

2 American intellectual property hegemony

25

For the good of the country: restructuring the American government to protect intellectual property 29

Reconfiguring bureaucracy 33

Congressional advocacy 37

Beyond America – intellectual property barbarians and intellectual property maximalism 45

Conclusion 49

3 Intellectual property piracy and the national security threat

58

Framing piracy as a national security threat 61

The securitization of intellectual property 63

Who is the enemy? From pirates and IP activists to terrorists 68

A fractured global debate 76

Conclusion 80

4	Intellectual property and the state: the territories of national culture	86
	<i>The Cold War and the clash of cultural policy</i>	90
	<i>Cold War copyright</i>	98
	<i>The state of national culture</i>	104
	<i>So what is European culture anyway?</i>	109
	<i>Conclusion</i>	111
5	Exporting authenticity and the hybridity of culture	118
	<i>Hybridity and the nation-state</i>	121
	<i>Conclusion</i>	135
6	Critical copyright, cultural flows, traditional knowledge, and the future	143
	<i>The colonizing practices of copyright</i>	146
	<i>Pathway one: preserving the past – neotraditionalism</i>	153
	<i>Pathway two: neoliberal indigeneity</i>	159
	<i>Pathway three: global indigeneity—hybridity and the (re)birth of authenticity</i>	164
	<i>Traditional knowledge and the modern state</i>	168
	<i>Conclusion</i>	174
7	Mass culture and the culture of the masses: a manifesto for user-generated rights	181
	<i>The origins of user-generated content</i>	182
	<i>Deconstruction of user-generated content</i>	183
	<i>The “problem” of user-generated content</i>	185
	<i>Toward a better copyright balance and a cultural bill of rights</i>	197
	<i>Conclusion</i>	199
8	Skipping through the desert of the real: copyright landscapes and the future of creativity	213
	<i>TRIPing through the desert of the real</i>	216
	<i>Skipping through the desert of the real</i>	225
	<i>Conclusion</i>	235
	<i>Bibliography</i>	241
	<i>Index</i>	263

Acknowledgements

There are many people to whom I owe debts of gratitude and intellectual debts. I'd specifically like to acknowledge the support of my former employer, Otterbein University, and my many wonderful colleagues there who gave me the space to pursue the scholarship I desired, despite its lack of clear disciplinary topicality. The Department of Political Science at the University of Hawai'i continues to allow me to chart my own intellectual path and, while this book is perhaps as close to political science as I have come, the UH Political Science department has also given me the flexibility to pursue my scholarship in unconventional ways. While the mainstream of the political science discipline remains detached from significant contemporary political battles such as the one surrounding the globalization of intellectual property rights, these two places have been ahead of their time in transcending disciplinary boundaries.

On a more specific level, I would like to thank Masa Kato and Brian Richardson for being part of an ad hoc reading group where my work took up the bulk of the time, it seems, for reading different parts of the book and making important theoretical contributions. I would like to thank my good friend Chris Farrar for listening to me puzzle through different parts of the argument on hikes, at dinner, and wherever else we might end up going while I had work on my mind. I would like to thank the very rich and interdisciplinary field of intellectual property scholars who host wonderful workshops, symposiums, and conferences and for their kind invitations to present my work at these events. Specifically, I would thank Peter Yu, not only for his leadership in the field, but for inviting me to so many different conferences over the years and opening doors to me even though I am not a law professor. I would also like to thank William Gallagher and Shubha Ghosh for their organizational efforts within Law and Society and for including me in their projects as well.

Finally, I would like to thank my colleagues and students in the political science department at the University of Hawai'i. Specifically, the students and my co-instructor

Colin Moore in the Technology Law and Policy course we taught in Spring of 2013 deserve a special shout out for their amazing work collecting and posting to our facebook page articles related to intellectual property, hacking, technology security, and copyright. I used this resource in the revision process regularly. I'd like to thank Aric Nakamura, Jonathan Cham, Brendan Burk, Christopher Tu, Carissa Nakamura, and graduate student Rex Troumbley, for finding the subject sufficiently interesting to keep posting articles, some even after the course had ended! I know they are all going on to great things.

1

INTRODUCTION

The state of culture

Large corporations, of course, are blinded by greed. The laws under which they operate require it—their shareholders would revolt at anything less. And the politicians they have bought off back them, passing laws giving them the exclusive power to decide who can make copies.

There is no justice in following unjust laws. It's time to come into the light and, in the grand tradition of civil disobedience, declare our opposition to this private theft of public culture.

We need to take information, wherever it is stored, make our copies and share them with the world. We need to take stuff that's out of copyright and add it to the archive. We need to buy secret databases and put them on the Web. We need to download scientific journals and upload them to file sharing networks. We need to fight for Guerilla Open Access.

With enough of us, around the world, we'll not just send a strong message opposing the privatization of knowledge—we'll make it a thing of the past. Will you join us?

Aaron Swartz, "Guerilla Open Access Manifesto"¹

For those following copyright and access-to-knowledge (A2K) issues, the death of Aaron Swartz came as a heartbreaking and powerful blow. Swartz had been indicted by the U.S. federal government under the Computer Fraud and Abuse Act (CFAA) for downloading files from the academic database, JSTOR, without authorization. JSTOR hosts a digital archive of old academic papers in the humanities, which are of primary interest only to academics. The "value" to JSTOR is that libraries pay a significant fee for access. The "value" to academics using the database is that it makes research and citation much easier in the fields covered by JSTOR. The "value" to those whose work appears in the database is not monetary because journal authors do not receive compensation from the digital existence of their published work.² Thus, "value" here is a complex idea.

To download the files, Swartz entered an unlocked storage room at the Massachusetts Institute of Technology (MIT) where he tapped into the computer system and ran a script that allowed him to capture the data.³ Over the course of several days, Swartz acquired millions of JTOR files. His intent was to share these academic articles widely as a political statement that would underscore the existing barriers to access to knowledge. His motivation was to demonstrate how the walls of the information age are used to monetize the intellectual work of others at the expense of the public.

When identified as the perpetrator, the U.S. federal government charged Swartz with wire fraud, computer fraud, unlawfully obtaining information from a protected computer, recklessly damaging a protected computer, aiding and abetting, and criminal forfeiture.⁴ For these charges, he faced up to 30 years in federal prison.⁵ To put the length of this sentence into context,⁶ compare this sentence to the 35 years to which David Headly was sentenced for helping to plan the attacks in Mumbai, resulting in over 167 deaths.

One might question how Swartz's "crime" would justify even the possibility of such a long sentence, given there was no real harm done. JSTOR did not want to prosecute and the scope of the "crime" committed against MIT included entering an unlocked storage room and tapping into an open and unsecured computer system.⁷ However, the justice department's agenda included taking computer infractions such as this one very seriously. In the negotiations that followed the indictment, Swartz was offered between three and six months in prison if he pled guilty to a felony offense.⁸

While the Justice Department points to the plea bargain that was offered as evidence that it was not overly harsh with Swartz, its public reasonableness masks the fact that the "crimes" for which he was indicted should not have been considered felonies at all. The fact that these were felony charges to begin with was a reason that Swartz refused the plea. Furthermore, those close to Swartz have a different story to tell about justice and prosecutorial discretion in this case. As Law professor Lawrence Lessig puts it:

Here is where we need a better sense of justice, and shame. For the outrageousness in this story is not just Aaron. It is also the absurdity of the prosecutor's behavior. From the beginning, the government worked as hard as it could to characterize what Aaron did in the most extreme and absurd way. The "property" Aaron had "stolen," we were told, was worth "millions of dollars"—with the hint, and then the suggestion, that his aim must have been to profit from his crime. But anyone who says that there is money to be made in a stash of ACADEMIC ARTICLES is either an idiot or a liar. It was clear what this was not, yet our government continued to push as if it had caught the 9/11 terrorists red-handed.⁹

So why the intensity of the federal prosecution? This question can only be answered by understanding the new political economy of the information age. The extent of

the possible penalty for these non-violent, arguably not even illegal actions is related to the fact that a computer was involved. Why would a computer make such a difference? Because information, access to it, and its control are the foundations of the new wealth made possible by the information age. As such, the law has been configured to support this new regulatory regime.

In part, the harsh response is related to Aaron's actions as a *political* subject. Aaron's short manifesto, published online and mirrored in many places, was used by prosecutors to demonstrate his "malicious intent" and justify the extensive penalties.¹⁰ Swartz was an advocate of free information and had dedicated much of his young life to fostering better access to knowledge, better communication tools, and the possibility of a world where information was unlocked and free. In his manifesto, written years before Swartz engaged in what he considered to be an act of civil disobedience, he said that, "sharing isn't immoral—it's a moral imperative. Only those blinded by greed would refuse to let a friend make a copy."¹¹ Swartz, as an advocate for access to information, called it a moral obligation to resist the privatization of knowledge.¹²

Aaron was a threat to the political order of the computer-based world. It is possible to suggest a depoliticized motivation for the prosecution of Aaron Swartz—he was after all, breaking the law, and we live in a system where the rule of law prevails.¹³ However, the law is not without politics and is certainly not neutral. Arguing for the intent to share academic papers widely as a malicious theft demonstrates the power of those siding with the current balance of copyright to frame and control how access to knowledge will proceed. Ironically, for a democracy anywhere in the world to fail to see that such laws limit our freedom, demonstrates how powerful is the ideology of private property over information. Freedom of information under the paradigm in which we find ourselves today is only an ideal if that "freedom" is freedom to purchase, concentrate, and own information.¹⁴

The federal prosecution of Aaron Swartz is an example that helps reveal how the nation-state, as the entity with police power, is used to construct a global enforcement regime for the protection of intellectual property (IP). Instead of civil cases brought by private actors, increasingly taxpayer dollars are now used to enforce criminal laws against property theft in intellectual property. The series of laws lobbied for and successfully promulgated by the culture and content industries at national and global levels demonstrate the success of an intellectual property paradigm that increasingly controls information and culture and permits sharing only under the auspices of the limited transfer of a private property right. The state of copyright law today is important because these political battles will define the scope of ownership, sharing, and culture well into the future.

Aaron Swartz's story is not only a moment of concern but also offers hope that the battle over access to knowledge in the information age has not yet been lost but has rather just been engaged. There are now those around the world who have woken up to the fact that the institutional frameworks for the information age set in motion during the 1980s and 1990s are worth resisting. There are now activists around the globe who have aligned against the efforts to further expand intellectual property protection, as the global protests against the Anti-Counterfeiting Trade Agreement

(ACTA), the U.S. protests against the Stop Online Piracy Act, and the growing number of voices wishing to see changes in IP policy, from software patents to geographical indications, demonstrate. Furthermore, the tactics of pro-intellectual property forces are more visible today to the general public than at any time in the past because content industries have turned against their fans and consumers to protect their property.

Not all within a given nation-state will embrace the pro-intellectual property policy position that may be required to join international trade regimes and is generally embraced by governments. States themselves are fractured and diverse entities where one branch may have a different set of intellectual property-related goals that contradict other parts of the state apparatus. However, what is important to note here is that the *general trajectory* globally is towards more property protection and the *underlying assumption* upon which policy is made is that more protection is a good thing. The U.S. federal government has led the way in ratcheting up protection of intellectual property. It has done so both domestically and internationally and thus is the starting point for any analysis of global intellectual property law. The United States has led the way, but other countries have implemented their own versions of anti-sharing. Most controversial are the "three-strikes" laws that can be found in France, New Zealand, and South Korea, among other places.¹⁵

Pro-intellectual property interests have used the state to establish a legal regime that has moved well beyond the protection of copyrights, patents, trademarks, and other types of abstractions as a limited monopoly balanced against a public interest, to protecting these abstractions as a form of property to which an original owner must be given virtually absolute rights. In doing so, the state becomes an advocate for a specific political economy of intellectual property that has ramifications for the free flow of information, access to knowledge, and the future of innovation. Intellectual property has always been, but has now more visibly become, an issue of social justice.

The global political economy of information ownership

Copyright law has been enormously successful as a tool to defend past acts of creativity from present (and future) transformations and appropriations. It has also become an excellent tool for concentrating ownership of this abstract property, the vast majority of which is now owned by media and information conglomerates that control access to information, entertainment, and knowledge.¹⁶ In defining the scope of protection in the way it does, intellectual property establishes a specific political economy of ideas and creativity. As James H. Mittelman states about the ideological underpinnings of globalization, "certain ideas become centerpieces of consensus, and consensus is more cost-effective than coercion."¹⁷ While there remains the need for coercion, the consensus that has been established for global intellectual property rules is one produced for, and with the direct aid of, transnational corporations (TNCs). Peter Drahos, who has done excellent work detailing the role of TNCs in developing the global intellectual property rules that exist, helps clarify the political economy of the present and the future:

TNCs are unified by the belief they will all do better in a world where states and citizens have embraced an ideology that favors hyper-strong intellectual property rights (IPR) because that ideology enables those TNCs to invest in turning knowledge from a public good into a private good and to set the terms of access to it.¹⁸

As Drahos makes clear, intellectual property has functioned as a *de facto* global consensus, one that is often challenged, but remains grounded in the international impetus towards neoliberalism.¹⁹ The global narrative produced to justify ongoing neoliberal efforts aligns around a discourse of "the information society,"²⁰ which further justifies the concentration of a type of knowledge production, governed by intellectual property laws.

The concept of globalization is an essential frame for understanding intellectual property debates. Globalization can manifest itself in many ways, but contemporary globalization can be understood "as a set of social processes that are thought to transform our present social condition into one of globality," according to Manfred Steger.²¹ Globalization creates new and overlapping social networks that "overcome traditional political, economic, cultural, and geographical boundaries."²² These networks mark an "expansion and stretching of social relations, activities, and interdependencies," while also creating "an intensification and acceleration of social exchanges and activities."²³ These understandings of globalization are exemplified by economic and cultural exchanges across the boundaries of the state.

Those seeking to enhance intellectual property protection align best with the rules and concept of neoliberal globalization. Neoliberal globalization has sought to connect the world through trade agreements and the free trade of commercial goods, culminating in the creation of the World Trade Organization (WTO), of which protection of intellectual property is an integral part.²⁴ Often understood as motivated by large transnational corporations and the nation-states that support them, those who study the evolution of international agreements governing intellectual property have argued that this ideological set of values is the primary impetus behind the expansion of intellectual property at the global level.²⁵ This model has resulted in efforts to transform the public domain into commodities and places primary value on private ownership instead of public ownership of all commercial as well as public goods. The result is that access to knowledge becomes an activist stance.²⁶ Continued expansion of intellectual property protection is the goal of advocates for this model, which they claim is tied to economic development for all.

In contrast to the neoliberal actors who wish to expand intellectual property protection, the second globalized ideological position relevant here is based upon the desire to see information circulate more freely without the barriers of the nation-state or the control of industrial giants interfering in a significant way. The global critique of intellectual property focuses heavily on issues of development, claiming that development is actually hindered by strong intellectual property laws. Those who advocate for reduced intellectual property protection, and for a stronger sense of public use, especially when it comes to patented medicines, embrace the more minimalist

approach to intellectual property. Some scholars go so far as to advocate for the elimination of intellectual property, especially copyrights, as we know them, but most simply seek more flexibility in the law, especially for the global South.²⁷

Development in this model is possible only with far freer access to knowledge, technology, and culture than that made possible under the strict regulatory structures of current intellectual property laws. Many defending the existing regulations, including the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), claim that the law as it currently stands includes adequate safeguards of the public domain, public health, and local desires to have flexibility in intellectual property laws, but advocates for more minimal standards of protection believe that TRIPS has gone too far and imposes too great a cost on the global South. While those seeking to maximize intellectual property argue that innovation only occurs if you allow the innovator to own and control the results, those who seek to minimize intellectual property protection claim that inspiration and innovation emerges from a far freer circulation of ideas, and that intellectual property is part of a larger global political economy that merely entrenches the inequalities of the status quo and exacerbates them into the future.

These tensions—to maximize protection and control and to limit protection and control—are what makes it necessary to analyze intellectual property debates along global trajectories. The network of nation-states, civil society actors, non-governmental organizations (NGOs), and industry representatives aligning with either side of the debate do not easily fit conventional international relations models. It is tempting to try to characterize and fit global politics into these conventional roles, dividing the world along the lines of the nation-state into North versus South, or along old Cold War ideological lines of capitalism versus communism. In these bipolar narratives, the industrial world as an engine of capitalism is poised against the developing world that often tends towards communism (at the worst) and protectionism of domestic markets that are antithetical to neoliberal trade policies (at their best). Theories of globalization problematize and undermine this rather simplistic view by suggesting that the relationships forged internationally must be understood through a different geographic and policy configuration.

Intellectual property can offer an excellent view of the complexities of globalization. In terms of intellectual property politics, it is often easy to characterize the lines as following these larger state-based divisions, especially given that the most significant attempts to expand the scope and length of intellectual property laws have come from the United States and the industrialized world. Furthermore, the global South has clearly been disadvantaged by the modern configuration of intellectual property laws, and efforts at the World Intellectual Property Organization (WIPO) are focused on a state-based development model in respect to the creation of the domestic laws, developing countries are encouraged to expand IP protection in an effort to enhance development via intellectual property regulation. In other words, one cannot escape the role and relevance of the nation-state in constructing the international legal apparatus upon which intellectual property is built. However, the story is far more complex than a traditional story of Western hegemony and state-based politics would suggest.

While the U.S. government, for example, has been a primary actor internationally in seeking expansive intellectual property rights, numerous NGOs with origins in the United States or strong advocacy networks in the United States have actively fought these expansive efforts. James Love's Knowledge Ecology International (KEI) is an excellent example of why it is important to think beyond the nation-state and understand the far more complex global relations that exist.²⁸ KEI has offices in Washington, DC and Geneva and, as an international NGO, has been instrumental in convincing WIPO to focus on development issues. While born as an American consumer-based advocacy group, it has transformed into a global network to resist the overexpansion of intellectual property rights. How might one locate such an organization in the bipolar narrative of nation-states? Rather, this organization, funded by donations and grants, and based in the developed world, clearly stands up for issues that the U.S. government does not, and will not, advocate for.

It is far more likely that KEI will find support from nation-states such as India and Brazil, both of whom have lobbied for more flexibility in patents on life-saving medicines and have sought to resist the expansive narratives of intellectual property in the context of development. Thus, member states, groups such as KEI, and activists were crucial in establishing the development agenda at WIPO, but would have met with opposition from other member states, as well as industry groups.²⁹ U.S. citizens and the U.S. government may have found themselves on opposite sides of the development agenda debates, but then so might the citizens and governments of other countries at the table. Obviously, while the North/South divide regarding development and IP is a stark and clear one, it is also the case that many developing countries have strong IP advocates among their business elites and their lawyers, and in their intellectual property offices. The fact that virtually all nations are members of WIPO and have signed TRIPS suggests at the very least that international legitimacy can be tied to a state's efforts to sit at the table in the important international forums. Thus, while populations across the globe—both inside and outside the developed world—may continue to engage in what industry actors call piracy, their government officials may support the more expansive model of intellectual property protection as required by international law.

Even those advocating for different lengths of protection may change over time, making the possibility of stable categories even more complex. Matthew David insightfully identifies an "aging effect" within intellectual property systems that is applicable here. This aging effect demonstrates that younger creators rely upon a public domain, but, as they age into ownership of IP rights themselves, they begin to seek stronger protection of their past creative work from others seeking to build upon it. This aging process applies equally well to individuals as it does to states. In David's words:

The young require a creative commons, where the old call for 'closure' This can be seen as societies develop, as individuals move through their careers as authors and/or inventors, as new creative media emerge from older forms, and as tastes, styles and genres emerge within artistic fields. The most jealous protectors of intellectual property today—whether these be states, individuals,

corporations and their representatives, and/or established field representatives—only emerged as a result of their previous success in profiting from yesterday's creative commons, often in the face of accusations of piracy or in conditions where intellectual property (here-after IP) law did not exist or was evaded.³⁰

David's analysis of how the same entity—be it an individual or a state—can advocate for a different level of rights at different stages of development makes it easier to see which types of interests can be and are protected by assorted levels of intellectual property protection.

For example, relaxed laws that allow for more sharing are designed to help the "younger" fields of innovation (think about the early computer software years where sharing was the norm). More restrictive laws help solidify control over the markets. At this point, we have reached a stage of significant control internationally. It is important to stake out the ideological pressures impacting the legal realm of intellectual property and then discuss the cross-cutting complexities that do not map onto existing narratives of North versus South, state versus NGOs, transnational corporations versus local businesses, or activists versus lobbyists.

Given the complexities of alliances, resistances, and advocacy positions that tend towards maximizing or limiting protection, the global debate over intellectual property can be better understood through examining the complex networks of states, industry actors, NGOs, and of course the flow of culture itself rather than focusing solely on the agency of the state. A global model for understanding the tensions over how to protect intellectual property is much better explained through positions regarding the scope and length of protection—hence the usefulness of characterizing states, industries, and organizations as IP maximalists or minimalists, instead of as representatives of the global North versus the global South. It is the ideological trajectories that can provide the lines for analysis when individual actors, states, or industries cannot.

With this complex global model as a starting point, it is important to identify who owns intellectual property in the twenty-first century. The function of modern copyright has been enormously successful in facilitating the continued concentration of the ownership of cultural products as the corporate entities that own these products merge. First, modern artistic forms—the movie, sound production, the mass-produced novel, and products with multiple creative contributors and heavy investment costs—resulted in the need for concentrated ownership rights. Bill Ivey notes that ownership was placed with "the corporation that had assembled the creative team, financed the project, and distributed it to audiences."³¹ Because it was possible for corporate concentration, the modern knowledge industrial complex is highly centralized, and the cultural heritage of modern nations is owned and controlled by corporate entities, a fact not recognized by most citizens.³² Furthermore, most artists do not benefit from the system at all, with only a few of the most visible ones receiving royalties.³³

Second, this corporate concentration represents a global phenomenon, with corporate control deterritorialized.³⁴ While it is assumed that American culture industries dominate, the transnational ownership of culture conceals ownership as much as it reveals it. Perhaps most interesting is the growing divergence between the American

assumption that it leads the way in the creative industries and innovation and the reality of who owns innovation. U.S. domestic and foreign policy, as will be described in the next two chapters, is designed around the assumption that American ingenuity must be protected globally. However, the globalized world in which we live means that in fact behind the veneer of American global cultural hegemony lies a far more complicated story of ownership and one that suggests that the U.S. government may be supporting the interests of corporate conglomerates housed outside the United States at the expense of its own citizens.³⁵ German citizen Leo Kirch, for example, is one of the owners of the biggest collection of copyrighted television shows and films, which he purchased from Columbia, Paramount, and Universal.³⁶ What goes as American is really owned globally without allegiance to any national culture.

Concentration is considerable.³⁷ In music, the "big five" is now the "big four," which together own 75 percent of the world's music.³⁸ In publishing, six primary entities control virtually all scholarly publications, and non-academic publications have also become increasingly concentrated.³⁹ The American movie industry is dominated by six movie studios, which control virtually all movie production in the United States.⁴⁰ When Ted Turner purchased MGM, not for its tangible assets, but for copyright control over its film library, he came into the possession of over 3,600 titles.⁴¹ As Paul Goldstein puts it, "now Turner—not the writers or producers or directors, let alone MGM—controlled the copyrights in all those movies."⁴²

The production and distribution of news, from newspapers to television to radio, have been highly concentrated, with entire media markets often served by a single corporation.⁴³ Americans have long lived under the mythology that they have a free press, but it is a system so concentrated in terms of media monopoly as to undermine the very idea of freedom, and this is the system that is exported globally.⁴⁴ Finally, the domination of Microsoft and the failed anti-trust efforts of the Clinton Administration demonstrate the power of centralized copyright control over everything from software to internet browsers. While Google still advocates for the free exchange of information, Google's increasing control over digital copies and cloud-based knowledge suggest it too may become an advocate for more copyright laws at some point in the future. Copyright law is designed to protect the products of this industrial complex within a legal system where an adequate defense against copyright infringement is well beyond the reach of virtually everyone, rich and poor alike, especially when lined up against the corporate attorney's of these global monopolies. These trends have been remarked upon and described in great detail by an enormous number of excellent scholars.⁴⁵

The larger questions regarding this corporate concentration and ownership have to do with the democratic role that culture plays and the opportunities made available for future cultural production within this system of ownership. Bill Ivey sums up these questions well:

Is our right to cultural heritage fulfilled if we're allowed to buy our way into access to the past? Does it make a difference that our familiar image of JFK Jr. is part of a global archive of more than 100 million images exploited for profit by a super-mogul of the computer software industry? Should the public see icons

images from our nation's past only if an author, magazine publisher, or television producer pays a price set by the marketplace and enforced by companies that control copyrighted heritage? In a hundred-year-old arts system defined by an unfettered marketplace, tension between culture as *asset* and culture as *heritage* is inevitable. But when a company makes available only what it thinks will sell and then demands the maximum payment possible, the public interest is not well served.⁴⁶

The political economy of culture as intellectual property is important to understand because concerns about cultural heritage, cultural creation, and democratic processes surrounding access and ownership are real when the predominant global model of protection is via private property rights and corporate control.

While globalization is a central interpretive device for understanding intellectual property, Aaron Swartz's case should remind us that a focus on globalization should not discount the continued role of the state in enforcing the law and imposing disciplinary punishments on those seeking an alternative world. As Mittelman argues, "the state does not remain idle. Those who hold the reins of power try to adjust by accommodating global flows and turning them to national and local advantage."⁴⁷ While additional configurations of power via global cities and transnational networks may challenge the hegemony of the nation-state system, "nation-states have retained control over education, infrastructure, and, most importantly, population movements."⁴⁸ As a result, the state remains relevant in the construction of national cultural policies and control over populations residing within their borders. As scholar Jean-Francois Bayart points out, the death of the state has been announced numerous times and yet it remains a player despite privatization and liberalizing efforts.⁴⁹ Rather, globalization helps produce the modern nation-state. As Bayart argues:

Historically, the sovereignty of the nation-state was actually the product of the whole set of relations between states and the constraints that bore down on the latter. There are no nation-states without a system of states, with all the limitations (de facto or de jure) on their sovereignty. The state does not come before the international system, it stems from it, and the way it is included within the system is less a form of alienation than a way for it to establish its power.⁵⁰

The state is far from absent in a globalized world. The state in the context of culture and intellectual property serves a key function—in terms of enforcement and seeking to impose a national cultural identity upon the cultural creations that occur within its territorial boundaries, even in the face of global cultural flows. The state functions as a barrier and a method of halting flows within the more globalized understanding of a world in flux.

The state's role in cultural formation, historically as today, is designed to impose control over creative and scientific expression in an effort to establish a national cultural identity and then to protect the products of domestic cultural production in an international marketplace. The state's interest in controlling the creative world of its citizens remains relevant even in a globalizing world.⁵¹

The state creates national identities based upon notions of cultural authenticity expressed by the people of the nation as a unified people. Territorial claims of sovereignty are contingent on protection of "a people" and these people are united through a narrative that describes their culture as a unique one to that nation. The national border is used by the modern state to establish cultural uniqueness and solidify its legitimacy over its people. This uniqueness extends to language, music, dance, art, theatre, and everyday practices such as dress, food, housing construction, and the other fundamentals of everyday life. The state seeks to preserve "a way of life" that is articulated as unique against the infusion of ideas from outside that may lead to contamination, difference, and challenges to tradition. These efforts to retain a "pure" national culture continue to exist even as the cities of the world become increasingly cosmopolitan, and virtually all states must deal with multi-ethnic, racial, and cultural diversity within their borders. In addition to its role in building the legal and economic framework within which the exchange of cultural flows occurs and mandating specific politically acceptable constraints on expression regarding what can and cannot be said, the link between the state and culture also includes nationalistic expressions of alignment with the state and solidifies the state's legitimacy. In many cases, the state actively supports culture through grants and awards, thus helping to develop a national culture and national consciousness.

Thus, the continued role of the state remains important in the context of culture and the law. It is through the application of the law via the frame of copyright that control over expression is made possible. Only because the state retains the ability to enforce the law can these laws, generally made to protect only the economic value of creative work within a system of corporate ownership, be enforced. The state continues to enforce these laws despite the fact that people all over the world do not see the property-based logic behind modern copyright law and instead understand how crucial and enlivening it is to share, appropriate, rework, and fuse the creative.

The political economy of information ownership is relatively straightforward to view and the data only continue to point towards even more concentration in the future. The role of the nation-state within a globalized world is less straightforward, but the state's efforts to align itself with culture and protect national culture as a commodity in the international sphere assure that it remains a central unit of analysis even when any given state may resist the "one-size-fits-all" intellectual property mandates of the international IP regime. However, the clear-cutting agenda that can be tracked domestically and internationally is the effort to push towards greater intellectual property protection and the efforts by those across the globe to resist this push. Thus, it is worth elaborating on what is meant by copyright maximalism and why the term itself remains relevant despite the obvious complexities in the global context of intellectual property rights debates.

Copyright maximalism

Paul Goldstein in his influential 1994 (reprinted in 2003) book, *Copyright's Highway: From Gutenberg to the Celestial Jukebox*, provides a detailed history of the impact that

technology has had on the evolution of copyright law. The forces arguing for greater or lesser protection tend to converge around each new technology that breaks content free from its tangible constraints (the printing press, the photocopy machine, the computer). Goldstein argues that efforts to free content must be addressed relatively quickly or else as "habits of free use proliferate, the prospects for dislodging them diminish."⁵² For Goldstein, those seeking free access tend to gain the upper hand, at least periodically. He believes an inevitable adjustment towards less protection is likely in an effort to correct for the controversies caused by stronger protection.⁵³ Goldstein's work is helpful because, while he supports a strong and robust intellectual property system, what is more important according to Goldstein is a stable system. As an advocate for a stable system, Goldstein is concerned about the instability that has become central to the legal process as it has become politicized. Patents, for example, pit big pharma against the technology and electronics industry, where the one seeks out maximum protection while the other needs only limited protection, creating uncertainty for all players.

Goldstein's attempt at balancing is often seen as the middle of the copyright advocacy spectrum. He provides no underlying critique of the system as one would find with the activists, but at the same time there is an acknowledgement that the system might go too far, at least in the context of some industries. Such a balance is not present in the arguments made for maximizing protection. The primary advocates for a copyright maximalist position are corporate voices. These political actors pay little attention to the origins of creativity, but instead lobby to create a regime designed to protect the products of creativity for those who own the copyright. As the concentration in copyright ownership above suggests, it is not the cultural producers themselves who own these rights, but the corporations that acquire them. Naming is always a political move and naming these actors as copyright maximalists is designed to clarify what intellectual property advocates who support strong or increased enhancements to intellectual property laws want. Thus, using the term copyright maximalism to speak about those who advocate for stronger protection is a political move.

I am not the first to make this move. Professor Madhavi Sunder discusses the maximalist approach as a threat to what she calls "fair culture" and innovation in her excellent book *From Goods to a Good Life*.⁵⁴ Political scientist Susan Sell discusses the contemporary American approach as a "ratcheting up" of intellectual property.⁵⁵ Bill Ivey calls these oppositional tendencies, "light" and "heavy" copyright protection.⁵⁶ These authors and others, beginning from James Boyle's articulation of a "new enclosure" all speak to the copyright maximalist trajectory.⁵⁷ The pushes and pulls of the global intellectual property debate are those of one favoring either enhanced or relaxed laws.

By intellectual property maximalist I mean several things.⁵⁸ Intellectual property maximalists do not believe that the current protective levels are sufficient, and thus advocate for longer terms, broader protection, and enhanced punishment for violations. Second, maximalists align themselves with the argument that providing economic incentives via a system of intellectual property is crucial to progress, that without this system nobody would create, and finally, that any reduction in the current level of protection will lead to less creativity. Third, if maximalists cannot expand intellectual

property protection, they at the very least want to preserve the status quo and thus resist efforts to enhance access to creative work that may weaken current laws. To put it into a global context, political scientist Susan Sell defines IP maximalism as an effort to "strengthen Intellectual Property protections to the maximum amount possible, to protect private monopoly interests, in disregard of any human cost, such as the millions who die from too expensive IP-protected medicines."⁵⁹ An important source of intellectual property maximalist arguments comes from industry reports. However, to a disturbing degree, government reports and public comments about the role that intellectual property plays reflect a maximalist position as well.⁶⁰

As with any legal advocacy struggle, debates over intellectual property will shift as the law changes to reflect a different set of assumptions and values. Advocates for copyright maximalism and/or minimalism can be found defending a given position for numerous complex reasons, and positions may shift over time and depending upon standpoint, as suggested by Matthew David's aging affect. The current state of academic scholarship, for example, falls clearly on the side that too much protection has been extended. More than at any time in the past, copyright has become a subject of mainstream debate, having moved from its primarily legal disciplinary home to become the subject of critique in disciplines ranging from political science, sociology, anthropology, computer science, theater, and much more. What is being mapped in both this Introduction and the book as a whole is the nature of the language game that is intellectual property politics.

The language game of intellectual property politics

Politics has long been understood as a power game.⁶¹ Efforts to enhance intellectual property protection globally certainly fit well within an analysis of politics as a power game that has enormous benefits for those who can establish what amounts to protectionist rules.⁶² Each negotiation, choice, and action is a move in this power game. Each public statement, argument, and testimony is designed to achieve a result of some kind. Each book written makes a contribution to the game. Any given push to shift the trajectory of current policy will take enormous effort, but it does remain possible to shift the trajectory. The power game is stacked, but that does not mean that anyone is without power; it simply means that how one influences the game must be strategically approached.

Jean-Francois Lyotard in his prescient 1979 monograph *The Postmodern Condition: A Report on Knowledge*, outlines the way in which the language game frames our political actions. He states that the modern condition has "altered the game rules for science, literature, and the arts."⁶³ That altered state includes the expectation that the nature of knowledge transmission will be understood as a commodity and that "knowledge is and will be produced in order to be sold, it is and will be consumed in order to be valorized in a new production: in both cases, the goal is exchange."⁶⁴ Knowledge becomes part of "the productive capacity of the nation-state."⁶⁵ This is where a new political economy of information begins.

To Lyotard, the frame of the industrial world where knowledge itself is a commodity is the language game we now find ourselves playing. Each actor in the game plays by a set of rules, which includes first and foremost that, "to speak is to fight." Playing the game involves speech acts that may or may not be played to "win," but are at the very least tactical maneuvers on the part of the players. Some of these moves may be made simply to play, to invent, or to communicate, but they all seek to alter the trajectory of the game itself.⁶⁶ The second principle is that, "the observable social bond is composed of language 'moves.'"⁶⁷ We are all every day engaged in any number of language games—it structures our social reality. Thus, our language and positionality in any given game ties us to the other players.

Lyotard argues that each "node" (individual) in the language game provides the individual with at least a minimal power over the system as a whole.⁶⁸ However, to gain power in a language game, one must seek to make an unexpected countermove.⁶⁹ These moves and countermoves constitute the political struggle of the postmodern information age and speak to the political economy of information. The condition of the game is one where access to data is controlled by experts and managed by elites.⁷⁰ However, as Lyotard concludes, computerization and full access to information are prerequisites for the creation of a just society. He states:

We are finally in a position to understand how the computerization of society affects this problematic. It could become the "dream" instrument for controlling and regulating the market system, extended to include knowledge itself and governed exclusively by the performativity principle. In that case, it would inevitably involve the use of terror. But it could also aid groups discussing metaprescriptions by supplying them with the information they usually lack for making knowledgeable decisions. The line to follow for computerization to take the second of these two paths is, in principle, quite simple: *give the public free access to the memory and data banks* [emphasis mine].⁷¹

While the language is dated, the intent is the same—a future of justice in a computerized world requires free and open access to information. As Mark Poster, notes, Lyotard was interested in linking his notion of the "small story" with "new media."⁷² Lyotard's understanding of knowledge politics and the role of the language game is an important interpretive method to help demonstrate the moves used by the nation-state in constructing intellectual property and controlling cultural outcomes and the countermoves that challenge their argumentation.⁷³

The game at issue here is the future field of intellectual property law. These games are not about truth with a capital "T," or the grand narratives of history, but rather they describe a specifically located truth that governs a specific time and place. Intellectual property is a contested idea and advocates for both maximalizing and minimizing the scope of the law fight for the line that will be drawn. The existence of the legal regime itself is both a frame for cultural work as well as a prison hindering the use of this work by others. As a frame and a prison, copyright law defines the types of culture that can be created and the conditions under which

they are created and distributed—the focus is on commercial culture targeted for consumption.

Copyright law might define the scope of how creativity can proceed, but in doing so it provides not only a frame for cultural creativity but also the limits of that creativity. It is a prison in that the law limits the possibilities by concealing alternatives or rendering them illegal and out of bounds. It is a prison in that the state is used to construct deviance, criminality, and bad behavior as attached to those who don't follow the rules as they are currently written, while ignoring that these rules are anything but neutral. As a prison, it attempts to limit our cultural innovation to what can be privately owned and controlled. For the most part, every move in the game is already circumscribed by the boundaries of the law. A strategic move can be made within the bounds of the law or, if possible, the laws themselves and the social structures they create must be changed. The emergence of political activists around intellectual property suggests that one of the goals is to change these very laws and thus the rules of the game.

Intellectual property law as a frame and prison establishes the political economy of contemporary cultural production and exchange. The concentration of information under the guise of intellectual property is the frame within which we now live and sets the stage for the language games deployed by the myriad actors involved in its moves and countermoves. Lobbyists, academics, scientists, politicians, policymakers, musicians, private organizations, activists, authors, artists, corporations, and individuals caught in the webs created by legal regimes of intellectual property are engaged in this game to establish the rules of the information age.

Aaron Swartz played a move in the game when he committed an act of civil disobedience leading to his indictment—an act of resistance in an effort to make a point about the game itself. The full power of the state was brought to bear upon his move; yet another move. Such an action both demonstrates that the state itself remains a relevant player in the globalized world of information flows because it can use the force of criminal law to make an example. Furthermore, the state's actions help to identify and mark people committing such "crimes" as deviant and hopefully in the process curb the behavior of others who may be tempted to make similar moves. Moves within the game are taken understanding these limits and frames.

Anonymous, the anarchist-inspired hacker group, played their own move when they quickly responded to his death by issuing a rallying cry and hacking into the U.S. Sentencing Commission's website.⁷⁴ Anonymous recognized and made visible what they saw as the zero-sum game of global intellectual property politics. Their efforts to resist the contemporary framing of global intellectual property law place them firmly on the side of the deviant, an anti-statist, anarchist cyberpunk approach that suggests that many players recognize not only the walls of the game, but are trying to break through them. The existence of a politicized hacker group that has as its enemy the nation-state and its use of technology to criminalize information as its target marks yet another move in the power game that is intellectual property politics.

The politicization of intellectual property and internet freedom did not begin with Swartz and does not end with him.⁷⁵ Other high-profile efforts to norm global

behavior to fit the rules of the content owners include the raid on MegaUpload owner, Kim DotCom's home.⁷⁶ In a case that implicates the global nature of intellectual property, the U.S. government with the help of the New Zealand police raided DotCom's home (who is himself a German citizen and New Zealand resident), confiscated his computers, froze his assets, and indicted him in U.S. federal court. As a result of this global intellectual property SWAT team approach, DotCom has emerged as an unlikely political activist. He sees his file-sharing work as political and has made a direct link between the government's case against him, the concentration of ownership on the internet, ACTA, and the face of the global future of information sharing.⁷⁷ Kim DotCom's MegaUpload was itself a move in the game, his arrest was one countermove, and, since legal proceedings have begun, he has rolled out a new file-sharing service that will make it even harder for the governments of the world to control the way information changes hands.

These moves and countermoves at the micro and macro levels of political discourse are what this book hopes to render more visible. The goal is not to create a black and white analysis of the complexities of global intellectual property politics. The goal is to make visible the complexity of the global debate and its ideological trajectories, to demonstrate the flows and shifting allegiances between individuals, states, and cultures, and to highlight how problematic the law can be for most actors outside the corporate elite. The goal is to make a move in the language game of intellectual property politics towards greater access, more freedom, enhanced opportunities for sharing, and social justice.

Chapter overview

Keeping in mind the language games of copyright maximalism and the globalization of the intellectual property debate, this book investigates the relationship of the state to culture within the context of a globalized flow of culture as a commodity. Given the complex and tangled interaction between culture, the state, and the law, this book seeks to contribute to the debate by looking specifically at the narratives produced by the state and associated actors when it comes to copyright law.

In developing the broad narrative, the second chapter establishes the status quo of the copyright maximalist position by focusing on the United States as the leading advocate for stronger protection. The United States is the starting point for an intellectual property maximalist position that has gone global. American policymakers and corporate interests have been at the forefront of the effort to have their version of copyright law extend to the entire world. Thus, what the United States does in terms of intellectual property ultimately impacts everyone globally. This chapter demonstrates how the state itself has been reconfigured to support and protect abstract rights to intellectual property. This chapter looks at the key political agencies in the United States and their public statements regarding copyright that are deployed to protect intellectual property domestically and globally. It integrates the statements of key business interests in the United States on copyright issues to demonstrate how closely aligned these interests are with government policymaking. Protection of stronger

intellectual property rights transcends American political ideology, and this protection has remained stable in its endorsement of a copyright maximalist position over the past 40 years. However, the chapter ends by suggesting that there are fractures appearing and the United States may find itself standing alone at some point in the near future.

The third chapter builds on the second to follow the language game of intellectual property piracy as articulated by both government and private agencies. The language of piracy has continued to evolve over the past few decades from being a problem of trade to now being understood as a serious threat posed by organized crime and terrorists. That piracy of CDs and DVDs is now claimed by some to be a driver of terrorist activity suggests one of the ways in which the state justifies its rigorous intervention into the territory of intellectual property and shifts enforcement of the law from primarily an issue of civil litigation to one of criminal litigation. Thus, the state further manages its borders and seeks to pass laws that can halt the flow of pirated goods from nation to nation, now in the name of economic and national security.

After painting a picture of the status quo in terms of intellectual property law, the fourth chapter looks at the nexus between the state and creativity. National cultures take place within the context of the circulation of corporate cultural products globally. Such circulation has created a world of much more complex cultural identities that problematize nation-building efforts while at the same time concentrating the products of knowledge and culture as commodities. This chapter argues that culture is often used ideologically and, in the case of the Cold War, the very underlying message of the free flow of information was part of a cultural agenda articulated by the United States to make the world safe for American cultural products. As a result, copyright did not always play a front seat in the public discourse over culture when the goal was to share culture globally in order to win the hearts of people everywhere to the Western way. This chapter also suggests that even a state such as the United States that advocates for the strongest protection possible, has multiple strategic goals, some of which do not align with the contemporary emphasis placed on the protection of intellectual property. Thus, the weaving of culture, nationality, intellectual property, and foreign relations are the heart of this chapter.

Chapter 5 shifts gears to investigate how the global flow of ideas transcends international legal structures and national discourses of cultural authenticity. This chapter takes up the possibility of hybridity across national boundaries and the implications of cultural sharing for the idea of authenticity. The state and the regulatory practices of copyright cannot control the sources of inspiration despite the fact that contemporary copyright law prohibits transformative works without authorization. A predominant theme throughout this chapter is the challenge of the authentic—what makes something nationally authentic? This chapter seeks to puzzle through the question of authenticity in relation to cultural protection, globalization, and the nation-state. Furthermore, it highlights how the copyright maximalist position has closed off the possibility of inspiration in ways that would have precluded some of the great art of the past, or at the very least targeted artists such as Picasso as pirates instead of artistic geniuses.

Chapter 6 will go "below" the state to investigate the important challenge of indigenous culture and knowledge to copyright regimes and to state sovereignty itself. As indigenous and aboriginal peoples have come to recognize the importance of intellectual property battles in relation to their culture and knowledge, they have mounted a variety of challenges to copyright law and the role of state and national organizations in supporting the law, as well as developed a series of arguments regarding their cultural heritage as it might relate to property rights. This chapter will sketch out the different approaches taken by indigenous groups and the copyright implications of each one. These range from support for perpetual protection to a rejection of copyright in an effort to better share ideas and knowledge. This chapter seeks to further problematize the role of the state in asserting nationalized cultural identities and undermine the claim that a copyright maximalist position is the most logical method for preserving culture in the future.

Chapter 7 continues to look "under" the law and the state to the new waves of cultural creation made possible by modern technology. Outside the copyright-based culture industry there are literally millions of artists, musicians, creative writers, and programmers working in a peer-to-peer world to produce creative works. These people are not simply consuming the culture provided by the culture industry but making (and remaking) their own. The law does not protect their work because, in fact, much of what they do violates the law as it is currently constructed. However, what is called user-generated content by copyright owners is a new wave of creativity made possible by a much more democratically available technological media world. This chapter stakes out the possible policy options that reflect the democratizing of cultural creativity and the ways in which fan fiction, inspiration, and appropriation should be introduced to copyright regimes.

The final chapter sketches out the futures of the culture industry, creativity and the role of the state in a much broader and theoretical manner. As with the previous chapters, the focus is on the tension between state control and cultural flows. This final chapter locates its critique in that of the culture industry and offers a different vision of where culture can come from and how it can move around the globe. This chapter continues the argument that cultural creativity can and does exist *without* the regulatory structure of copyright law. Despite the assertions of copyright proponents, creative work continues to be done without recourse to the law and often despite the restrictive ownership rights associated with modern copyright protection. Thus, a point that remains outside most legal discussions is that, prior to any form of intellectual property law imposed through the state, creativity was a fundamental part of the human condition. Furthermore, without intellectual property laws, creativity, innovation, and art will continue to exist, though they may take radically different forms than those protected by a legal regime dedicated to maximizing the profitability of a cultural creation. If, indeed, we need to be able to visualize alternative futures to the status quo, this chapter seeks to provide one radical alternative.

Current copyright law protects culture as a commodity—it protects culture like it protects shoes or pots and pans. That is, it transforms the larger flow of culture, creativity, innovation, and sharing into discreet products that can be owned by an

individual and only shared through the act of purchase. To use Habermasian terms—it allows for capitalism to invade yet another aspect of the lifeworld.⁷⁸ The issue is not simply is copyright good or bad, but rather to question if the type of culture protected, promoted, and preserved by systems of intellectual property is the type of cultural system we want? Indeed, copyright *has* value as an effort to resist exploitation—it provides mechanisms for claiming infringement and a legal language within which to do it. It can do its job to protect the small inventor, the author, or artist from having their work appropriated and commercialized without their permission. However, it tends to produce a type of culture that is only seen as a commodity and is bought, sold, and allowed to flow across boundaries only within its commodity form.

Copyright is not simply important because of its impact on contemporary creativity, but is also increasingly important as a symbol of the type of future we are creating. That future will be constructed within the architecture of laws that we are developing now. Our current legal framework did not appear naturally on the scene but was produced intentionally by those with interests in a specific type of cultural production. The future also must be produced intentionally and I hope that this book will contribute to a debate in which the world of culture is less restricted, more open, and unruly. For this to be the case, a serious assessment of the state, the global political and legal environment, and the role of culture must be examined.

Notes

- 1 For the best analysis and the details of the case, watch Lessig's excellent lecture: Lessig on "Aaron's Laws—Law and Justice in a Digital Age," 2013, www.youtube.com/watch?v=9HAW1i4gOU4&feature=youtu.be. Aaron Swartz, "Guerilla Open Access Manifesto," Pastebin, July 2008, <http://pastebin.com/cefxMVAy>. Visited June 9, 2013.
- 2 My own publications live behind similar gates. For example, a 1997 article I published on intellectual property piracy and the construction of deviance appeared in the *International Journal for the Semiotics of Law*. I have never been paid anything for my work but if a non-subscribing member would like to read this article through the official source, they would need to pay US \$39.95 for the opportunity. See: <http://link.springer.com/article/10.1007%2F301099260?LI=true>. I of course am more than happy to share a copy with you for free. The value they have to me is in their citation value.
- 3 Lessig on "Aaron's Laws—Law and Justice in a Digital Age," op. cit.
- 4 *United States of America v. Aaron Swartz*, 1 (United States District Court, District of Massachusetts 2012); Volokh argues that the charges were appropriate and the interpretation of the law was apt. See: Eugene Volokh, "The Criminal Charges Against Aaron Swartz (Part 1: The Law)," *The Volokh Conspiracy*, January 14, 2013, www.volokh.com/2013/01/14/aaron-swartz-charges.
- 5 Lawrence Lessig, "Prosecutor as Bully," *Huffington Post*, January 14, 2013, www.huffingtonpost.com/lawrence-lessig/aaron-swartz-suicide_b_2467079.html.
- 6 Nathan Robinson, "Prosecutors Sought 30 Years for Swartz's JSTOR Download, 35 for Headley's Mumbai Massacre," *Huffington Post*, January 30, 2013, www.huffingtonpost.com/nathan-robinson/headley-mumbai-massacre-conviction_b_2571156.html.
- 7 Lessig on "Aaron's Laws—Law and Justice in a Digital Age," op. cit.
- 8 The deal meant that if he pled guilty to a felony he may not have had to actually serve the time. Ryan J. Reilly, "Eric Holder: Aaron Swartz Case 'A Good Use of Prosecutorial Discretion'," *Huffington Post*, March 6, 2013, www.huffingtonpost.com/2013/03/06/eric-holder-aaron-swartz_n_2819161.html.

- 9 Some reports place the length as high as 50 years. See: Lessig, "Prosecutor as Bully," op. cit.
- 10 Ibid.
- 11 Swartz, "Guerilla Open Access Manifesto," op. cit.
- 12 Ryan J. Reilly, "Aaron Swartz Prosecutors Weighed 'Guerilla' Manifesto, Justice Official Tells Congressional Committee," *Huffington Post*, February 22, 2013, www.huffingtonpost.com/2013/02/22/aaron-swartz-prosecutors_n_2735675.html.
- 13 Volokh, "The Criminal Charges Against Aaron Swartz (Part 1)," *The Volokh Conspiracy*, op. cit.
- 14 I will return to this subject in the fourth chapter where I discuss our ideological commitment to the free flow of information during the Cold War.
- 15 Dwanye Winseck, "NZ Feels the Throttling Effects of New Maximalist Copyright Laws," *The Globe and Mail*, November 8, 2011, www.theglobeandmail.com/technology/digital-culture/nz-feels-the-throttling-effects-of-new-maximalist-copyright-laws/article1183070/; Cory Doctorow, "South Korea's US-led Copyright Policy Leads to 65,000 Acts of Extrajudicial Censorship/Disconnection/Threats by Govt Bureaucrats—Boing Boing," October 26, 2010, <http://boingboing.net/2010/10/26/south-koreas-us-led.html>.
- 16 While the general trajectory is to concentrate wealth using intellectual property laws, it is also worthwhile to identify how strong intellectual property can be used in ways unintended by its creators. Previously disenfranchised peoples might be able to use the law to draw some of the profits made from their labor and raw materials their way. One example, described, by Professor Madhavi Sunder, is the use of trademark by Ethiopian coffee farmers to secure for themselves a larger portion of the profits of the global coffee trade, much to the chagrin and against the wishes of some of the primary global destructors. Thus, while this example suggests a form of resistance from within the law, it also demonstrates that even a copyright maximalist position may be used in unintended ways. Madhavi Sunder, *From Goods to a Good Life: Intellectual Property and Global Justice* (New Haven, CT: Yale University Press, 2012), 40–42.
- 17 James H. Mittelman, *Whither Globalization? The Vortex of Knowledge and Ideology* (New York and London: Routledge, 2004), 47.
- 18 Peter Drahos, "IP World—Made by TNC Inc.," in *Access to Knowledge in the Age of Intellectual Property*, ed. Gaëlle Krikorian and Amy Kapczynski (New York: Zone Books, 2010), 211.
- 19 Neoliberalism is defined by Mittelman as "the bedrock framework of deregulation, liberalization, and privatization." See: Mittelman, *Whither Globalization?* op. cit., 49.
- 20 Ibid., 97.
- 21 Manfred Steger, *Globalization: A Very Short Introduction* (Oxford: Oxford University Press, 2013), 8.
- 22 Ibid., 9.
- 23 Ibid., 11.
- 24 Manfred B. Steger, *Globalization* (New York: Sterling Publishing Company, Inc., 2010), 38.
- 25 Susan K. Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights*, Cambridge Studies in International Relations 88 (Cambridge: Cambridge University Press, 2003); Peter Drahos, *Information Feudalism: Who Owns the Knowledge Economy?* (New York: New Press, 2003).
- 26 Gaëlle Krikorian and Amy Kapczynski, *Access to Knowledge in the Age of Intellectual Property* (New York: Zone Books, 2010).
- 27 Joost Smiers, "The Abolition of Copyright: Better for Artists, Third World Countries and the Public Domain," *Gazette* 62, no. 5 (October 1, 2000): 379–406.
- 28 "Attending and Mending the Knowledge Ecosystem," *Knowledge Ecology International*, accessed June 11, 2013, www.keionline.org.
- 29 The authors argue that we need a far more complex understanding of technology and development that transcends traditional developed/developing approaches. See: Shannad Basheer and Annalisa Prinni, *The WIPO Development Agenda: Factoring in the "Technologically Proficient" Developing Countries*, SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, October 19, 2008), <http://papers.ssrn.com/abstract=1289288>.
- 30 Matthew David, *Per to Per and the Music Industry: The Criminalization of Sharing* (London and Thousand Oaks, CA: SAGE, 2010), 43.
- 31 Bill Ivey, *Arts, Inc: How Greed and Neglect Have Destroyed Our Cultural Rights* (Berkeley: University of California Press, 2010), 11.
- 32 Ibid., 30.
- 33 Cees J. Hamelink, "Intellectual Property Rights," in *Who Owns the Media? Global Trends and Local Resistances* (New York: Zed Books, 2004), 45.
- 34 Steger, *Globalization*, 2013, op. cit., 80–81; Paul Hopper, *Understanding Cultural Globalization* (Polity, 2007), 61–63.
- 35 Jonathan Band and Jonathan Gerafi, "Foreign Ownership of Firms in IP-Intensive Industries" (Policybandwidth.com, March 2013), <http://infojustice.org/wp-content/uploads/2013/03/foreignownrep.pdf>.
- 36 Hamelink, "Intellectual Property Rights," op. cit., 44.
- 37 Thomas' edited volume offers numerous essays that clarify the scope and depth of media concentration at the global level. See: Pradip Thomas, *Who Owns the Media? Global Trends and Local Resistances* (London, New York, Penang, Malaysia: Zed Books, Southbound, 2004).
- 38 Jack Bishop, "Concentrations of Power and Property in the Music Industry—Technology News—redOrbit," *redOrbit*, October 2005, www.redorbit.com/news/technology/258789/concentrations_of_power_and_property_in_the_music_industry/.
- 39 Ben Bagdikian, *The Media Monopoly*, 6th. edn (Boston, MA: Beacon Press, 2000); "Hot Topics: Publisher Mergers," *University of California Berkeley Library Collections Scholarly Communication*, 2008, www.lib.berkeley.edu/scholarlycommunication/publisher_mergers.html.
- 40 Eli M. Noam, *Media Ownership and Concentration in America* (New York: Oxford University Press, 2009).
- 41 Paul Goldstein, *Copyright's Highway: From Gutenberg to the Celestial Jukebox*, Rev. edn (Stanford, CA: Stanford University Press, 2003), 135.
- 42 Ibid.
- 43 C. Edwin Baker, *Media Concentration and Democracy: Why Ownership Matters* (Cambridge: Cambridge University Press, 2007).
- 44 Robert Waterman McChesney, "The Political Economy of International Communications," in *Who Owns the Media? Global Trends and Local Resistances* (New York: Zed Books, 2004), 3–22.
- 45 The list here is just a sample. There are of course many more that I will cite throughout the book. Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (New Haven, CT: Yale University Press, 2006); Ronald V. Betteg, *Copyrighting Culture: The Political Economy of Intellectual Property* (Boulder, CO: Westview Press, 1996); Debora Halbert, *Intellectual Property in the Information Age: The Politics of Expanding Ownership Rights* (Westport, CT: Quorum, 1999); Debora Halbert, *Resisting Intellectual Property Law* (New York: Routledge, 2005); C. May, "The International Political Economy of Intellectual Property Rights," *European Intellectual Property Review* 27, no. 5 (2005): 199; Christopher May, *The Global Political Economy of Intellectual Property Rights: The New Enclosures*, 2nd edn (Oxford and New York: Routledge, 2009). Christopher May and Susan K. Sell, *Intellectual Property Rights: A Critical History* (Boulder, CO: Lynne Rienner Publishers, 2006); Neil Weinstock Netanel, *Copyright's Paradox* (Oxford: Oxford University Press, 2008); Susan K. Sell, *Power and Ideas: North-South Politics of Intellectual Property and Antitrust*, SUNY series in global politics (Albany: State University of New York Press, 1998); Susan K. Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights*, Cambridge studies in international relations 88 (Cambridge: Cambridge University Press, 2003); Joost Smiers, *Arts Under Pressure: Promoting Cultural Diversity in the Age of Globalization* (London and New York: Zed Books,

2003); Alan Story, "Burn Berne: Why the Leading Copyright Convention Must be Repealed," *Houston Law Review* 40, no. 3 (2003): 763–801; Siva Vaidhyanathan, *Copyleft and Copyright: The Rise of Intellectual Property and How it Threatens Creativity* (New York: New York University Press, 2001); Rosemary J. Coombe, "Contingent Articulations: A Critical Cultural Studies of Law," in *Law in the Domains of Culture*, ed. Austin Sarat and Thomas R. Kearns (Ann Arbor: University of Michigan Press, 2000), 21–64; Roberto Verzola, *Towards a Political Economy of information: Studies on the Information Economy* (Quezon City, Philippines: Foundation for Nationalist Studies, 2004); James Boyle, "The Second Enclosure Movement and the Construction of the Public Domain," *Law and Contemporary Problems* 66, no. 1 (2003): 33; Lawrence Lessig, *The Future of Ideas: The Fate of the Commons in a Connected World* (New York: Random House, Inc., 2002); Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (New York: Penguin, 2004); Lawrence Lessig, *Code: Version 2.0* (New York: Basic Books, 2006); Lawrence Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy* (New York: Penguin, 2008); James Boyle, *Shamans, Software, and Spleens: Law and the Construction of the Information Society* (Cambridge, MA: Harvard University Press, 1996).

46 Ivey, *Arts, Inc.*, 36.

47 Mittelman, *Whither Globalization?* op. cit., 90.

48 Steger, *Globalization*, 2013, op. cit., 63.

49 Jean-François Bayart, *Global Subjects: A Political Critique of Globalization* (Cambridge and Malden, MA: Polity, 2007), 30–45.

50 *Ibid.*, 78.

51 The state's historical role has been to develop a legal regime that facilitates the economic use of expression at the behest of specific interests. For example, the history of copyright law emerged from a struggle to define authorship and ownership over literary works in eighteenth-century England in the midst of a highly politicized atmosphere that included censorship, international trade in literary texts, and protectionist strategies advocated by already existing monopoly holders. This history remains the subject of keen interest and inquiry. See: Mark Rose, *Authors and Owners: the Invention of Copyright* (Cambridge, MA: Harvard University Press, 1993); Christopher May and Susan K. Sell, *Intellectual Property Rights: A Critical History* (Boulder, CO: Lynne Rienner Publishers, 2006); Martha Woodmansee, "The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author,'" *Eighteenth Century Studies* 17, no. 4 (1984): 425; Martha Woodmansee, *The Construction of Authorship: Textual Appropriation in Law and Literature* (Durham, NC and London: Duke University Press, 1994).

52 Goldstein, *Copyright's Highway*, op. cit., 109.

53 Paul Goldstein, *Intellectual Property: The Tough New Realities That Could Make or Break Your Business* (New York: Portfolio, 2007), 55.

54 Sunder, *From Goods to a Good Life*, op. cit., 84.

55 Susan K. Sell, "The Global IP Upward Ratchet, Anti-Counterfeiting and Piracy Enforcement Efforts: The State of Play," *P2P Foundation*, December 17, 2011, http://p2pfoundation.net/IP_Maximalists.

56 Ivey, *Arts, Inc.*, op. cit., 14.

57 James Boyle, "The Second Enclosure Movement and the Construction of the Public Domain," *Law and Contemporary Problems* 66, no. 1 (2003): 33.

58 Goldstein would call them copyright optimists, not maximalists, in distinction to copyright pessimists. See: Goldstein, *Copyright's Highway*, op. cit., 11.

59 Sell, "The Global IP Upward Ratchet, Anti-Counterfeiting and Piracy Enforcement Efforts: The State of Play," op. cit.

60 There are several other sources for the IP maximalist position worth considering for how they shape our understanding of the law and contribute to the language game. For example, the IP maximalist position is enshrined in the legal system itself. Obviously, courts offer a diversity of interpretations of the law, but the general outline of copyright,

patents, trademarks, and other forms of intellectual property remain bound by the regulatory apparatus of the statutes involved and make no radical break from it. The courts have often worked to maximize protection even when the opportunity exists to limit the interpretation of the law. For example, the U.S. Supreme Court could have agreed with Eldred in his efforts to strike down the Copyright Term Extension Act, but the decision supported the maximalist position instead. See: *Eldred v. Ashcroft*, 537 US 186 (Supreme Court 2003); Another example might be *Bridgeport v. Dimension*, a 6th Circuit ruling that made music sampling impossible without licensing and thus eliminated even the possibility of fair use in music. See: *Bridgeport Music, Inc. v. Dimension Films*, 383 F.3d 390 (Court of Appeals, 6th Circuit 2004); Joanna Teresa Demers, *Steal This Music: How Intellectual Property Law Affects Musical Creativity* (Athens: University of Georgia Press, 2006), 95–97. Justifications for the status quo and for increasing rights can be found in case books and "how to" books as well. Goldstein's book about intellectual property and business is a single example (Goldstein, *Intellectual Property*, op. cit.). Just one example in this genre is: Mary E. Carter, *Electronic Highway Robbery: An Artist's Guide to Copyrights in the Digital Era* (Berkeley, CA: Peachpit Press, 1996). They are not generally written with a theoretical claim or argument in mind, but rather to help the sole inventor or the non-professional author understand how to use the intellectual property system to support their work. They also tend to be supportive of the logic behind intellectual property and see it as a method for protecting authors and inventors.

61 Hedrick Smith, *The Power Game: How Washington Works* (New York: Random House, 1988).

62 The deliberations over the TRIPS agreement remain one of the best examples of how this game is played and the winners and losers in the game. See: Drahor, *Information Feudalism*, op. cit.

63 Jean François Lyotard, *The Postmodern Condition: A Report on Knowledge* (Minneapolis: University of Minnesota Press, 1984), xxiii.

64 *Ibid.*, 4–5.

65 *Ibid.*, 5.

66 *Ibid.*, 10.

67 *Ibid.*, 11.

68 *Ibid.*, 15.

69 *Ibid.*, 16.

70 *Ibid.*, 14.

71 *Ibid.*, 67.

72 Mark Poster, *Information Please: Culture and Politics in the Age of Digital Machines* (Durham, NC: Duke University Press, 2006), 131.

73 There has been much written since Lyotard published his short monograph about his theoretical approach. I am not interested in engaging in this theoretical critique or offering a critical assessment of his contribution. Rather, I want to use Lyotard's idea of the language game strategically and appropriate its usefulness for my own project. For a critique of Lyotard, please see: Ioan Davies, "Narrative, Knowledge and Art: On Lyotard's Jewishness," in *The Politics of Jean-François Lyotard: Justice and Political Theory*, ed. Chris Rojek and Bryan Turner (New York: Routledge, 1998), 84–101; Chris Rojek and Bryan Turner, eds, *The Politics of Jean-François Lyotard: Justice and Political Theory* (New York and London: Routledge, 2002).

74 The video has been viewed over 1.5 million times since it was initially posted. "Anonymous Takes Over Sentencing Commission Website," *Huffington Post*, January 26, 2013, www.huffingtonpost.com/2013/01/26/anonymous-sentencing-commission_n_2557250.html.

75 An earlier global controversy emerged when computer scientist and security expert Dmitry Sklyarov was arrested by the FBI after presenting his work on how to crack an e-book reader at the DEF CON (hacking) conference in Las Vegas. The FBI was using the Digital Millennium Copyright Act's (DMCA's) anti-circumvention rules to arrest

the Russian hacker. However, questions from the software community made it clear that applying U.S. law to a Russian computer expert for a program he produced in Russia and then discussed in the U.S. created an entirely new understanding of the applicability of American law. Robert Lemos, "Russian Crypto Expert Arrested at Def Con," CNET, July 17, 2001, <http://news.cnet.com/2100-1001-270082.html>.

76 Ernesto, "MegaUpload Shut Down by the Feds, Founder Arrested," *TorrentFreak*, January 19, 2012, <http://torrentfreak.com/megaupload-shut-down-120119/>; another case worth mentioning is the extradition efforts to bring college-aged Richard O'Dwyer to the U.S. to stand trial for copyright infringement for his website that linked to what the U.S. claimed was pirated content. See: Somini Sengupta, "U.S. Pursues Richard O'Dwyer as Intermediary in Online Piracy," *The New York Times*, July 12, 2012, sec. Technology, www.nytimes.com/2012/07/13/technology/us-pursues-richard-odwyer-as-intermediary-in-online-piracy.html.

77 DotCom's video has been viewed of 1.6 million times and he invites potential activists to follow him on twitter. *Kim Dotcom—Mr President*, 2012, www.youtube.com/watch?v=MokNvbiRqCM&feature=youtu.be.

78 Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (Cambridge, MA: MIT Press, 1991).

2

AMERICAN INTELLECTUAL PROPERTY HEGEMONY

Because there actually is a kind of tribe, a community of interest, united by a shared passion in attacking copyright. They are in spirit the impossible fusion of the tribe of boys in *The Lord of the Flies*, the extras in a Mel Gibson post-nuclear-holocaust movie, and the American Library Association. Their wildness has been denatured into a crusade against copyright, their audacity lies in button-pushing, and their chief barbarism is the use of intemperate language behind a shield of anonymity on the internet. They are sprinkled like confectioners' sugar over all the United States, although no doubt more than 99 percent of them reside within an iPod's throw of a Starbucks.¹

In 2012, the Republican Study Committee (RSC) posted a policy brief on their website titled "The Three Myths of Copyright." Authored by RSC 24-year old staff member Derek Khanna, the brief made three arguments about copyright that it can be assumed its author thought were consistent with the conservative commitment to free markets and a strict constructionist reading of the constitution. The three "myths" were first, that the constitutional provision creating copyright was designed to compensate the creator. Instead, Khanna argued, the constitution is designed to promote progress in the arts and sciences and there is no assumption about compensation written into its meaning. Second, is the myth that copyright protection is free market capitalism, when, as Khanna points out, it is in reality a government monopoly and thus antithetical to the free market and the conservative goal of eliminating government interference in the market. Third, he argued that the claim that the current copyright system leads to innovation is a myth because the length of time has gone well beyond that originally proposed by the founders and does not support but hinders innovation.² Khanna's position, grounded in what he thought would be a constitutionally conservative viewpoint, goes on to recommend policy changes to bring copyright law back into line with its original constitutional mandate.

Khanna's brief reflects claims made in the scholarly literature about the efficacy of a copyright policy that is so broad and overreaching. However, as a political agenda, the brief stakes out a new move in the language games³ surrounding copyright expansion.⁴ The briefing, offered by the RSC, stands out as an effort to distinguish between Republican and Democratic approaches to copyright. Such a contrast is difficult to make given that the prevailing U.S. intellectual property agenda has consistently advocated for more protection and longer terms regardless of political party over the last 30 years. As the Democratic and Republican platforms for the 2012 presidential election demonstrate, the parties are in a race to claim they protect intellectual property more strongly than their opponents, not to profess a nuanced or a complex understanding of the impact of copyright on innovation and creative work.⁵

Unfortunately for Khanna, the politics of copyright do not follow ideological lines. In the language games surrounding the policy brief, which threatened the intellectual property maximalist position of the entertainment industry (including the agenda of former Senator turned Motion Picture Association of America (MPAA) lobbyist Christopher Dodd) and thus politicians who receive contributions from them, Khanna's briefing was disavowed. Within a day of its release, and after a strong reaction from conservative officeholders, the report was pulled from the website, the RSC chair publicly apologized for not fully examining the report prior to its distribution, and Khanna was fired for publishing it.⁶

Khanna did not disappear from the fight, but continues to play the game. As a young conservative just embarking on his political career, he has now emerged as a policy-oriented copyright reform advocate who remains committed to challenging the IP status quo.⁷ From a new position outside the beltway, he continues to advocate for change to the copyright law and remains in a position to make copyright into a much more partisan issue than it has been to this date. Despite being taken down by the RSC from its website, the brief can still be found on the internet and Khanna has perhaps a larger platform for his views now than he did while working at the RSC. The RSC brief, the political reaction to it, and the general public response, suggests that perhaps there are growing cracks in what has been a consistent American approach to intellectual property over the past few decades.

Despite the possibility of cracks in the copyright maximalist system, Khanna's personal experience demonstrates that, as an issue of public policy, intellectual property tends to enjoy a level of bipartisan support rare amongst political issues. The assumed starting point for politicians is that all forms of intellectual property are good and that the government's role is to increase regulation of these property rights until the threat posed by those who "steal" intellectual property is alleviated. Public officials over the past 30 years have almost always configured policy arguments to justify increased copyright protection. As part of the justification, the threat of piracy has been elevated to a national security issue.⁸ The end result has been a field of struggle between competing intellectual property interests over the structure and scope of future legal measures. While intellectual property maximalists (or optimists as Goldstein calls them) tend to believe that the government has not gone far enough, intellectual property reductionists (or pessimists) believe it has gone too far.⁹

Today's debates demonstrate that the expansion and protection of intellectual property is central to the role of the state in the information age. Even as potential fissures appear, we have witnessed a reconfiguration of government bureaucracies with intellectual property in mind, as new positions are created, enforcement units deployed, and rules promulgated. The state is one of the strongest advocates for intellectual property protection, and state officials consider a protective approach essential to a growing economy and national security. The stakes are the degree to which intellectual property will frame the future of our cultural creativity, economic assets and productivity. The information age has enhanced the levels of abstraction of property and hence established a new cross-cutting line of control by the state over the productive classes.¹⁰ The struggle being waged in today's debates is one that will determine how the apparatus of state control over creativity, innovation, and our information future evolves.

According to McKenzie Wark, we have embarked upon a new layer of class formation where the production of intellectual property is the subject of acquisition. He notes:

The recognition of intellectual property as a form of property—itsself an abstraction, a legal hack—creates a class of intellectual property creators. But this class still labors for the benefit of another class, to whose interests its own interests are subordinated. As the abstraction of private property is extended to information, it produces the hacker class as a class, as a class able to make of its innovations in abstraction a form of property. Unlike farmers and workers, hackers have not—yet—been dispossessed of their property rights entirely, but still must sell their capacity for abstraction to a class that owns the means of production, the vectoralist class—the emergent ruling class of our time.¹¹

Wark offers a crucial insight into the ongoing efforts on the part of the state to reconfigure the rules of intellectual property for the information age. Power over knowledge is with those whom Wark calls the vectoralist class—"the emergent ruling class of our time." The vectoralist class are those who control the new layers of property as abstraction—intellectual property.¹²

On the other side of the intellectual property legal divide from the vectoralist class who seek to monopolize the products of the information age as property, are those who create and do so without thinking about copyright: These are the people Wark calls the "hacker class," artists, scientists, computer programmers, musicians, who create new things.¹³ For Wark, this is a new class war at a new level of abstraction. The instability experienced by those who follow intellectual property issues is the result:

The vectoralist class wages an intensive struggle to dispossess hackers of their intellectual property: Patents and copyrights all end up in the hands, not of their creators, but of a vectoralist class that owns the means of realizing the value of these abstractions.¹⁴

Certainly, the growing monopolization of intellectual property discussed in the Introduction, the shaping of the American bureaucracy to better control and manage intellectual property, the heightened criminality associated with the theft of intellectual property, and the ways in which the American agenda has been exported globally all speak to the underlying changes that Wark has identified.

With the American government as the lead advocate, this chapter seeks to remark upon efforts by the vectoralist class, those who can be understood as the owners of intellectual property, to solidify a narrative of control over intellectual property in an effort to assure their continued dominance into the future. The state is the vehicle through which a process of transfixing the abstract into property has proceeded. To Wark:

The index of the relationship of the vectoral class to state power is the transformation of the laws governing vectors, such as the airwaves and networks, and regulating patents, copyrights and trademarks. When thought itself and the air itself have been subordinated to their representation as property, the vectoral class is in charge.¹⁵

Everything within this world of the vector, supported and secured by the state, is a commodity.¹⁶

The argument of this chapter is that the state itself is being reconfigured to assure protection over intellectual property as central to its future mission. That reconfiguration is in part a reaction and response to the globalization of economic relations as the state attempts "to be proactive in order to steer globalizing processes."¹⁷ The struggle being waged is one that will determine how the apparatus of the state will control creativity, innovation, and our information future. The efforts of the vectoralist class, often speaking through the state, to enhance intellectual property rights are positioned within the ongoing debates over intellectual property. U.S. government publications and statements by public officials from the American president down across the last 30 years offer only a small hint that a critical debate regarding the scope, length, and depth of all types of intellectual property has been underway, or that there is a possible alternative to the intellectual property maximalist frame of reference. Instead, enormous effort has been put into producing a system that will continue to expand the length of protection, the scope of protection, and the consequences for violating the law.

I will trace the primary arguments made in the United States by those who advocate for a stronger intellectual property system or see the current system as absolutely necessary for innovation and progress. There are several themes used to argue for continued or strengthened intellectual property laws. Each serves a function as the state develops the "technologies of power" that are endlessly modified to produce a managed population for the information age.¹⁸ The sections in this chapter describe the reconfiguration of the American political system to focus on issues of intellectual property as fundamental to our economic security. This chapter focuses upon the U.S. political system because it is a leader in the intellectual property maximalist game, but similar trajectories have become part of the nation-state

mandate since the TRIPS agreement established a minimum level of protection for all nations.

In the case of the United States, starting with presidential statements regarding the importance of intellectual property, the chapter describes the institutional changes that have occurred in the past several decades. These details are provided in order to establish evidence of the clear hegemony of a strong intellectual property policy agenda promulgated by the United States. This chapter looks at both executive and congressional changes. Second, perhaps the most clear defense of the maximalist position are those authors, inventors, or lobbyists, who argue for perpetual rights in intellectual property and for strong intellectual property rights more generally. Those advocating for perpetual protection offer the most absolute arguments for why intellectual property ought to be most strongly protected and thus help to better define the scope of the debate. Their moves in the game ensure that there is a constant push towards even more protection.

Mapping the public declarations of the state and the efforts by others to enhance legal protection of intellectual property helps define for us the power of the state to regulate culture and creativity. Virtually all intellectual property arguments become wrapped in a language of national innovation and creativity. Thus, the state gains its legitimacy and relevance within the world of art, culture, and innovation by siding with those who claim to be the engineers of creative work. Creative culture becomes national culture. The first four chapters elaborate on the tenuous relationship between the state and culture and the need of the state to make the link between the two appear seamless.

Preserving the legitimacy of the state to intervene in areas of creativity and culture may help explain why presidents from Ronald Reagan to Barack Obama have all endorsed the same intellectual property agenda—making it one policy space where bipartisan ideological struggle seems to play an insignificant role. What follows are some of the moves in the game that structures our current intellectual property policy. It is important to note that the politics of intellectual property reside in the moves and countermoves of the debate—that what has emerged is a prevailing position on what policy ought to be. However, the players, sides, and arguments are constantly moving and evolving as positions are put forward and resisted.

For the good of the country: restructuring the American government to protect intellectual property

On March 11, 2010 the White House published the remarks by President Barack Obama at the Export-Import Bank's Annual Conference on their website. The President was talking at the conference about general economic issues and his plans for helping the economy by facilitating international trade and travel. Key, it turns out, to this international agenda, is the issue of intellectual property. Obama had this to say about intellectual property and its importance to the United States:

What's more, we're going to aggressively protect our intellectual property. Our single greatest asset is the innovation and the ingenuity and creativity of the

American people. It is essential to our prosperity and it will only become more so in this century. But it's only a competitive advantage if our companies know that someone else can't just steal that idea and duplicate it with cheaper inputs and labor. There's nothing wrong with other people using our technologies, we welcome it—we just want to make sure that it's licensed, and that American businesses are getting paid appropriately. That's why USTR [Office of the United States Trade Representative] is using the full arsenal of tools available to crack down on practices that blatantly harm our businesses, and that includes negotiating proper protections and enforcing our existing agreements, and moving forward on new agreements, including the proposed Anti-Counterfeiting Trade Agreement.¹⁹

Obama's speech indicated that he would continue on the path set before him by his predecessors. This quote is also on the Office of the U.S. Intellectual Property Enforcement Coordinator's website as one of the important quotes by President Obama regarding intellectual property.²⁰ After winning the 2012 election, the MPAA praised President Obama for his strong approach to intellectual property and, true to form, Obama has continued to support an IP agenda favorable to content owners.²¹

In a January 2013 fireside chat hosted by Google, Obama reasserted his pro-IP stance:

"I'm an ardent believer that what's powerful about the internet is its openness and its capacity for people to get out there and introduce a new idea with low barriers to entry," he said. "We also want to make sure that people's intellectual property is protected and whether it's how we're dealing with copyright, how we're dealing with patents, how we're dealing with piracy issues. What we've tried to do is be an honest broker between the various stakeholders and to continue to refine it, hopefully keeping up with the technology, which doesn't mean that there aren't occasionally going to be some problems that we still haven't identified and have to keep on working on."²²

The language used by Obama is not new—the American people are creative, our economic well being comes from intellectual property, those who "steal" our intellectual property harm our country, we will do everything possible to protect our IP, and we will provide for enhanced regulatory structures with new laws. These same themes were present 24 years earlier, when President Ronald Reagan made a radio speech to the nation on free and fair trade in which he also discussed issues of international trade and intellectual property. In Reagan's words:

Our country is also victimized by the international theft of American creativity. Too many countries turn a blind eye when their citizens violate patent and copyright laws designed to protect intellectual property rights. If we permit the product of our best minds to be stolen, we will pay the price in ingenuity,

vision, and creativity—the core of all human progress. Here again, we expect tangible changes to be made to straighten this matter out.²³

The difference in the language used by Obama and Reagan when it comes to how intellectual property should be protected is insignificant. Obama's concession that we would let others use our ideas if appropriately licensed is simply a more modern framing of the same issue and the one sentence indicating that Obama is aware of the popularity of the open source movement, the creative commons, the GPL, and numerous other efforts to provide alternatives to intellectual property. However, while Obama has pledged to make federally funded research more easily available, there has been only minimal movement towards these open systems, with much of Obama's approach being rhetorical.²⁴

George Herbert Walker Bush was also concerned with issues of intellectual property and trade and he made numerous statements about strengthening IP through the GATT, including the precursors to what became the Trade Related Aspects of Intellectual Property Agreement.²⁵ Bill Clinton was not out of step with his predecessors either; along with continuing the negotiation over GATT and ultimately TRIPS, Clinton encouraged Congress to pass the Digital Millennium Copyright Act (DMCA) which included international obligations under World Intellectual Property Organization Treaties. In his remarks to Congress regarding the passage of the DMCA he said:

American copyright-based industries that produce and promote creative and high-technology products contribute more than \$60 billion annually to the balance of U.S. trade. This bill will extend intellectual protection into the digital era while preserving fair use and limiting infringement liability for providers of basic communication services. I look forward to signing this legislation into law, and I urge the Senate to ratify these treaties so that America can continue to lead the world in the information age.²⁶

In a 1999 speech, Clinton helped justify the need for intellectual property protection by commenting on the American spirit and its constant quest for creativity and innovation. For Clinton:

[T]he American people have always been a bold and innovative bunch. We are always drawn to uncharted lands over the next horizon. Who will pack our bags and head out to the latest gold rush or tinker in our basements for years to invent a product no one else has ever imagined? That's what we do.²⁷

Clinton's vision of the American innovator as the isolated individual and the pioneering leader is wholly consistent with the larger American myth of our underlying creativity as a nation—this is nation-building, a tactic employed by all presidents to help paint the American innovative spirit as exceptional and innate in our heritage.

Under the Clinton Administration, and based upon these general assertions of American innovation and the creative spirit, we witnessed a dramatic increase in the scope, duration and depth of intellectual property coverage. Clinton's Administration helped to create a new generation of criminals by outlawing and criminalizing file sharing with the No Electronic Theft Act, it created liability for service providers who did not comply with the notice and take down procedures included as a concession to service providers in the DMCA, and extended the length of copyright protection, including retroactive protection for those who had already died, with the Sonny Bono Copyright Term Extension Act. While the general trajectory for U.S. IP law has always been expansive, it was the Clinton years, by definition, when the regulatory apparatus that constitutes our modern IP world went from theory into being.

George W. Bush did not stray from the well-entrenched national narrative, though he helped create a terrorist-themed interpretation of the threat caused by intellectual property piracy. During the signing ceremony for the Stop Counterfeiting in Manufactured Goods Act, Bush made the following comments about piracy and intellectual property:

Counterfeiting costs our country hundreds of billion dollars a year. It has got a lot of harmful effects in our economy. Counterfeiting hurts businesses. They lose the right to profit from their innovation. Counterfeiting hurts workers because counterfeiting undercuts honest competition, rewards illegal competitors. Counterfeiting hurts our—counterfeiting hurts consumers because fake products expose our people to serious health and safety risks. Counterfeiting hurts the Government. We lose out on tax revenue. We have to use our resources for law—of law enforcement to stop counterfeiting. Counterfeiting hurts national security because terrorist networks use counterfeit sales to, sometimes, finance their operations.²⁸

The President claiming a link between terrorism and counterfeit goods is significant and I will return to the link between terrorism and counterfeiting in the next chapter because the issue of piracy, either discussed or implied by all presidents, is a key part of the maximalist justification.

Despite the ideological differences claimed to exist between Democratic and Republican presidents, the underlying discourse on intellectual property has remained remarkably steady. The comments regarding intellectual property seem to have come from the same script—a script that includes the following claims. First, that America's biggest strength is its innovation and creativity. Second, that countries outside the United States profit by stealing our ideas and this hurts us economically. Third, that it is the government's job to establish strong rules that will protect American intellectual property abroad. Finally, that the theft of intellectual property has negative consequences not only for our economic bottom line but for public health through the distribution of counterfeit goods, with the ultimate result that terrorists and criminals profit at the expense of hard-working innovative Americans.

The standard rhetorical approach to intellectual property by our most prominent elected leaders is anything but nuanced. These public pronouncements gloss over distinctions between different IP regimes. In the process, these presidential statements function to create something called "intellectual property" that must be protected from "theft." They do not suggest any distinction exists between copyrights, patents, trademarks, or other *sui generis* forms of protection, but instead lump all these different agreements under a "property in ideas" rubric. In fact, even after decades of attention paid to this area of law, it would seem that the distinction between patent, copyright, and trademark law remains as it did in 1970 when Alan Latman said that, "most people do not understand the differences between patents, trademarks, and copyrights. This applies to clients, other lawyers, and at times even judges."²⁹ In fact, calling the limited monopolies associated with most forms of intellectual property a form of "property" at all implies a more permanent relationship to the intangible than what might otherwise exist if we were to use the language of limited monopolies. In many ways, the overwhelming success of the term "intellectual property" has already defined the boundaries for the future.

These presidential statements ignore the possibility that too much intellectual property protection might harm innovation as much as too little. The statements are unreflective about how innovation actually occurs, but instead reproduce the myth that America's best innovative work has happened because of the creative genius of an individual "working in his basement." These statements do not reflect the complicated process of creation and innovation, they do not talk about patent or copyright trolls (though Obama has noticed the existence of trolls) and their predatory practices, they do not talk about access to life-saving medicines at significantly lower costs, they do not discuss the ways in which Web 2.0 technologies have changed creation and distribution of creative work and the very people who do it. In other words, these statements produce a problem that is easy to solve with more restrictive legislation and enforcement. In the process of making policy, the United States establishes a hegemonic discourse on intellectual property that has not wavered over time. It has done so despite decades of scholarship pointing out the flaws in the logic, including the fact that the United States does not dominate the ownership of IP globally as cited in the previous chapter, the policy process, the clear ways in which the law singles out beneficiaries at the expense of the general public, the global South, and new innovation itself.

Reconfiguring bureaucracy

In tandem with the enhancement of domestic and international laws regarding all forms of "intellectual property," the U.S. government has reconfigured its bureaucracy to help fight piracy and further protect intellectual property. In 1999 President Clinton made the United States Patent and Trademark Office (USPTO) an agency within the Department of Commerce and established an Under Secretary of Commerce for Intellectual Property who also serves as Director of the USPTO.³⁰ Obama nominated David Kappos, former counsel for IBM, to serve as the Under Secretary

of Commerce for IP. Prior to Kappos, Bruce Lehman headed the USPTO and was an instrumental voice in the creation of the Digital Millennium Copyright Act as well as a strong advocate for enhanced IP rights.³¹

Numerous agencies within the federal bureaucracy now have intellectual property-related subdivisions. According to a resource list compiled by the Department of State, they include the USTR, the Department of Justice, the Department of State, the U.S. Library of Congress, the Office of Management and Budget, the White House, and others. The USTR continues to issue a Special 301 report yearly, which puts offending countries on a priority watch list or a watch list depending upon how significant the piracy in that country is and how they have worked to address it. Countries that do not sufficiently protect IP can also be considered priority foreign countries. The Department of Commerce includes the International Trade Administration which helps oversee the Special 301 process as well as issues related to the TRIPS agreement. It also hosts the relatively new Strategy Targeting Organized Piracy (STOP) initiative designed to help businesses protect their intellectual property via the United States Patent and Trademark Office (USPTO).³²

The U.S. Department of Justice now includes a Computer Crime and Intellectual Property Section, the U.S. Department of State has an Office of International Intellectual Property Enforcement, there is a collaborative International Intellectual Property Training Database sponsored by the Department of State, and the U.S. Immigration and Customs Enforcement division includes the National Intellectual Property Rights Coordination Center, which is a multi-agency entity including the FBI that focuses on IPR crime.³³ Thus, it is safe to say that considerable public resources are now focused on the protection of intellectual property domestically and internationally. There is of course the U.S. Copyright Office, hosted by the U.S. Library of Congress.

One of the most recent expansions in the scope of protection for intellectual property, passed with bipartisan support in both houses, along with support from a broad range of special interests from Hollywood to unions, was the Prioritizing Resources and Organization of Intellectual Property Act (PRO-IP).³⁴ George W. Bush signed the act, formerly known as the Enforcement of Intellectual Property Rights Act, into law in October of 2008. Beginning in 2008 as a result of the PRO-IP Act, the newly created intellectual property tsar, also known as the U.S. Intellectual Property Enforcement Coordinator, began to develop a more comprehensive approach to IP. Chris Israel was the first appointee; a former Time-Warner public policy executive, Israel had worked for Bush in the Commerce Department before taking on the duties of the first U.S. Coordinator for International Intellectual Property Enforcement. He then went on to work for several pro-IP lobbying firms.³⁵ The law also increased the civil penalties for copyright, patent, and trademark infringement and established an executive branch agency to oversee IP enforcement. Obama became the first president to appoint the official intellectual property "tsar," who worked directly with the White House: Victoria A. Espinel.

As the first intellectual property "tsar," echoing the language of the drug wars, Espinel's initial statements about the new agency and its direction adhered to the

already well established government policy regarding intellectual property. In 2010, Espinel announced the new U.S. IP Enforcement Strategy:

I am pleased to announce that today we unveiled the administration's first Joint Strategic Plan to combat intellectual property theft. The U.S. economy leads the world in innovation and creativity thanks to American inventors, artists and workers. Our ability to develop new technology, designs and artistic works supports jobs and allows us to export great new products and services around the world. Our citizens need to feel confident that they can invest in new innovation and intellectual property, knowing it will be safe from theft. Ensuring that our ideas and ingenuity are protected helps us create jobs and increase our exports.³⁶

She goes on to say:

Now, more than ever, we need to protect the ideas, artistry, and our reputation for quality, provide our businesses with the incentives to make each new product better, reduce crimes related to intellectual property infringement and keep dangerous counterfeits out of our supply chain to protect our citizens. Strong intellectual property enforcement will help us to accomplish that. The Obama Administration has always embraced the free flow of information, online collaboration, and fair use by average citizens, which are also helping to advance our society and economy every day—this strategy does not target legitimate and legal activity. The Administration is technology-neutral, using both proprietary and open source platforms on the web and all content on WhiteHouse.gov is public domain, making it an active participant in the online communities of the 21st Century.³⁷

While this generally supports the maximalist position that U.S. policy requires the strictest of enforcement measures for piracy and gives assurances that this type of property will be protected globally, it is also worth noting the small concession to the concept of the public domain and to open source platforms, along with the hint that net-neutrality might be a considered option for this administration. Perhaps the first fissure in the long-standing policy approach can be seen in her statements. However, there is little evidence that the Obama Administration will act significantly differently than its predecessor over these issues, especially given the Democratic and Republican platforms. In fact Espinel has now stepped down as the Enforcement Co-ordinator to take a job as the head of the Business Software Alliance (BSA), a top lobbying organization for the software industry. Ethics restrictions will keep her from directly lobbying her former office for at least 2 years.³⁸

There is evidence that Obama's Administration will continue down the path of greater enforcement. The strategic plan issued by the White House on IP legislative recommendations in March of 2011 focuses exclusively on increasing punishment for IP crimes, including longer sentences, as well as increasing law enforcement flexibility

to catch IP criminals. They specifically identify "infringement by streaming" as a possible felony and make more targeted recommendations regarding counterfeit goods.³⁹ In response to the White Paper, the president and CEO of the Computer & Communications Industry Association (CCIA), Ed Black, issued a statement asserting that the administration had been "hijacked" by "big content":

The legitimate desire to address some serious counterfeiting abuses—such as medications or industrial components used in defense products—has been hijacked to create draconian proposals to alleviate the content industry of the burden of protecting its own interest using its own extensive resources ... This is the latest indication of the extent to which the content industry has infiltrated this administration and managed to turn the Administration's IP agenda into a policy which protects old business models at the expense of consumers, citizens' rights and our most innovative job creating industries.⁴⁰

The CCIA response to the Obama plan is telling on several fronts. First, it helps to identify the consistency in the efforts of government to expand IP protection. Second, it also begins to highlight the fissures between different copyright-based industries. The case can hardly be made that computer-related industry associations are not interested in copyright legislation. However, what the CCIA suggests is that there is a growing recognition on the part of some that government regulation to protect "old business models" will increasingly put the administration at odds with their own citizens.

Obama's overarching strategy, however, seems to remain very much in favor of additional IP enforcement. Obama's United States Trade Representative Ron Kirk was part of the launch of the IP Enforcement Strategy in 2010 and discussed his office's efforts to make the world safe for American IP. In a press release Ambassador Kirk said:

USTR uses a full arsenal of trade policy tools to support and implement President Obama's commitment to aggressively protect American intellectual property rights around the world. We are actively engaged in bilateral and multilateral trade negotiations, dialogues, and cooperation that are particularly critical to advancing the effective enforcement and protection of intellectual property rights overseas. That engagement is backed by a strong commitment to ensuring that our trading partners deliver on their commitments.⁴¹

In 2011 Obama issued an executive order to establish an intellectual property advisory committee at the cabinet level. As the announcement of the executive order notes, the committee will be, "comprised of the heads of the Departments responsible for intellectual property enforcement, including the Departments of Justice, Homeland Security, Commerce, Health and Human Services, State, Treasury, Agriculture and USTR."⁴² Their job will be to ensure that American intellectual property is protected domestically and internationally to support American innovation. It would appear that intellectual property has become central to the future stated economic well-being of the United States and advocates for its protection and enforcement are fully entrenched in the American institutional structure.

As can be seen by these public statements and commentaries, the predominant approach to intellectual property enforcement remains focused on securing rights for business interests in foreign and domestic markets. The analysis in these sections has focused predominantly upon the rhetoric delivered from the president's office as well as the reconfiguring of the vast American bureaucracy to better address issues of intellectual property as relevant to our domestic, foreign, and economic policies. It is also worth examining the Congressional approach to issues of intellectual property.

Congressional advocacy

Congressional perceptions on intellectual property are similar to presidential claims and, taken together, mark a transformation in how government approaches issues of intellectual property. While earlier generations saw the enforcement of IP as primarily a private issue, sometimes subject to civil litigation, it has become a public issue, subject to possible criminal penalties including vast federal oversight. The efforts by the U.S. government to become relevant in the management and protection of intellectual property, including creating a legal structure that goes beyond the initial provision of a limited monopoly, helps clarify how significant the change in focus has been.

While, in 1985, the chair of the House Judiciary Committee's subcommittee on copyright, patent, and trademark law, Robert W. Kastenmeier, requested that changes in IP law should be accompanied by evidence that the public benefit would outweigh private benefit, according to Paul Goldstein, no such claim had ever been made before, or since.⁴³ All told, the United States has passed over 25 laws expanding some aspect of intellectual property protection since 1995, including the most recent Enforcement of Intellectual Property Rights Act, which passed in 2008 and established the first ever copyright "tar" for the United States discussed in the previous section.⁴⁴ Furthermore, being considered for the 111th Congress are a series of laws that would expand protection to fashion design, the Innovative Design Protection and Prevention of Piracy Act, and the Combating Online Infringements and Counterfeits Act.⁴⁵ President Obama signed the America Invents Act into law in 2011, which revises patent law for the first time since 1952.⁴⁶

While it is impossible to cover the full scope of IP-related issues that have made their way through Congress in this section, I would like to use one example to illuminate how a narrative of strong protection is part of the legislative process. In terms of political moves, advocates for stronger protection tirelessly introduce legislation session after session, the language of strong IP protection is part of the Congressional debates, and, with only a few outliers, both Democrats and Republicans support the national intellectual property agenda.

While it may take time for the measures introduced to become law, the fact that IP laws continue to expand indicates that the Congressional default position is strong and expansive intellectual property rights protection. With the exception of the proposed Orphan Works legislation, which would allow individuals to use copyrighted materials for works where the copyright owner cannot be located, legislation introduced to Congress in the last decade has been focused on enhancing intellectual

property rights. One example of legislation aimed at shoring up strong copyright protection against efforts by administrative agencies to help expand access to knowledge is the Fair Copyright in Research Works Act, which more recently has become the Research Works Act.

In 2007, George W. Bush signed into law the Omnibus Spending Bill, which included a provision that mandated that the National Institutes of Health (NIH) make research funded through their agency available in an open access format.⁴⁷ The NIH open access policy gave private publishers a year to publish exclusively and profit from publicly funded research before the papers produced from the research had to be made available publicly by placing them in the PubMed Central database. Thus, scholars, professionals, and others who needed the most contemporary information would still be required to purchase journals at a rate set by the publishers. However, after the initial year, research funded by taxpayers, especially research related to health issues, should be made as openly available as possible.

The NIH policy was not the first of its kind. In 1965, the U.S. Office of Education (OE) made a similar policy when it published the following statement in the *Federal Register*:

Material produced as a result of any research activity undertaken with any financial assistance through contract with or project grant from the Office of Education will be placed in the public domain. Materials so released will be available to conventional outlets of the private sector for their use. This policy is effective immediately. (July 12, 1965).⁴⁸

The Office of Education statement reflected a growing awareness on the part of the agency regarding the importance of knowledge for the U.S. economy. The OE had been tracking trends of government funding of research and had also come to realize that the power of the photocopy machine had made it much more easy to distribute knowledge. The Fund for the Advancement of Education commissioned law professor and librarian Julius Marke to study the issue and make recommendations about the public domain policy. Then, as now, there was a hotly contested battle over the scope of the public domain and the role of public funding for privately owned research.⁴⁹

Today, the Department of Education (DOE) continues to have a fairly open access model for materials that can be found on their website and via ERIC, which is an educational equivalent to PubMed Central. DOE policies have met with much less resistance. The current DOE website copyright policy is that all information found on their website is in the public domain.⁵⁰ The ERIC website hosts both copyrighted and public domain materials in an easy-to-access database. Their copyright policy reflects the differing status of materials there, but also indicates that ERIC has secured a license for all copyrighted works that are in the database. The relevant section of their copyright policy states:

Certain works, including documents, reports, and other materials authored by the U.S. government, reside in the public domain and may be freely

distributed and copied. Works authored by a private contractor on behalf of the U.S. government are not necessarily in the public domain. Contract terms and conditions vary from one agency to another. If the copyright status of a particular work is uncertain, it should be verified with the sponsoring agency.⁵¹

Educational materials funded by the DOE remain in the public domain; however, funding by the DOE to private funders is more complex. No matter what the copyright status, however, ERIC offers an index of all education-related materials and links to the full text of many of its journal articles. In other words, it functions a lot like the PubMed Central database. However, if the Fair Copyright in Research Works Act were to pass, the complex and rich materials compiled by ERIC would also be threatened by the formal change in U.S. copyright policy in a manner that would undermine and threaten access to scholarship.

Decisions by public agencies to make works available in the public domain, have met with substantive resistance on the part of commercial publishers and other industry groups who believe research paid for with government funding should be privatized and monetized. The Fair Copyright in Research Works Act is designed to protect the publishing industry, who see the NIH policy as undermining their control of medical publications to which they continue to own the copyrights. If the public were able to access the work free through the PubMed Central Website, they may be less likely to pay the subscription fees charged by the publishers. As Allan Adler, the Association of American Publishers Vice President for Government and Legal Affairs, argued in his testimony before Congress on the subject:

Publishers strongly believe that American taxpayers are entitled to the research they've paid for. As taxpayers ourselves collectively and individually, everyone in this room has paid for government-funded research, and the data and summary reports that result from this research. But taxpayers have not paid for the private sector, peer-reviewed journal articles reporting on that research.⁵²

Adler wants to make a distinction in his testimony between research funded by the government that concluded in an original but as yet non-peer-reviewed paper and the peer-reviewed, formatted, edited, and published end result of the publication process where the publisher adds value to the results. His point is that taking a paper from its submission to final product, which involves the process of peer review, a paid staff, complex databases to manage all the submissions, and much more, is not funded by the research grant, but is instead the contribution of the publishing agency. The final article that is submitted to PubMed Central, then, is more than the original results. As is true in any type of advocacy-based language game, both sides seek to highlight the strengths of their position as well as, in a case such as this, position themselves as victims of an unbalanced policy.

It is certainly true that the publisher adds value through the process of copy editing and managing the details of publication as Mr. Adler argues. However, what he fails to mention is that virtually all peer review and an enormous amount of the editorial

work is completed free by academics in the field, that authors are not paid for their submissions to journals and so the content itself is free, and that the journal costs can be in the thousands if not tens of thousands of dollars, giving publishers an enormous incentive to avoid upsetting the current balance of power but making subscription costs for libraries almost impossible to afford. Because the industry is consolidated and they hold a monopoly over the important journals, but pay nothing for the production of the knowledge, the industry benefits significantly from academic publication.⁵³ This arrangement can exist because scholars are generally subsidized by securing government grants and by their employer, typically universities, where publication is a requirement for tenure and promotion.

In a true free market, publishers would have to solicit and then purchase content, which would harm their profit margins. Perhaps it is equally true that, if publishers had to pay the actual costs of research, they would have no incentive to publish academic works, much like they argue that they have no incentive to publish works if everyone can access the product for free. Thus, it is not that Adler is incorrect in his assessment of the role that publishers play, but rather that the way he frames the issue conceals as much as it reveals about what is happening in the publishing industry today and the enormous benefit they gain from public funds and a system that has virtually nothing to do with incentives to produce knowledge for profit.

The Fair Copyright in Research Works Act was introduced initially in 2008 to the 110th Congress by Representative John Conyers and then again by Conyers in the 111th Congress.⁵⁴ The title of the bill is of course euphemistic, given that it is designed to protect the status quo and not encourage "fair" copyright policies. The bill was designed to rescind the NIH policy of placing publicly funded research into the PubMed Central Website as well as prohibit all government agencies from formulating open access policies regarding the research funded by their agencies.⁵⁵ The passage of the law was strongly supported by the Copyright Alliance, an organization formed in 2007 to promote the protection of copyright law and lobby congress to enhance this protection. Interestingly, the Copyright Alliance board is not made up of individuals, but corporate and trade groups. The executive members are also all corporations, industry groups, or other business entities. Not a single individual creator appears at the board level of the organization.⁵⁶

While 1965 is well before the most recent copyright wars, the arguments have not substantially changed in the ensuing 40 years. In both cases, the primary group seeking to close the public domain and limit access were commercial publishers who use publicly funded research as the basis for their commercial success. The comment of Senator Russell B. Long regarding the Office of Education policy remains as relevant today as it was in 1965:

It appears, he said, that what the publishers are seeking is privileged monopolies, denying the public access to what it already paid for unless it makes an additional payment to the publisher who happened to secure the copyright. They argue that the federal government should both finance the research and protect private profit in its publication through a copyright monopoly. This is

tantamount to saying that the government should finance the building of highways and then permit private companies to charge tolls.⁵⁷

Of course, it is worth noting that, in terms of the public/private balance, we are moving towards privatizing and charging for publicly funded roads as well.⁵⁸

In the 2008 hearing on the Fair Copyright in Research Works Act, Representative Howard Burman, Chairman of the Subcommittee on Courts, the Internet, and Intellectual Property, opened by saying that he could see both sides of the issue.⁵⁹ Martin Frank, the Executive Director of the American Physiological Society, speaking in support of the legislation, argued that the publishers he represented already put their content up for online distribution and that it is "available freely after an embargo period."⁶⁰ It is difficult however, he argued, to create a one-size-fits-all policy for when the appropriate time to publish freely might be. He goes on to state that copyright has been the tool that allows publishers to invest in the appropriate infrastructure and peer review that is necessary.⁶¹ Despite acknowledging that most if not all of the journals he represents already have made available the full text of their articles within a similar timeframe to that required by the NIH policy, he was against the bill. His position seems less about the copyright policy or even if the articles are available, given that they already are. Instead, the concern seems to be with the connectivity and innovative approach to the scientific literature made possible by the PubMed Central database.

Frank argued:

As PubMed Central becomes an increasingly valuable and singular resource, as envisioned by Ms. Joseph, it becomes more likely that journal subscribers will opt to access articles from NIH's Web site rather than the journals. This will lead to subscription cancellation, as suggested by studies discussed in my written testimony.⁶²

In other words, what Mr. Frank feared was the way in which access to knowledge would change the rules of the game that may not be of advantage to the older business model.

Elias A. Zerhouni, the Director of the NIH, spent his time discussing the truly profound way in which the PubMed Central database can transform the research process and thus spark faster and more innovative science. These database projects allow for information connectivity that is simply not possible without the internet. The database creates links between multiple articles published by different sources and offers an innovative way of searching the literature that is active instead of passive. He states:

And we know now that to make progress, we will need to interconnect all of the discoveries we are making and make sure that the scientists and anybody who needs that information is able to exploit it in the Internet age, because the real value is in the full connectivity, not just the posting of the passive

documents, it is the connectivity of all available electronic sources of scientific information and their efficient exploitation with the new powerful engines of software that are used in the modern search engine technology, and not just in a passive display. This is what 21st century science and health require, even the current explosion of knowledge, and what NIH needs to keep its competitive edge worldwide.⁶³

Thus, while copyright is the ostensible focus of the hearing, the larger issue is how copyright can be used to control the future of producing knowledge and who will control it.

One interesting oversight in the Congressional hearing is that the authors of scientific studies and their resulting papers were not invited to testify. Ostensibly the author of an intellectual work is its copyright owner, and the justification for supporting a system of copyright in the United States hinges on promoting progress in the arts and sciences, something done when authors write things, not when publishers publish them. Of course, authors sign their rights over to the publishers upon the acceptance of their article for publication and, according to a recent survey, copyright issues rank last in author priorities. Instead, authors care about reputation, readership, impact factors, and speed of publication.⁶⁴ Towards the end of the hearing, Representative Melvin Watt questioned where the original scientists and authors might be in this particular debate, the people who are giving up copyright no matter who is the ultimate publisher. His question highlighted that the author is no longer relevant—publishers see copyrights as theirs.⁶⁵

The Fair Copyright in Research Works Act was reintroduced as the Research Works Act (RWA) in 2012 with continued support from private publishers. The bipartisan team of Representative Carolyn Maloney (D-N.Y.) and Representative Darrell Issa (R-Calif.) introduced the RWA.

The 2012 version went beyond the NIH policy to prohibit *all* government agencies from making research that they fund publicly available.⁶⁶ After public outcry (the public generally supports open access to publicly funded research), the legislation was allowed to die for the time being. The failure of the RWA to gain traction might be an indication that public efforts to make government-funded research available has gained a slight upper hand in the ongoing political struggle.⁶⁷

The fight over public access to federally funded research took a new turn after activists utilizing the Whitehouse.gov petition process generated over 65,000 signatures for an open access to federally funded research initiative.⁶⁸ In response, the White House Office of Science and Technology Policy issued a memorandum that requires federal agencies funding research to make the results available publicly within one year of publication.⁶⁹ This open access policy rode the wave of popular support for such action, an issue that perhaps even a decade ago would have generated almost no public attention. Additionally, even as the RWA was being silently abandoned by its co-sponsors, counter-legislation under the name Fair Access to Science and Technology Research (FASTR) was introduced in February of 2013.⁷⁰ In other words, while the underlying ideological position remains very much in favor of more

intellectual property laws, the American hegemonic state narrative rests on top of a far less united public—a public that differs significantly on how copyright and patents should be protected now and into the future. This public is now making waves.

The larger goal of this section is to demonstrate that, as with presidential statements, there is little to indicate a difference between Republican and Democratic voices on issues of intellectual property. For example, Representative Bob Goodlatte, the Chairman of the House Subcommittee on Courts, the Internet, and Intellectual Property for the 112th Congress recently reproduced the same narrative about American innovation and the role IP plays in protecting it in his weekly statement published in the Lynchburg Times. He said:

Specifically, we will promote policies to protect American intellectual property. America is the most innovative nation on earth, due in part to the strong intellectual property protections our Founder's included in the Constitution and Congress' commitment to keep those protections strong and current. In order to grow our national economy we must ensure this vital sector is protected and able to thrive.⁷¹

As a strong advocate of broad intellectual property rights, Representative Goodlatte does not seem substantively different in ideological focus from his Democratic counterparts when it comes to intellectual property. The irony of an anti-government, pro-deregulation Representative being willing to pass legislation to prop up monopoly control of big industry should not be lost.

What is surprising is that Representative John Conyer, who introduced the Fair Copyright in Research Works Act would go on to call for legislation that sides with musicians and recording artists against the recording industry when it comes to termination rights.⁷² The story of how termination rights (the ability of artists to regain control of their copyrighted works from industry) came to include sound recordings is one of typical Congressional complicity with industry—a provision was inserted into an earlier law that classified sound recordings as “work made for hire” under the copyright statute. The staffer responsible for inserting the provision, changing the status of sound recordings, Mitchell Glazier, went to work for the recording industry.⁷³ Despite aligning with the publishing industry to keep works out of the public domain, Representative Conyer has also aligned with the artist against the industry in this other copyright battle. However, his support for the underlying ideology of copyright has not changed.⁷⁴

Furthermore, with a few deviations, Congressional support remains bipartisan in its advocacy for intellectual property protection. While Representative Berman sought to offer a balanced assessment of the rule to turn back putting government works in an open access model, he is otherwise staunchly pro-copyright. As Representative Howard Berman noted in a press release from Senator Patrick Leahy's office

“The theft of American Intellectual Property not only robs those in the creative chain of adequate compensation, but it also stunts potential for economic

growth, cheats our communities out of good paying jobs, and threatens future American innovation," added Bernan. "Today I remain as committed to this fight as ever, and I look forward to working with my colleagues both Republicans and Democrats to protect American businesses, workers, and innovators."⁷⁵

The Republican House Judiciary Committee Chair Lamar Smith joined these Democratic senators in making these statements.⁷⁶

While it is possible to track the statements and policy actions of Congressional actors in more detail, what seems fairly clear is that enhanced copyright, patent and trademark protection remain bipartisan and based upon the conventional narrative expressed in presidential speeches and Congressional hearings. These views reflect almost exactly the views expressed by intellectual property industries. The revolving door between Congress and content lobbyists certainly exists.

Former Democratic Senator Christopher Dodd was vocally in favor of the controversial Stop Online Piracy Act (SOPA). His new position as the Motion Picture Association of America Chief Executive is simply a visible version of the revolving door.⁷⁷ The then Chief Counsel of the House intellectual property subcommittee, who was later hired by the Recording Industry Association of America (RIAA), inserted changes to the law sought by the RIAA into legislation while still a government official.⁷⁸ David Carson, the now former general counsel of the U.S. Copyright Office, took a position at the IFPI (the International Federation of the Phonographic Industry) in 2012 to head their global legal policy section and connect with policy-makers worldwide to formulate efforts to halt digital piracy.⁷⁹ In a related trade, the U.S. government got Shira Perlmutter, who "left the top global legal policy post at IFPI to become the lead official for international affairs at the U.S. Patent and Trademark Office."⁸⁰ With such close industry ties it would be difficult for anything but an IP maximalist position to dominate. Furthermore, the revolving door of government and industry officials ensures that the intellectual property maximalist position is part of the government approach.

What is less clear is where the author and artist reside in the debates. As Bill Ivey, former chair of the National Endowment for the Arts pointed out:

One thing should be clear from our exploration of the impact of an unfettered marketplace, light-touch regulation, and an expanding web of intellectual property constraints: our cultural system has become detached from the interests of the American people. And, at the end of the day, our loss of cultural rights reflects a failure of leadership—a failure to define and secure the public interest in art and art making, compounded by the repeated cave-in of government to the market-driven carving up of our collective expressive life.⁸¹

However, these larger cultural considerations are not part of the contemporary intellectual property discourse. There are, of course, also authors who embrace the IP maximalist discourse, as the next section will demonstrate.

Beyond America—intellectual property barbarians and intellectual property maximalism

In 2007, Mark Helprin, perhaps most famous for his novel, *A Winter's Tale*, published an opinion piece in the *New York Times* titled, "A Great Idea Lives Forever, Shouldn't Its Copyright?"⁸² In this short essay, Helprin expressed his frustration with the current protection of copyright and sketched his argument for a copyright maximalist position. He argued that authors should retain the rights to their work, that these should be inheritable by their children, and that these rights should be protected for as long as possible. He argued that, while the constitution prohibits perpetual protection, the next best thing, or the longest term possible, would be acceptable. Helprin sketched out the key concepts of a position designed to maximize copyright protection, preferably in perpetuity. Given Helprin's passionate advocacy for a pro-IP system that would extend author's rights in perpetuity, it is worthwhile to investigate his argument on the subject in more detail.

Helprin was surprised when his move in the language game generated a negative backlash.⁸³ The year 2007 was also almost a decade after Napster had transformed the face of the music industry and had rendered most of the world into pirates engaged in the illegal download of music. It was also more than 20 years after the TRIPS agreement was signed, leading to international controversy that resulted in the least developed countries being given increased time to meet the TRIPS standards. In other words, a global and vocal struggle over the scope of intellectual property rights already existed,⁸⁴ and perhaps Helprin did not know he was entering an ongoing debate, one that could actually be charted back much further than this century, but that does not change the fact that the debate had long been raging before he entered the fray.

In his original editorial, Helprin sketched out his argument for a copyright maximalist position by making the point that, while the government taxes inheritance and regulates all forms of property, it still allows future generations to retain tangible property after the death of the original owner. What makes no sense to Helprin is that copyright does not follow a similar path as real property. He writes, "Were I tomorrow to write the great American novel (again?), 70 years after my death the rights to it, though taxed at inheritance, would be stripped from my children and grandchildren."⁸⁵ Helprin notes that the beneficiaries of a system that removes the copyright from the author and the author's heirs, is a system that benefits corporate publishers who can then freely reproduce the work without any compensation to the heirs of the original creation. In his words:

"Freeing" a literary work into the public domain is less a public benefit than a transfer of wealth from the families of American writers to the executives and stockholders of various businesses who will continue to profit from, for example, "The Garden Party," while the descendants of Katherine Mansfield will not."⁸⁶

Thus Helprin points out the crucial flaw in the contemporary public domain—the public will most likely continue to pay, though the internet is changing this, but the author's immediate family will not benefit.

While Helprin acknowledges that at least in the United States we are bound by the language of the Constitution, the wiggle room within the constitutional mandate is that we protect these works "for a limited time," which for Helprin should be extended by Congress as "far as it can throw."⁸⁷ In a short essay, Helprin helps to clarify some of the key concepts of the copyright maximalist position with a focus on authors and not corporate copyright owners. For Helprin, authors should retain the rights to their works, these should be inheritable by their children, and these rights should be protected for as long as possible—and, while the constitution prohibits perpetual protection, the next best thing would be acceptable.⁸⁸

Under his vitriolic rant, there is an element of truth that helps to highlight one of the key tensions and fundamental tenets of the copyright maximalist camp. Specifically, Helprin, as an author, sees these issues from the perspective of the producer of something subject to copyright. He is even clear that he understands that corporate control over copyright and licensing can create a situation that is not only detrimental to him personally but to authors more generally.⁸⁹ Helprin is also very quick to point out that most writers make hardly anything from their labors and few will even be lucky enough to get an advance, let alone have an inheritance to leave their children.⁹⁰ Thus, in many ways, Helprin stands aligned with those who critique the contemporary political economy of intellectual property.

Helprin's arguments are the same ones made by the anti-copyright legions that he abhors with one small difference—he believes that extending copyright longer will benefit authors, when in fact the system as currently conceptualized has been stacked in favor of publishers, industry executives, and those willing to capitalize on creativity. What the "digital barbarians" are willing to envision is not the end of authorship or creativity, but a radically disintermediated future where industry does not control copyright. With the exception of a few advocates, the vast majority of those labeled "anti-copyright" are not suggesting the abolition of copyright in its entirety. The creative commons approach, for example, relies heavily upon the existence of copyright and does not abandon copyright but instead facilitates non-corporate sharing of ideas.

Those who critique the modern manifestation of copyright often have done so because it is a mechanism for concentrating control of ownership, not into the hands of authors, but into the hands of copyright owners, typically the publishers and industry reps who then decide what will be read, heard, seen, and done based upon profit margins and bottom lines. Thus, authors are in part poor and their heirs do not own 200-foot yachts (Helprin's example) because the owners of the publishing houses to whom these authors are required to assign copyright do (or at least the corporate CEOs of the publishing conglomerates who have concentrated most copyrighted wealth into their personal businesses do). While perhaps Helprin is one of the few authors who retain control over their copyright, a typical publishing or music contract requires the artist to sign over their copyright to the publisher and thus even limited authorial control is lost.

Aside from Helprin, it is somewhat difficult to find works that justify, embrace, or advocate for stronger intellectual property rights coming from anyone but corporate advocates. Copyright maximalists, as described in this chapter and the next, tend to

be located in industry and law firms that help support industry interests because there is an industry incentive to keep copyright.⁹¹ Posner's and Landes's economic treatment of intellectual property law has been mentioned as two texts that develop an economic justification for intellectual property.⁹² *Justifying Intellectual Property*, by Robert Merges, fits the bill of intellectual property advocacy.⁹³ The now classic book by Paul Goldstein, *Copyright's Highway*, describes the tension between copyright optimists and pessimists as those who seek greater or less protection for copyrighted works.⁹⁴ Goldstein's work is not "maximalist," however. His argument is better described as a legal analysis of the technological challenges that have evolved over the past 30 years for copyright law, and his work begins from the assumption that intellectual property as a system has legitimacy.

Goldstein, in his 2007 book, *Intellectual Property: The Tough New Realities That Could Make or Break Your Business*, sees the uncertainty created by the push and pull of these positions to be the "tough new reality" within which business must operate. Constant legal challenges, efforts to reform the law, and expansion of rights are all part of an uncertain and continually changing terrain.⁹⁵ In other words, IP has emerged from the sideline of jurisprudence into a central position fraught with politics and struggle. While Goldstein is correct, that there is uncertainty in the world of IP, I disagree with the assessment that it comes from those who seek to reduce the current status of intellectual property. Instead, I would argue that the current instability comes from the expansion of rights. As the concept of IP has achieved a more popular status, more people have turned to the courts to protect what they see as their rights, thus using the law to make their claims. One of the unintended consequences of expanding concepts of property rights is that not only the original actors seeking to protect their self-interest benefit, but the field upon which rights will be contested is widened, and broader claims are thus allowable. More contestation over rights by new actors and thus more litigation have the impact of undermining the very efforts intended by the law. Once someone understands a previously unprotected thing as property, then by default a new struggle over ownership ensues. Expansion of rights also transforms previously non-criminal acts into criminal ones, requiring more enforcement, surveillance, and control than previously warranted, again making the field more divisive.

What copyright maximalists tend to share in common is belief in the claim that copyright and patents are forms of property. Goldstein clarifies that the distinction between copyright optimists and pessimists (or maximalists and reductionists) revolves in part around the concept of property. The fact that intangibles can be shared and used without leaving the possession of their original owner means to pessimists that copyright is a non-rivalrous good and thus not property. To maximalists, however, despite the intangibility of copyrighted objects, the concept of property remains paramount.⁹⁶ To that degree, Goldstein sees the law as having evolved in tension between these sides—with maximalists seeking to expand the law and reductionists imposing safety valves where possible.⁹⁷

The perpetual rights arguments, with the understanding of information as property, can be situated within Wark's assessment of the coming struggle of the information age. As he puts it in his introduction:

Just as the development of land as a productive resource creates the historical advances for its abstraction in the form of capital, so too does the development of capital provide the historical advances for the further abstraction of information, in the form of "intellectual property." In traditional societies, land, capital and information were bound to particular social or regional powers by customary or hereditary ties. What abstraction hacks out of the old feudal carcass is a liberation of these resources based on a more abstract form of property, a universal right to private property. This universal abstract form encompasses first land, then capital, now information.⁹⁸

To Wark, a writer such as Helprin has been caught up in the struggle over a new form of property.

These advocates and the myriad business interests supporting stronger and more comprehensive intellectual property laws have successfully established the discourse on intellectual property within which any critique must be made. In 1991, Patterson and Lindberg, writing about the applicability of the 1976 revisions of the American copyright statute, predicted that, as new technologies became the subject of copyright protection but old precedents continued to apply, copyright law would, "enhance the monopolistic position of industry leaders."⁹⁹ Writing before much of what became the copyright battles of the 1990s and 2000s, Patterson and Lindberg were among the first to stake out a balanced approach between users and owners, and they argued that courts should limit copyright protection when it "frustrated those constitutional policies: the promotion of learning, the protection of the public domain, and the protection of the author (though not necessarily the publisher)."¹⁰⁰ Unfortunately, as they noted then, and it is still true now, "the law of author's rights and the law of users' rights are both currently underdeveloped—primarily because of the courts' emphasis on economic rights."¹⁰¹ Their vision of a balance is a far cry from where our current law is headed, and certainly their prediction of the future was prescient.

To conclude, the assumption upon which the U.S. extension of copyright maximalism exists is that it is the United States that paves the way for global IP domination by being the most innovative and creative. We need such strong intellectual property protection domestically and globally because the creativity of the United States is what drives global innovation. However, this assumption is incorrect. In March 2013 Band and Gerafi published a report on ownership concentration in IP-related industries that suggested that ownership of IP-related industries is global at best and far from being dominated by U.S. interests. Their key findings include:

- Four of the "Big Six" publishers, the largest English-language trade publishers, are foreign-owned. More than 80 percent of the global revenue of the Big Six is generated by these foreign-owned companies. These foreign-owned companies published more than two-thirds of the trade books in the United States.
- Four of the five largest STM (science, technical and medical)/Professional publishers are foreign-owned. More than 90 percent of the revenue of the five largest STM/Professional publishers was generated by foreign-owned firms.

- Only seven of the world's 50 largest publishers of all categories are U.S.-owned.
- The book-publishing industry in Europe has approximately twice as many employees as in the United States.
- Of the top ten best selling fiction authors in any language whose work is still in copyright, five are foreign. A British author wrote three of the top five best selling books in the United States in 2012.
- Two of the three major record labels are foreign owned. These two labels have a market share of 59 percent.
- Thirteen of the 20 best selling recording artists are foreign.
- Of the 50 most popular motion pictures in the United States in 2012, half were filmed partly or entirely outside of the United States.
- In 2013, the Oscar winners in 13 of 24 categories were foreign. In 2012, the Oscar winners in 11 of 24 categories were foreign. In 2011, the Oscar winners in eight of 24 categories were foreign.
- Seventy percent of the most recent generation of game consoles were manufactured by Japanese companies. Japanese companies have manufactured 92 percent of all game consoles ever sold.
- In 2011, foreign companies obtained 7,000 more U.S. patents than U.S. companies.
- In 2011 and 2012, seven of the top ten companies receiving U.S. patents were foreign.
- 57 percent of the global revenue of the 15 largest pharmaceutical companies was generated by foreign-owned companies.
- The majority of the employees of both the United States and the foreign-owned pharmaceutical companies work outside of the United States.¹⁰²

Thus, even if the United States remains central to creative and innovation-driven industries, *ownership* of the resulting intellectual property is not retained. The government has, however, pushed for even more restrictive IP laws that may, in the words of the report, "benefit foreign corporations at the expense of U.S. consumers."¹⁰³ It is within the context of expanding U.S. IP laws and the support of a globalized capitalist economy that we must assess what type of future global economy is being created.

Conclusion

In April of 2013, former President Bill Clinton gave a speech at the Creativity Conference that signaled a departure from the American talking points on intellectual property. The former president, who presided over the expansion of copyright in the digital age, spoke in favor of flexible copyright, crowdsourcing, creative commons, and a balancing between remuneration for creative work and public use of that work.¹⁰⁴ In many ways, this particular move in the language game is profound and marks a significant departure from what we have come to expect from public officials. While the prevailing narrative of U.S. intellectual property policy remains stable and very pro-IP, the idea that, after 30 years of advocacy, there is a small hope that more flexibility is even acknowledged by a former official is significant. As discussed

in this chapter, there are small fissures and clear resistance building to the prevailing IP wisdom. Thus, the game is not over yet.

What is also significant is the challenge to the official American position on IP by the public as exemplified by the recent failure of the SOPA and PIPA (PROTECT Intellectual Property Act) legislation. Such resistance may suggest change for future Congressional debates. As Public Knowledge President Gigi Sohn notes, at the very least, future pro-IP legislation will be placed under much greater scrutiny and be subject to more debate than in the past.¹⁰⁵ Thus, while the underlying state message remains strongly in favor of intellectual property, the possibility of alternatives as raised by those debating the issue emerges as a sliver of hope. That massive protest would erupt over the issue of intellectual property would have been inconceivable 20 years ago. However, resistance has been mounting for some time now.¹⁰⁶

The hegemonic language of IP maximalism leaves relatively little space for a more complex and nuanced approach to innovation or creativity. It assumes that only the most maximalist protection will inspire art, music, and literature. Increasingly, the maximalist position pits content owners against content users as well as the technological infrastructure where content is primarily circulated—the internet. As with any political discourse, the intellectual property maximalist project is based upon ideological assumptions, the articulation of victims and victimizers, winners and losers, and assertions about the conditions under which innovation and creativity occur.

Conversely, most scholarship on issues of intellectual property has a critical lens. The critical scholarship may take a variety of approaches to the concept of intellectual property. It might criticize a specific aspect of the law, it could embrace the logic that the law ought to balance competing interests, it might highlight the unequal outcomes of the law as it currently stands, it can offer a critical history of the evolution of the law, or it might make arguments that types of intellectual property should be abandoned altogether. Goldstein identifies the emergence of the critical academic approach in the software battles of the 1980s, where:

the greatest casualty of the software wars was copyright itself, and not because the judicial decisions in any way injured copyright principle—they did not—but because the debate ignited a skepticism about the value of copyright that was unprecedented in the law's long history.¹⁰⁷

As Goldstein continues, "other academics picked up this critical theme during the software battles of the 1980s, and have not dropped it since. No expansionist legislative initiative—from extending the term of copyright to shoring up the rights of movie and record companies—has failed to trigger a loud and critical academic response."¹⁰⁸ The literature that is critical of expanding intellectual property, especially copyright law, is so large that I will not seek to cite it here, but a review of the bibliography and associated endnotes for this book will provide some sense of the depth of this literature. However, despite these layers of criticism, government policy remains remarkably unconcerned with opposing points of view and, instead, as this chapter has sought to demonstrate, reflects a coherent national narrative about the

importance of American ingenuity and government efforts to protect it. As a result, academics, activists, and others concerned with the future of IP are lumped together with pirates, counterfeiters, and those engaged in economic acts against the current system as the problems that must be stamped out.

If intellectual property activists and scholars want to see a different future, then it is important to figure out how to alter the policy trajectory of the intellectual property maximalists. The Washington Declaration on Intellectual Property and the Public Interest is one place where those concerned with the IP maximalist trajectory have begun.¹⁰⁹ Critics of intellectual property span the globe, represent many disciplines of thought, are activists seeking to alter the information economy, and also are artists, musicians, authors, and creators themselves. By contrast to claims made by IP maximalists that government has not gone far enough to protect IP, critics of the current IP system see the failure of government in that fact that it has gone too far and created too expansive a system rather than that it has not gone far enough. Each side recognizes the state as the arbiter of IP rules—either seeing the state as a vehicle for corporate interests against the public interest or, for the maximalists, seeing the state as failing to establish the necessary conditions for economic growth.

It is difficult to identify winners and losers here. After decades of debate, there seems to be not much new that can be said either for or against the protection of IP. All the arguments for and against the system have been played out, critiqued, and exhausted. We know the arguments and counter-arguments by heart and yet each side continues to struggle to define the policy territory. The same stories are told. In the political economy of the information age, the user, the sick, the student, the global South, the music fan, the movie buff, the small business, and much more are those who either don't care about intellectual property rights or can't afford to protect what rights they might have anyway. This leaves the playing field open to business interests who do have the wherewithal to establish strong rights.

The state is not a neutral arbiter of disputes but an active participant in managing the population, and increasingly a global population, for the new information economy. This chapter sought to develop the American maximalist position that prevails in policy circles and the ways in which government statements regarding the future of IP establish the prevailing policy paradigm. Foucault suggests that the state survives, and is limited by, the tactics of governmentality that it employs—what falls within its domain. States are not defined by their territoriality but by the "mass of population" requiring "apparatuses of security" to control.¹¹⁰ This chapter describes part of the modern regulatory scheme developed by the state to ensure its legitimacy—the value of the state in protecting intellectual property. The next chapter focuses on the role of the state internationally and situates the hegemonic narrative of American intellectual property within the global context and the goals of other state actors.

Notes

- 1 Mark Helprin, *Digital Barbarism: A Writer's Manifesto* (New York: Harper Paperbacks, 2010), 33.

- 2 Derek Khanna, *Three Myths About Copyright Law and Where the Start to Fix It*, RSC Policy Brief, November 16, 2012, 1–3, rsc_policy_brief-three_myths_about_copyright_law_and_where_to_start_to_fix_it-november_16_2012.pdf.
- 3 As developed in the Introduction, Lyotard's concept of the language game is useful for understanding the way in which debates over copyright are engaged and the act of struggle that they produce. Lyotard, *The Postmodern Condition*, op. cit.
- 4 Khanna, *Three Myths About Copyright Law and Where the Start to Fix It*, op. cit.
- 5 "The Democratic Party Platform," *Democrats.org*, 2012, www.democrats.org/democratic-national-platform; "2012 Republican Platform—GOP," GOP, accessed May 21, 2013, www.gop.com/2012-republican-platform-home; MPAA lobbyist (and former Democratic Senator) Christopher Dodd commended both the Republican and Democratic platforms as being good for U.S. intellectual property goals. See: "U.S. Film Industry Praises Republicans on IP and Internet Freedom," *Intellectual Property Watch*, August 30, 2012, www.ip-watch.org/2012/08/30/us-film-industry-praises-republicans-on-ip-and-internet-freedom/?utm_source=post&utm_medium=email&utm_campaign=alerts; "U.S. Film Industry (Also) Likes Democrats' Platform On IP And Internet Freedom," *Intellectual Property Watch*, September 4, 2012, www.ip-watch.org/2012/09/04/us-film-industry-also-likes-democrats-platform-on-ip-and-internet-freedom/?utm_source=post&utm_medium=email&utm_campaign=alerts.
- 6 Timothy P. Carney, "GOP Sides with Mickey Mouse on Copyright Reform," *Washington Examiner*, December 5, 2012, washingtonexaminer.com/article/2515183.
- 7 Andrew Couts, "Meet the Muzzled Copyright Crusader Who Believes Laws Are Paralyzing Progress," *Digital Trends*, March 15, 2013, www.digitaltrends.com/mobile/the-great-copyright-contrarian-dt-interviews-derek-khanna.
- 8 The subject of national security will be taken up in Chapter 3.
- 9 I will return to the notion of IP maximalism later in the chapter, but please see: Goldstein, *Copyright's Highway*, op. cit.
- 10 McKenzie Wark, *A Hacker Manifesto* (Cambridge, MA: Harvard University Press, 2004), 20.
- 11 Ibid.
- 12 Ibid.
- 13 Ibid., 2.
- 14 Ibid., 21.
- 15 Ibid., 330.
- 16 Ibid., 332.
- 17 Mittelman, *Whither Globalization?* op. cit., 90.
- 18 I am using the concept of "technologies of power" from Foucault as they related to population. This will be more fully developed as the chapter progresses. Michel Foucault, *Security, Territory, Population: Lectures at the Collège de France, 1977–78* (Basingstoke; New York: Palgrave Macmillan; République Française, 2007), 110.
- 19 Barack Obama, "Remarks by the President at the Export-Import Bank's Annual Conference," *The White House*, March 11, 2010, www.whitehouse.gov/the-press-office/remarks-president-export-import-banks-annual-conference.
- 20 "Office of the U.S. Intellectual Property Enforcement Coordinator," *The White House*, accessed May 21, 2013, www.whitehouse.gov/omb/intellectualproperty/quotes.
- 21 "Film Industry Praises Obama's 'Understanding' of IP's Importance," *Intellectual Property Watch*, November 7, 2012, www.ip-watch.org/2012/11/07/film-industry-praises-obamas-understanding-of-ips-importance/?utm_source=post&utm_medium=email&utm_campaign=alerts.
- 22 Barack Obama, quoted in: Kelly Burke, "Obama Takes Swipe at Patent Trolls in Call for Further Reform," *Intellectual Property Watch*, February 15, 2013, www.ip-watch.org/2013/02/15/obama-takes-swipe-at-patent-trolls-in-call-for-further-reform/?utm_source=post&utm_medium=email&utm_campaign=alerts.
- 23 John T. Woolley and Gerhard Peters, "Ronald Reagan: Radio Address to the Nation on Free and Fair Trade," *The American Presidency Project*, September 13, 1986, www.presidency.ucsb.edu/ws/?pid=36412.
- 24 Obama has continued efforts to make publically funded research available via open access methods. These efforts have met with stiff resistance from publishers as will be detailed later. Nevertheless, they also indicate that there isn't a single coherent approach to copyright issues. See: Michael Stebbins, "Expanding Public Access to the Results of Federally Funded Research," *The White House Office of Science and Technology Policy*, February 22, 2013, www.whitehouse.gov/blog/2013/02/22/expanding-public-access-results-federally-funded-research.
- 25 One such comment was made to the U.S. Chamber of Commerce, where President Bush pledged to increasing international IP protection via the GATT agreement. See: John T. Woolley and Gerhard Peters, "George Bush: Remarks at the Annual Meeting of the United States Chamber of Commerce," *The American Presidency Project*, April 30, 1990, www.presidency.ucsb.edu/ws/?pid=18427.
- 26 John T. Woolley and Gerhard Peters, "William J. Clinton: Statement on Congressional Action on Digital Millennium Copyright Legislation," *The American Presidency Project*, October 12, 1988, www.presidency.ucsb.edu/ws/?pid=55077.
- 27 John T. Woolley and Gerhard Peters, "William J. Clinton: Remarks on the National Economy," *The American Presidency Project*, December 3, 1999, www.presidency.ucsb.edu/ws/?pid=57019.
- 28 John T. Woolley and Gerhard Peters, "George W. Bush: Remarks on Signing the Stop Counterfeiting in Manufactured Goods Act," *The American Presidency Project*, March 16, 2006, www.presidency.ucsb.edu/ws/?pid=65347.
- 29 Quoted in: Goldstein, *Copyright's Highway*, op. cit., 6.
- 30 "Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office," *U.S. Department of Commerce*, July 8, 2002, www.osc.doc.gov/omo/dmp/doors/door10_14.html.
- 31 He was inducted into the "IP Hall of Fame" in 2006. The IP Hall of Fame is funded by the IP Media group and inducts individuals based upon their support for strong IP laws. See: "IP Hall of Fame—Bruce Lehman," *Inductees*, 2006, 2006, www.iphalloffame.com/inductees/2006/Bruce_Lehman.aspx.
- 32 The information in this section comes from the following resource provided by America.gov and developed in 2008. "List of Resources on Intellectual Property," *America.gov*, April 29, 2008, www.america.gov/st/econ-english/2008/April/20080429235644eafas0.1053299.html; "Strategy for Targeting Organized Piracy (STOP)," *United States Patent and Trademark Office*, accessed August 9, 2011, www.uspto.gov/ip/global/stopfakes.jsp.
- 33 "List of Resources on Intellectual Property," op. cit.
- 34 David Kravets, "Obama Appoints Scholar as New Copyright Czar," *Wired.com*, September 25, 2009, www.wired.com/threatlevel/2009/09/obama-taps-new-copyright-czar.
- 35 "Biography: Chris Israel: U.S. Coordinator for International Intellectual Property Enforcement," June 2006, www.netcaucus.org/biography/chris-israel.shtml; "PCT Government Relations, LLC," accessed August 9, 2011, www.pctgr.com/welcome; "ACG: American Continental Group: Chris Israel," 2011, www.acg-consultants.com/our-team/chris-israel.
- 36 "Secretary Locke Joins Vice President Biden for Intellectual Property Enforcement Strategy Event," *Department of Commerce*, June 22, 2010, www.commerce.gov/blog/2010/06/22/secretary-locke-joins-vice-president-biden-intellectual-property-enforcement-strategy.
- 37 Ibid.
- 38 Tony Romm, "Former White House IP Adviser Victoria Espinel to Lead BSA," *POLITICO*, August 28, 2013, www.politico.com/story/2013/08/victoria-espinel-bsa-96015.html.
- 39 "Administration's White Paper on Intellectual Property Enforcement Legislative Recommendations" (Office of the President, March 2011), www.whitehouse.gov/sites/default/files/ip_white_paper.pdf.
- 40 "U.S. IP Czar Proposes Limits on Civil Rights and Liberties to Protect Big Content," *Computer & Communications Industry Association*, March 16, 2011, <http://ccia.net.com>.

- blog/2011/03/us-ip-czar-proposes-limits-on-civil-rights-and-liberties-to-protect-big-content.
- 41 "USTR Ron Kirk Joins Vice President Joe Biden to Announce the Joint Strategic Plan on Intellectual Property Enforcement," *Office of the United States Trade Representative*, June 2010, www.ustr.gov/about-us/press-office/press-releases/2010/june/ustr-ron-kirk-joins-vice-president-joe-biden-announce.
 - 42 "Office of the U.S. Intellectual Property Enforcement Coordinator," *op. cit.*
 - 43 Goldstein, *Intellectual Property*, 18, *op. cit.*
 - 44 For an updated list of copyright-related legislation introduced in the most recent Congress see: "U.S. Copyright Office—Legislative Developments (111th Congress)," accessed March 13, 2011, www.copyright.gov/legislation/; Lawrence Lessig, *Code: Version 2.0*, *op. cit.*
 - 45 "U.S. Copyright Office—Legislative Developments (111th Congress)."
 - 46 "President Obama Signs America Invents Act, Overhauling the Patent System to Stimulate Economic Growth, and Announces New Steps to Help Entrepreneurs Create Jobs," *The White House*, September 16, 2011, www.whitehouse.gov/the-press-office/2011/09/16/president-obama-signs-america-invents-act-overhauling-patent-system-stim.
 - 47 R. Liebler, "Open Access to Publicly Funded Research Signed into Law: 'Congress Has Just Unlocked the Taxpayers' \$29 Billion Investment in NIH,'" *Copyright Advisory Network*, January 2, 2008, <http://librarycopyright.net/wordpress/?p=62>.
 - 48 Julius Marke, *Copyright and Intellectual Property* (New York: Fund for the Advancement of Education, 1967), 11.
 - 49 From the point of view of the Office of Education's Deputy Commissioner, Henry Loomis, "We want to make this material available to the maximum number of people, in the shortest time, with minimum of restrictions." His view reflects an educational approach to knowledge premised in the enlightenment tradition—that knowledge should be shared as broadly as possible so that it will spark the creation of new knowledge. However, publishing companies saw the potential of all work being placed in the public domain as a threat to their business models. See: *Ibid.*, 12–13. Marke, in writing his recommendations regarding the OE policy, sought to balance the interests of private publishers with the interests of free access to information. His conclusion was that, instead of a full grant to the public domain, "it would appear that OE's all-encompassing public domain policy must be replaced by one that recognizes certain proprietary rights at one stage of research and provides for a public domain policy at another." See: p. 52.
 - 50 "Department of Education Copyright Status Notice," November 18, 2004, www2.ed.gov/notclamped/notices/copyright/index.html.
 - 51 "Copyright Policy," *ERIC Education Resources Information Center*, accessed September 14, 2011, www.eric.ed.gov/ERICWebPortal/resources/html/about/copyright_policy.html.
 - 52 Allan Adler, "Testimony before the House Committee on Oversight and Government Reform on Government Mandates on Journal Articles," *The Association of American Publishers*, July 2010, 1, <http://publishers.org/psp/publicpolicy>.
 - 53 For an excellent description of the state of publishing as it relates to access to knowledge, see: George Monbiot, "Academic Publishers Make Murdoch Look Like a Socialist," *The Guardian*, August 29, 2011, www.guardian.co.uk/commentisfree/2011/aug/29/academic-publishers-murdoch-socialist.
 - 54 While the bill has still not passed, the introduction of this legislation helps to situate Congress in the larger scheme of copyright protection. Democratic Representative Conyers, who made jurisdictional arguments about how he felt the Omnibus bill into which the NIH policy had originally been inserted was problematic, introduced the Fair Copyright in Research Works Act. However, despite his claim that he was process oriented, the legislation demonstrates that he sided with the publishers in this fight. In response to criticism by Lawrence Lessig, Conyers responded in *The Huffington Post* by asserting that the process was his concern, not the content of the bill. See: John Conyers, "A Reply to Larry Lessig," *The Huffington Post*, March 6, 2009, www.huffingtonpost.com/john-conyers/a-reply-to-larry-lessig_b_172642.html.
 - 55 Robin Peek, "Fair Copyright in Research Works Act Challenges Federal Funding," *Information Today, Inc.*, September 22, 2008, <http://newsbreaks.infotoday.com/NewsBreaks/Fair-Copyright-in-Research-Works-Act-Challenges-Federal-Funding-50849.asp>.
 - 56 "Copyright Alliance," accessed September 9, 2011, <http://copyrightalliance.com/content.php?id=44>.
 - 57 Quoted in: Marke, *Copyright and Intellectual Property*, *op. cit.*, 20.
 - 58 For competing press releases that stake out the ideological claims associated with privatizing the nation's public highway system, see: "Challenging the Wisdom of the Trans-Texas Corridor," *Corridor Watch*, accessed September 7, 2011, www.corridorwatch.org/ttc_2007/CWP0702090.htm; "Anti-toll Privatization Lobby Formed by Washington Lobbyists," *Tollroadnews*, February 9, 2007, www.tollroadnews.com/node/1792.
 - 59 *Fair Copyright in Research Works Act* (U.S. Government Printing Office, 2008), 2–3, <http://judiciary.house.gov/hearings/legislation11.html>.
 - 60 Testimony of Martin Frank, Executive Director, American Physiological Society. *Ibid.*, 76.
 - 61 *Ibid.*
 - 62 *Ibid.*, 71.
 - 63 Testimony of Elias A. Zerhouni. *Ibid.*, 16–17.
 - 64 As a point of interest, this essay was easily accessible via the PubMed Central database. The focus of the article was the perception of a crisis in access to information. The study found that scholars and authors do not perceive such a crisis to exist because they are able to access information through their libraries and other databases. Libraries, by contrast, feel this crisis as the subscription costs for journals continues to skyrocket. While academics indicate free access to publications is not a significant consideration, in part that can be explained by the fact that virtually all of them get free access through their University library. Philip M. Davis and William H. Walters, "The Impact of Free Access to the Scientific Literature: A Review of Recent Research," *Journal of the Medical Library Association* 99, no. 3 (July 2011): 208–17, doi:10.3163/1536-5050.99.3.008.
 - 65 *Fair Copyright in Research Works Act*, *op. cit.*, 90.
 - 66 Kakaes Konstantin, "Scientists' Victory Over the Research Works Act Is Like the SOPA Defeat," *Future Tense*, February 28, 2012, www.slate.com/blogs/future_tense/2012/02/28/research_works_act_elsiever_and_politicians_back_down_from_open_access_threat.html.
 - 67 *Ibid.*
 - 68 Kelly Burke, "Obama Administration Announces New Open Access Policy," *Intellectual Property Watch*, February 26, 2013, www.ip-watch.org/2013/02/26/obama-administration-announces-new-open-access-policy/?utm_source=post&utm_medium=email&utm_campaign=alerts.
 - 69 *Ibid.*
 - 70 "Notes on the Fair Access to Science and Technology Research Act," *Harvard Open Access Project*, accessed May 21, 2013, http://cyber.law.harvard.edu/hoap/Notes_on_the_Fair_Access_to_Science_and_Technology_Research_Act.
 - 71 Bob Goodlatte, "Congressman Bob Goodlatte's Weekly Column: The Technology Sector Is Vital to Our Economic Recovery," *The Lynchburg Times*, June 21, 2011, <http://lynchburgtimes.com/news/2011/06/21/congressman-bob-goodlatte%E2%80%99s-weekly-column-the-technology-sector-is-vital-to-our-economic-recovery>.
 - 72 Larry Rohter, "Legislator Calls for Clarifying Copyright Law," *New York Times*, August 29, 2011, sec. C.
 - 73 *Ibid.*
 - 74 Conyers's website indicates that he was one of the original sponsors of the Stop Online Piracy Act (SOPA) and offers a strange assortment of images, links, and embedded documents related to his work on intellectual property. "Conyers In The House Intellectual Property," accessed May 20, 2013, <http://conyersinthehouse.blogspot.com/p/intellectual-property.html>.

- 75 States News Service, "Senate, House Judiciary Committee Leaders Focus on Fighting Online Infringement," April 4, 2011.
- 76 It should be noted that Berman is considered the "representative from Disney" for his staunch advocacy of strong copyright laws to help support his entertainment industry supporters. See: Mike Masnick, "Will Howard Berman Step Down From Leading Copyright Subcommittee?" *Techdirt*, January 24, 2008, www.techdirt.com/articles/20080123/16460153.shtml.
- 77 "MPAA's Chris Dodd Takes Aim at SOPA Strike," *Los Angeles Times*, January 17, 2012, <http://latimesblogs.latimes.com/entertainmentnewsbuzz/2012/01/dodd-lashes-out-at-sopa-strike.html>.
- 78 William F. Patry, *Moral Panics and the Copyright Wars* (Oxford and New York: Oxford University Press, 2009), 117.
- 79 William New, "Revolving Door: U.S. Copyright General Counsel Joins Music Industry," *Intellectual Property Watch*, August 29, 2012, www.ip-watch.org/2012/08/29/revolving-door-us-copyright-general-counsel-joins-music-industry/?utm_source=post&utm_medium=email&utm_campaign=alerts.
- 80 Ibid.
- 81 Mark Helprin, "A Great Idea Lives Forever. Shouldn't Its Copyright?" *The New York Times*, May 20, 2007, sec. Opinion, www.nytimes.com/2007/05/20/opinion/20helprin.html?_r=1&adxnml=1&pagewanted=2&adxnml=1299481200-JSugZnsfvMzJ4wppST/RA.
- 82 Ibid.
- 83 Of course, that Helprin was surprised suggests he had not been keeping up with the contemporary debates on copyright law. After all, the Sony Bono Copyright Term Extension act had culminated with a Supreme Court decision in *Eldred v. Ashcroft*, where arguments against a 20-year retroactive extension were rejected. In the aftermath of the Court's support for extending the term of copyright, the Creative Commons movement began to gather steam and grow internationally, led by Lawrence Lessig, among others.
- 84 Robert Stoll, "Symposium Series Number 6," *University of Washington School of Law*, 2001, www.law.washington.edu/casrip/symposium/Number6.
- 85 Helprin, "A Great Idea Lives Forever. Shouldn't Its Copyright?" op. cit.
- 86 Ibid.
- 87 Ibid.
- 88 The negative response to his essay so angered Helprin that he wrote a book, *Digital Barbarism*, in defense of his views and in reaction to the attacks made against him. The title indicates the way in which he views those who do not support his position—as barbarians seeking to destroy the last of civilized culture—the literary tradition of which he sees himself an integral part. See: Helprin, *Digital Barbarism*, op. cit.
- 89 Ibid., 87.
- 90 Ibid., 82.
- 91 Despite the fact that copyright terms are already lengthy, industry actors would like to seek longer terms. While not as common, similar arguments have been made regarding patents. Carl Weissman, chairman and CEO of venture capitalist firm Accelerator, posted the argument for perpetual patent rights in a Seattle-based online journal, *Xconomy*. His essay, "Diamonds are Forever, Why Not a Drug Patent?" begins with a similar link to the world of tangible property that Helprin provides for copyright. See: Carl Weissman, "Diamonds Are Forever, Why Not a Drug Patent?" *Xconomy*, accessed March 13, 2011, www.xconomy.com/seattle/2009/05/29/you-can-own-a-diamond-forever-why-not-a-drug-patent.
- 92 William M. Landes, *The Economic Structure of Intellectual Property Law* (Cambridge, MA: Belknap Press of Harvard University Press, 2003).
- 93 Robert P. Merges, *Justifying Intellectual Property* (Cambridge, MA: Harvard University Press, 2011).
- 94 Goldstein, *Intellectual Property*, op. cit.

- 95 Goldstein, *Intellectual Property*, op. cit. Each chapter concludes by mapping the change that has occurred in that area of law.
- 96 Goldstein, *Copyright's Highway*, op. cit., 12.
- 97 Ibid., 14–15.
- 98 Wark, *A Hacker Manifesto*, op. cit., 18.
- 99 L. Patterson and Stanley W. Lindberg, *The Nature of Copyright: a Law of Users' Rights* (Athens: University of Georgia Press, 1991), 227.
- 100 Ibid., 228.
- 101 Ibid., 229.
- 102 Band and Gerafi, "Foreign Ownership of Firms in IP-Intensive Industries," op. cit., 2.
- 103 Ibid., i.
- 104 Alyssa Rosenberg, "Former President Clinton Calls for Copyright Flexibility, Crowdfunding, and Creative Sustainability," April 26, 2013, <http://thinkprogress.org/alyssa/2013/04/26/1930001/former-president-clinton-calls-for-copyright-flexibility-crowdfunding-and-creative-sustainability/?mobile=nc>.
- 105 "Film Industry Praises Obama's 'Understanding' of IP's Importance," op. cit.
- 106 Debora Halbert, "Globalized Resistance to Intellectual Property," *Globalization*, 2005, <http://globalization.icaap.org/content/v5.2/halbert.html>.
- 107 Goldstein, *Intellectual Property*, 96, op. cit.
- 108 Ibid.
- 109 "The Washington Declaration on Intellectual Property and the Public Interest," *Infojustice.org*, 2011, <http://infojustice.org/washington-declaration>.
- 110 Foucault, *Security, Territory, Population*, op. cit., 109–10.

3

INTELLECTUAL PROPERTY PIRACY AND
THE NATIONAL SECURITY THREAT

No one doubts that a great deal of copyright piracy is taking place, but reliable data about scale and trends is surprisingly scarce.

UK Hargreaves Report, 2010¹

We determined that the U.S. government did not systematically collect data and perform analysis on the impacts of counterfeiting and piracy on the U.S. economy and, based on our review of literature and interviews with experts, we concluded that it was not feasible to develop our own estimates or attempt to quantify the economic impact of counterfeiting and piracy on the U.S. economy.

May 2010 Report of the GAO²

The annual losses are likely to be comparable to the current annual level of U.S. exports to Asia—over \$300 billion. The exact figure is unknowable, but private and governmental studies tend to understate the impacts due to inadequacies in data or scope.

Report of the Commission on the Theft of Intellectual Property, 2013.³

The Anti-Counterfeit Trade Agreement (ACTA) was born October 1, 2011 when eight of the negotiating countries—Australia, Canada, Japan, Morocco, New Zealand, Singapore, South Korea, and the United States—signed the agreement.⁴ ACTA represents what Professor Peter Yu and Daniel Gervais call a “country club agreement,” one with an exclusive membership, lacking transparency in the negotiating process, and designed to bypass the multilateral norm-setting procedures that exist in the traditional fora for intellectual property negotiations.⁵ While there is much to be said about the process through which ACTA was negotiated, on its face it represents an example of IP maximalism where the signatory countries pushed for even stronger IP enforcement standards than exist in current international law.⁶

The failure of ACTA to acquire the necessary signatures also demonstrates the global complexity of the political landscape surrounding issues of intellectual property. ACTA sparked global anti-intellectual property protests, with people coming into the streets to resist the new trade agreement. In many cases, the negotiating states were not able to assure their own citizens that the agreement was in their best interests. Countries not party to ACTA were vocally critical of the agreement because of the impact it would have on already existing international agreements, and numerous NGOs from across the globe spoke against it. The Electronic Frontier Foundation (EFF), for example, an American-based non-profit advocating for less restrictive copyright, privacy rights, and digital freedoms, summarized the U.S. role in ACTA this way:

Through ACTA, the US aims to hand over increased authority to enforcement agencies to act on their own initiative, to seize any goods that are related to infringement activities (including domain names), criminalize circumvention of digital security technologies, and address piracy on digital networks.⁷

ACTA is indicative of the ratcheting up of IP enforcement globally. The resistance to it is indicative of the fractures that surround IP debates when they are held publicly. These fractures do not align: not in terms of countries, stages of development, or even business interests versus public interests. Thus the globalized landscape of intellectual property is a complex one to narrate.

The public statements, legislative machinations, and transformation of the administrative infrastructure to protect and promote a strong IP agenda are indications of the way the state sees itself as relevant to the future of IP. American policymakers continue to support stronger global intellectual property rights via trade talks, international fora, and bilateral and multilateral agreements using the same narrative about technological innovation, ingenuity, and the rush to protect the creative spirit as they did 30 years ago. Despite decades of critique, these mythological assertions remain the foundation for intellectual property law in the United States and one of the most powerful exports from the United States.

As noted in Chapter 1, the maximalist and minimalist perspectives do not easily align by political ideology or levels of development, or between states and their people. Rather, the complex global world of IP means that the United States advocates for the most aggressive IP protection and other states offer a range of different approaches. Additionally, American citizens have been involved with anti-IP efforts abroad, NGOs are not bound by the nation-state where their headquarters may be located, and new economy businesses such as Google align against old economy businesses such as big pharma, both of whom are global in reach, when it comes to configuring the IP debate. Maximalist and minimalist IP efforts defy traditional units of analysis, especially when located on the international scene.

What ACTA does affirmatively represent is a virtual alignment of pro-maximalist IP private forces with negotiating agents of the nation-state. Trade agreements negotiated in secret with only a few corporate representatives able to participate in

drafting the text is not a democratic process. It is further evidence that the contemporary struggle regarding intellectual property is one over how we will define property at a new level of abstraction in the information age. If all the myriad players in the intellectual property game were allowed to sit at the table, a consensus would have been impossible, or the agreements would have looked substantially different and would have required an accommodation of the interests of those who see a different future for a global digital economy. Limiting dialogue during the negotiation to those embracing stronger IP protection ensured that a document would be produced that, while controversial once disclosed, would set the agenda and make downward negotiation much more difficult. Controlling how the protection and enforcement of IP laws will be defined at the international level also constructs the framework for how we will view and understand the transfer of technology, the sharing of culture, and future innovation. The paradigm established is that these are commodities to be bought and sold, and as much as possible sharing of ideas, innovations, or art across national borders should be allowed only for profit.

While ACTA wallows and the American domestic versions—the Stop Online Piracy Act and the PROTECT Intellectual Property Act were stopped by protests, the efforts to further increase IP protection have not waned, but have merely shifted locations. The Trans-Pacific Partnership (TPP), which essentially seeks to implement similar restrictive IP enforcement as ACTA, has also been negotiated in secret and represents the newest in a relentless effort on the part of IP maximalists to ensure that the law suits their interests.⁸ Beginning domestically with the DMCA, the United States has been at the forefront of the IP maximalist efforts and has set the international agenda for how the field of international regulation over intellectual property will look. However, what ACTA and the TPP face that TRIPS did not is a much more globally sophisticated resistance that has fought for transparency as well as a more democratic set of rules to govern global IP rights.

Chapters 2 and 3 are designed to set the stage for understanding the IP maximalist position. Chapter 2 described how the United States has reconfigured its institutional processes to better protect intellectual property based upon the claim that stronger and broader IP protection is good for innovation and creativity. Despite counter arguments and evidence, the domestic law of the United States regarding IP has become increasingly restrictive over the last few decades, a move in the language game that has been exported globally. Chapter 3 takes up the claim that the “theft” and “piracy” of IP are threats that must be stopped by stronger laws and regulations. Those in favor of this position continue to assert the argument that the world is in need of ever more expansive enforcement mechanisms for intellectual property because the threat of piracy is so dire and the monetary loss so significant.

Piracy has long been claimed to harm to the U.S. economy.⁹ In this chapter, the maximalist discourse of IP protection is examined in the context of American foreign policy and the efforts of the United States to link intellectual property theft and piracy to American national security interests. Most significantly, the new turn in the language game is the recent assertions that terrorists are also intellectual property pirates. Seeing piracy as a national security threat can then be used to justify even

more stringent protective measures against IP theft. These arguments also represent a shift from understanding intellectual property piracy as a business matter to understanding it as one of national security. Pirates and hackers can then be prosecuted more harshly than would otherwise be possible. These arguments also set the stage to justify aggressive and offensive cyberattacks on those who steal IP. Furthermore, they clearly locate the protection of intellectual property under the auspices of the nation-state instead of private industry.

In the final section of the chapter, I will investigate the far more fragmented field of state approaches to piracy globally. These variable approaches have led to the disruption of the IP maximalist agenda at the international level. What becomes clear is that even the closest trading partners of the United States tend to embrace different attitudes towards the protection of IP and may chart a different course, leaving an alternative to the IP maximalist position at the global level possible.

Framing piracy as a national security threat

Following in the footsteps of former President George W. Bush, President Barack Obama has taken up the language of security to describe intellectual property issues. The cybercrime battles of the century, according to Obama, will deal with intellectual property issues. Obama noted that “It’s been estimated that last year alone cyber criminals stole intellectual property from businesses worldwide worth up to \$1 trillion. In short, America’s economic prosperity in the 21st century will depend on cybersecurity.”¹⁰ While it is not clear where the \$1 trillion figure comes from, and critics have often denounced such high numbers as being inaccurate,¹¹ it should be noted that facts have not gotten in the way of political rhetoric, and the pirate remains an important “threat” to fight. Ironically, the past 30 years of effort to halt piracy have done little to decrease the estimated losses, if the numbers are true.

Piracy has long been the evil against which pro-IP forces align and serve as the justification for enhanced protection. Piracy is what William Patry calls a “moral panic.”¹² There are many different dimensions to the illegal use of IP—they include counterfeiters who make knock-off products, from Nike t-shirts to patented pharmaceuticals, organized criminals who smuggle and trade in said knock-offs, hackers who infiltrate computer systems, file sharing, and much more. The concept of the pirate is the overarching label that ties these multiple activities together and locates such behavior outside the scope of legal legitimacy or trade. In the popular pro-IP discourse of piracy, the pirate takes what isn’t theirs and their actions result in billions of dollars of loss to the victims—the IP industries. According to the argument, the pirate is among the most dire threats facing our economic security in the twenty-first century.

Before moving forward, it is important to clarify what I am seeking to do when describing claims made about piracy. I am not, as some might want to argue, endorsing piracy of commercial products, though I do see their production as serving a market function. However, it is worth understanding how piracy functions to establish a moral and political frame where certain types of production and exchange

are made possible at the expense of others. Naming the pirate as the threat to economic life and blaming the pirate for everything from producing faulty products to terrorism is a tactic that attempts to remove alternatives to our current intellectual property system from even being discussed.

Certainly, there are issues of fairness when someone makes a copy of something you have produced and passes it off as their own. Concepts such as originality, authenticity, and control of what we create have evolved over the past few centuries to take on the mantle of truth. The idea of the individual as the location for all things creative, working alone while capturing that moment when the spark of genius brings an idea into being, is so central to the narrative of creation that we tell ourselves that asserting protection over that act of creation, seen as the expression of the self, is foundational. We react to the personal copying from an individual author—of a song, a book, an artwork, because the deception deployed by the copier strikes a chord of injustice in us. In many ways, everyone from the most extreme IP abolitionist to the most avid maximalist understands this basic premise. The debate, however, is over the legitimacy of property rights as a mechanism of protection and the complexities of an international political economy that has transformed the circulation and sharing of culture into a commodity.

This initial impulse towards fairness within the modern copyright, patent, and trademark debates helps conceal the political economy of intellectual property that has developed over the last 30 years or so—an economy that, as pointed out in Chapter 1, has vastly concentrated the ownership of these intellectual properties and placed the debate at a level of abstraction from the original artist that makes the initial argument not scalable. First, rarely does the original artist within this corporate structure of IP benefit from the system. If anything, the logic of an “incentive to create” functions like the company store where the artist is paid so little for their creative work that they are forced to continue to work creatively to pay the bills and get out of debt to their corporate owner.

Second, what goes as copying (either the counterfeit goods or downloads of music or movies) are not as a general rule being passed off as the original work of the seller—most people purchasing knock-off luxury products understand what they are doing and most people watching a movie downloaded from the internet know that the site they took it from did not create the movie. Thus, there is a break from our original sense of justice—stripping the original author from attribution for their creative work—and purchasing or using a commercial product that followed an uncontrolled distribution channel. What issues of piracy focus on are these uncontrolled distribution channels, but they mask these claims behind issues of harms to those who create the content.

Third, it bears questioning why counterfeiting is an intellectual property issue at all. While arguments regarding anti-counterfeiting have been central to the intellectual property policy debate since before the introduction of ACTA, they have certainly taken on new life with this agreement. The argument is made that counterfeiting is dangerous because it results in faulty products. Obviously, nobody wants to buy break pads made of kitty litter or drugs without active ingredients.

However, making the cross-cutting issue a violation of trademark implies that there are no harms associated with “brand” name products, when in fact the issue of consumer safety applies equally to authentic products.¹³ It is worth asking what is concealed in a discourse of piracy that attributes danger to counterfeits, thus implying that, within the capitalist economy protected by strong intellectual property laws, consumer harm is not an issue. Chances are that nobody has died from buying a knock-off Coach handbag, and so using the concept of harm coming from counterfeit goods while the official branding of goods assures that a company will be a good corporate actor is a false dichotomy.

So, the issue is not if piracy is good or bad, but what type of economic structures do arguments about piracy produce? Who benefits from this structure? What do we learn about the ways in which piracy is positioned that help us understand how economic and political actors assert and develop their interests? We are engaged in a struggle to assert a new economic model based upon control over the intangible. This struggle is part of what Foucault calls governmentality, which has “the population as its target, political economy as its major form of knowledge, and apparatuses of security as its essential technical instrument.”¹⁴ Thus, I am not offering up piracy as a solution or even advocating for piracy, but instead seeking to understand how a discourse regarding the role piracy that plays is developed and used to establish a specific type of economic relationship and to manage the population of a state (or states) accordingly. With this brief introduction in mind, it is worth seeing how the contemporary discourse on piracy is evolving.

The securitization of intellectual property

In the winter of 2013 security sources in the United States announced that China had successfully hacked U.S. databases and downloaded U.S. intellectual property using an army of hackers employed by the Chinese government. The Chinese government denied the allegations,¹⁵ but security experts traced the hacking efforts to a state-run location in China. Mandiant, the private security company whose report helped support the U.S. accusations, acknowledged that it *could* be possible the hackers involved were not employed by the Chinese government, but instead worked just outside the gates of Unit 61398, the state-sponsored hacker unit under surveillance. However, they argued, the most logical conclusion was that a sustained and systematic cyberattack sponsored by the Chinese government existed and its goal was to steal American intellectual property.¹⁶

The Chinese, it was reported, were hacking into as many American computer sources as they could infiltrate, including company computers (looking for trade secrets, plans, and financial information), public libraries, university systems, and government resources. While the Mandiant document sparked a media frenzy surrounding issues of cybersecurity, the concern over Chinese hackers stealing American intellectual property has existed as a significant political issue for years. While not originally conceived of as a threat to national security in the way that it has been shaped in the current permutation, more conventional “theft” of IP has been a

significant thorn in the United States-China relationship for decades.¹⁷ China has long been implicated in intellectual property theft, especially of copyrighted works such as software, movies, and music.

While conventional Chinese piracy occurs via the production and sale of pirated software, movies, and designer goods, the newest move in American claims about Chinese IP theft focuses not on the goods themselves but from where China is getting the IP. The previous "theft" of American IP involved manufacturing pirated goods in China. The idea was that someone in China secured a legitimate copy of a movie or software program and then reproduced pirated copies to be sold cheaper. There were also concerns about Chinese pirates looking at designs on public websites and then directly copying these designs. None of these conventional methods of piracy described as a threat to the U.S. economy involved hacking into protected computer systems and downloading as much information as possible.

Thus, the new dimension to the long-running battle with the Chinese over intellectual property is that the theft involves hacking to download intellectual property by infiltrating private computers, but also government information as well. The reports are somewhat vague about what has been stolen or how China will be able to use this information to create pirated products. In fact, the goal of this version of IP theft seems to be knowledge itself—to download as much information to help develop the Chinese economy as possible, some of which may result in piracy as we currently understand it, but much of which may simply set the foundation for future innovation.

The second new move in the piracy language game is the role of the Chinese state. Unlike prior controversies where the Chinese government was seen as turning a blind eye to piracy committed by private actors, the Chinese state is now directly implicated as the perpetrator of IP theft. Once the Chinese government is labeled as the intellectual property pirate, accessing American computers and sucking up vast quantities of intellectual property, the significance in terms of national security becomes more pronounced. State invasions of American sovereign space are a serious matter and, as will be detailed below, IP has now become wrapped into the national security discourses of the American state at the highest levels.

In 2011, Bloomberg published a lengthy piece detailing the hacking of at least 760 companies primarily by Chinese sources. In the process, the Bloomberg piece equates China's behavior to that of Russia during the Cold War.¹⁸ According to their data, cyberhacking with the intent of intellectual property theft has been ongoing since at least 2001 but has increased in intensity over the last decade. The authors indicate that China is stealing everything possible to help it leapfrog over the United States in terms of development. The security experts interviewed could not assess yet how the information was being used, but as Scott Borg, director of the U.S. Cyber Consequences Unit, noted, "We're talking about stealing entire industries," he said. "This may be the biggest transfer of wealth in a short period of time that the world has ever seen."¹⁹

The 2011 report suggests that private companies were hesitant to define the theft of their intellectual property as an issue of national security because many high-tech

companies continue to see the internet as relatively free of government intrusion. If, however, theft of intellectual property becomes a matter of national security, then government oversight of the internet will be more justified. While claims of vast amounts of IP theft are rampant in the media, companies remain hesitant to disclose hacking attacks or loss of data. Security companies also play their cards close to the vest and Mandiant's decision to disclose their private report was calculated to demonstrate the true threat that Chinese hacking poses for the United States.

What more recent reports demonstrate is that Chinese hacking and the theft of intellectual property has achieved the status of a national security threat.²⁰ As *The New York Times* reported in March of 2013, the threat has "moved to the forefront of American concerns with China."²¹ Specifically, the cybersecurity threats under most clear scrutiny by American security experts were those related to "the theft of intellectual property by Chinese state entities."²²

The types of intellectual property stolen are not articulated in terms of copyrighted, patented, or trademarked products. Trade secret theft is central to the government's case against Chinese hackers. However, the distinct type of intellectual property stolen is not relevant, it is *all* considered crucial to the U.S. economy. Additionally, the IP taken by China goes beyond copies of popular DVDs or the newest version of Windows. As a result, the national security justification for stronger state action has expanded to include intellectual property protection.

The marriage of IP and national security can be seen in the numerous reports on cybersecurity that have been produced in the last several years. For example, Dr. Andrew Krepinevich in his report on cyberwarfare for the Center for Strategic and Budgetary Assessments wraps attacks on critical infrastructures and theft of intellectual property seamlessly within the same argument. As he notes:

While cyber economic warfare has not been characterized by formal letters of marque, it does appear that there is a willingness on the part of states to use proxies to better avoid attribution when stealing state secrets, intellectual property, and other valuable information. Employing cyber proxies successfully could give risk-tolerant leaders an even greater incentive to engage in large-scale cyber war against an enemy's critical infrastructure.²³

The quote shifts easily between destroying infrastructure via a cyberattack and stealing intellectual property, whatever that is deemed to be. Such equivocation establishes a new way of understanding IP that requires a state response beyond that of the United States Trade Representative.

The link between theft of IP and national security was also made clear in a recent report by the Commission on the Theft of American Intellectual Property published by the National Bureau of Asian Research in May of 2013. Of the many remarkable recommendations made in the report, one of the very first was to "designate the national security advisor as the principle policy coordinator for all actions on the protection of American IP."²⁴ The national security advisor is a senior advisor to the president with offices in the White House and chairs the National Security Council (NSC).²⁵ While

cybersecurity is already within the scope of the NSC mandate, placing IP enforcement under this umbrella makes IP a national security issue.

While many of the recommendations in the Theft of American Intellectual Property report remain economic in scope (regulating foreign investments based upon IP theft, further criminalizing IP theft, stopping goods made with stolen IP at the border, and much more), the report begins by quoting President Obama on the seriousness of the problem. This same quote also graces the NSC website. President Obama makes it clear that the theft of IP is "one of the most serious economic and national security challenges we face."²⁶ The report goes on to note that "Network attacks, together with other forms of IP attacks are doing great damage to the United States and constitute an issue of the first order in United States-China relations."²⁷ As becomes clear from the way these reports are written, hacking and aggressive cyberattacks are equated with IP theft. It is not clear what an "IP attack" might be, but the concept of one is introduced as a serious concern and suggests the need for an appropriate defense.

The Theft of American Intellectual Property report helps contribute to the new move in the language game—that IP theft is a threat to U.S. national security. The Commission that produced this report was co-chaired by U.S. Navy Admiral Dennis C. Blair, the former Director of National Intelligence, and Jon M. Huntsman, former Governor of Utah and former U.S. Ambassador to Singapore and China. He also ran an unsuccessful bid for the 2012 Republican presidential nomination. Such high-powered leadership assures that the recommendations of the report will be seriously considered. Neither of the co-chairs has any specifically mentioned background in law or the diverse types of intellectual property, but such background no longer seems to matter given that patents, trademarks, trade secrets, and copyright are lumped together as the indistinguishable category of "intellectual property."

The numerous reports produced on the issue of IP theft and cybersecurity includes one by the National Security Council itself, the *Cyberspace Policy Review*. This document uses a similar choice of words to promote intellectual property to the level of a national security threat. In the preface to the 76-page report, subtitled "Assuring a Trusted and Resilient Information and Communications Infrastructure," the authors note that:

Our digital infrastructure has already suffered intrusions that have allowed criminals to steal hundreds of millions of dollars and nation-states and other entities to steal intellectual property and sensitive military information. Other intrusions threaten to damage portions of our critical infrastructure. These and other risks have the potential to undermine the Nation's confidence in the information systems that underlie our economic and national security interests.²⁸

From an issue of trade to an issue vital to the integrity of the United States economy, American national security interests have become closely aligned with the theft of intellectual property. While it is unclear what, if any, of the hacked information will be usable by the Chinese or what they might use to undermine the security of

America's critical infrastructure, its theft alone is sufficient to warrant a heightened sense of national security threat.

Intellectual property piracy has been clearly aligned with the future health of the American economy.²⁹ IP as a national security issue means that protecting it becomes even more central to the role that the state will play in the future of IP policy.³⁰ Prior to the Chinese hacker scandal, the Republican Party Platform waxed hysterical about the threat that China posed to our intellectual property and claimed that the Obama Administration was doing nothing to save the United States from this threat.³¹ In the aftermath of the Chinese hacker scandal, the Pentagon issued a report on cybersecurity in which they recommended that some cyberattacks could be considered acts of war, but that "routine theft of intellectual property" was not yet in that category.³² That being said, offensive cyberattacks are very much within the purview of the U.S. policy on cyberthreats,³³ and there is reason to believe that the close alignment of IP theft with aggressive foreign behavior sets the stage for linking IP theft more closely to acts of war in the future.

The growing evidence compiled on China as a massive IP pirate that threatens the economic stability of the nation very clearly indicates that intellectual property has taken on a new and prominent role in American foreign policy discourses. Over the course of the last few years, the strategic move made by the U.S. government and private entities, such as the U.S. Chamber of Commerce, has been to align the theft of IP as closely as possible with national security issues. In terms of economic policy, efforts exist to ensure compliance or face trade sanctions. In terms of foreign policy, our very national security is now at stake.

Furthermore, in the mainstream media and in reports on cybersecurity, all computerized resources are now understood as something labeled "intellectual property." These reports do not distinguish between copyrights, patents, trade secrets, or any other type of IP that is subject to theft. They do not discuss the details of what has been stolen or how it has been used against us. At this point, much of what the full impact of the theft of IP will be for the U.S. economy is speculation. For example, it is not yet clear how we will know if a given product designed in China was possible because of the information taken by the Chinese government or because of already existing Chinese research.

In this section, I am not arguing that the national security threat articulated by government officials lacks seriousness. Within the logic and framework established by the United States and embraced by strong intellectual property advocates, the threat is real and very serious. However, I am suggesting that framing IP theft in terms of national security is a new move in the language game to further enhance a specific type of property relation and political economy. Understanding all American assets as IP and thus subject to private ownership and using the language of property to define these intangible assets sets in motion a specific configuration of how knowledge is produced, consumed, and shared. It also sets the stage to claim that future innovation emerging from China exists only because of the massive theft of intellectual property they have committed, not because of investments in science and technology sectors. If we can then bar Chinese products from entering the country based on claims of

theft, the more the better for the U.S. economy. If the theft of IP is a national security issue, then it sets up other states as possible enemies and creates the possibilities of new forms of warfare. The configuration that securitizes IP places the state in the forefront of the game and reinforces the power and purpose of the nation-state in protecting national property. When piracy is understood in this way it also further demonizes the hacker and the pirate.

Who is the enemy? From pirates and IP activists to terrorists

The Global Intellectual Property Center (GIPC), funded by the U.S. Chamber of Commerce, is at the forefront of identifying the threat to U.S. businesses from piracy. In their report, "Intellectual Property: Creating Jobs, Saving Lives, Improving the World," the GIPC claims that the current assault on IP is coming from two forces that must be countered. In the words of the GIPC, "The first threat comes from criminals who have built a \$600 billion global criminal enterprise of counterfeiting and piracy that destroys jobs, undermines innovation, and endangers consumers."³⁴ The second threat comes from:

a growing movement of anti-IP activists drawn from universities, foundations, non-governmental organizations (NGOs), ideologically driven interest groups, and even governments. These activists promote the idea that IP rights should not be recognized and that the protection of IP impedes progress and hurts the poor. They are spending tens of millions of dollars annually to transform this ideology into governmental and multinational policy.³⁵

While of course positioning their own report and arguments as the opposite of these anti-IP activists (thus non-ideological and evidently an organization that does not spend millions of dollars annually to enhance IP laws globally), the U.S. Chamber's point deliberately attacks those critical of expanded intellectual property rights as a threat to the American way of life. IP activists, then, can be grouped into the same category as organized criminals. Colin Darch notes in response to the Chamber report:

Authors of critical texts on the copyright system may find it chilling to be identified as a serious threat—and by the largest lobbying organisation in Washington, no less—alongside the owners of a "\$600 billion global criminal enterprise". It would be uncharitable, nevertheless, to suppose that any such effect was intended, and it is encouraging to know that the world's biggest business federation keeps up with the academic literature, even if, on the basis of the summary quoted, it has not grasped all the nuances of the debate.³⁶

The nuances of the debate are in fact, nowhere to be seen. In addition to labeling academics a serious threat to the protection of IP and American innovation, the report would like its readers to believe that there is currently no protection of IP in the United States and that those who seek to protect their innovations and creative

expressions are helplessly fighting on their own without legal recourse of protection. These statements are fundamentally untrue.

The report outlines ten reasons why we should care about IP. Along with causing a loss of jobs, and a loss of tax revenue that could go for roads and schools, piracy is also responsible for the creation of life-threatening products. The report claims that, "not protecting these inventions is the same as giving them away to our global competitors for nothing."³⁷ How the authors could honestly argue that the United States does nothing to protect intellectual property, since there is an entire infrastructure in place to do just that, is unclear. However, the report is aimed at producing hysteria and a sense of helplessness in those who seek enhanced IP protection: a problem can only be solved by more government intervention. There is an irony in the U.S. Chamber of Commerce, not a bastion of pro-government regulation ideologues, taking a position in favor of more government regulation over the market and advocating for much stronger regulatory oversight and criminal penalties.

Despite statements made by the GIPC, we are objectively far from the reality that they claim exists. First, we have witnessed 30 years of expanded protection both within the United States and globally. This protection has enhanced the scope of IP rights, but more importantly it has expanded the depth of the enforcement available, criminalizing previously non-criminal acts and, as mentioned in the previous chapter, transforming government agencies throughout the American bureaucracy to deal with the "threat" posed by the theft of IP.

Second, while I would be interested to know where the millions of dollars funding anti-IP research is going, the language of those seeking to better balance IP rights has made virtually no difference in U.S. public policy. One of the reasons to stake out the growth of the intellectual property maximalist position is to understand how fully entrenched it is as the legal architecture of the information age. Finally, the GIPC report, much like others mentioned in the last chapter, tends to be a series of assertions with limited substantiation that instead supports an ideological agenda designed to support a specific configuration of property rights. The government can now justify its maximalist position by using worldwide piracy, now also including IP activists, and of course terrorists to claim a danger exists that must be halted.

Lest the GIPC report seem insignificant and unworthy of attention, it is worth noting that their position is mirrored in the public pronouncements of government officials, such as USTR Ambassador Ron Kirk. In a recent statement associated with the release of the 2010 Special 301 review, Kirk has this to say about IP piracy:

Piracy and counterfeiting undermine the innovation and creativity that is vital to our global competitiveness. These notorious markets not only hurt American workers and businesses, but are threats to entrepreneurs and industries around the world.³⁸

The U.S. Chamber of Commerce itself might easily have produced these words. Certainly, they are also strikingly similar to those issued by Presidents Reagan, Clinton, Bush, and Obama.

As discussed in the previous section, piracy is considered to be a global threat to American innovation and increasingly to its national security. Not only is IP theft now understood as a matter of national security, but, in yet another move to ensure a maximalist approach will be taken to further enforce IP laws, in the post 9/11 world, piracy has also now been linked to terrorism. The specific framing of the argument is that terrorists fund their violent efforts via IP piracy and thus there is additional justification for enhanced enforcement and punishment of intellectual property crimes. While Chapter 2 looked at the economic considerations of IP and how its protection has transformed the nation-state itself, this section investigates another dimension of intellectual property as a security consideration—terrorism.

Much like the war on drugs, the government is in a perpetual battle to make the world safe for American goods and ideas. Like the defense of intellectual property more generally, claims about piracy have remained remarkably similar over the decades. Discourses of danger associated with the computer hacker and copyright pirate are not new.³⁹ However, in the post-9/11 world, a new permutation of the threat posed by intellectual property theft has been included—the link between piracy and terrorism. Terrorism will justify a further securitization of intellectual property.

On September 30, 2001, former Clinton associate deputy attorney general and criminal division special counsel for intellectual property Roslyn A. Mazer in a *Washington Post* article argued that counterfeit goods were linked to terrorism, culminating in the events that had happened only a few weeks earlier.⁴⁰ The GIPC seven years later cited this single *Washington Post* article as its sole evidence for linking piracy to terrorism, but in the process helped to reproduce the claim as a form of truth.⁴¹ Along with arguing that counterfeit Nike t-shirt sales helped fund the 1993 bombing of the World Trade Center, Mazer notes that countries that have high piracy rates and counterfeit products also host al-Qaeda supporters.⁴² It turns out, according to Mazer, that a section of the Irish Republican Army (IRA) funded some of its efforts off pirated copies of *The Lion King*.⁴³ She concludes:

The convergence of our economic security and our national security became starkly apparent on Sept. 11. The staggering economic losses to America's copyright and trademark industries—alarming unto themselves—now are compounded by the opportunistic trafficking in IP products to finance terrorism and other organized criminal endeavors.⁴⁴

Only weeks after the 9/11 attacks, copyright theft was made a culprit in the worst terrorist attack in American history.

The assertion that terrorists fund their efforts through IP piracy has not gone away and is being further developed as an important justification for expanded enforcement efforts. Those interested in establishing a link have been laying the groundwork for their legal maneuver since at least 9/11. Testimony in Congressional hearings in 2003 asserted the link between terrorism and intellectual property piracy, with copyright maximalist Jack Valenti claiming that, "a lucrative trafficking in counterfeit and pirate products: music, movies, seed patents, software, tee-shirts, Nikes, knock-off CDs and

fake drugs accounts for much of the money the international terrorist network depends on to feed its operations."⁴⁵ While Valenti provided no evidence for his assertions, the movie industry has an interest in making this link real—if terrorism funds itself off the illegal sale of pirated movies, then it justifies further government intervention and much harsher penalties for movie piracy. The issue is gaining traction politically and will most likely become more pronounced as efforts to justify stricter enforcement continue.

Much of the documentation regarding terrorism comes from a 2009 report published by the RAND Corporation. In "Film Piracy, Organized Crime and Terrorism," a report produced by RAND, but funded by the Motion Picture Association, the authors explore the links between IP theft, organized crime and terrorism.⁴⁶ The RAND report was intended to provide the proof that to stop terrorism we must be able to deal a blow to intellectual property piracy, especially the piracy of movies.

It is worthwhile to look at this report in some detail because it is exemplary of one of the key copyright maximalist positions—that there are significant economic and political consequences associated with intellectual property piracy and we must have expansive laws in place to deal with IP piracy and crimes. In the case of the study produced here, and despite its title, it is not clear that the report substantiates the claim that there is a significant link between movie piracy and terrorism. The authors write in the preface:

It [the report] presents detailed case studies from around the globe in one area of counterfeiting, film piracy, to illustrate the broader problem of criminal—and perhaps terrorist—groups finding a new and not-much-discussed way of funding their nefarious activities. Although there is less evidence of involvement by terrorists, piracy is high in payoff and low in risk for both groups, often taking place under the radar of law enforcement.⁴⁷

The hesitant claims of the RAND research team are distant from Valenti's absolutist testimony to Congress that counterfeit goods are the funding mechanism for terrorism. The lack of clear and direct evidence, however, does not deter the authors from seeking to create a link between terrorism and piracy.

The RAND report offers anecdotal evidence based upon 14 case studies developed from interviews, primary texts, and other methods. In trying to logically work through the connections between organized crime and terrorism, the authors first blur the distinction between organized crime and terrorists. The convergences of interests and techniques used by these groups suggest that terrorists and organized crime entities exist on a continuum that makes the distinction between the two groups hard to identify.⁴⁸ This means that it is possible to think about terrorism and organized crime as different permutations of the same thing and conflate the economic incentive of criminal organizations with the political motivations of terrorists.

The report argues that, because of a lack of enforcement and relatively high profit margins, DVD piracy is a more rational choice for criminals than drug smuggling, which comes with stiffer criminal penalties and includes a higher overhead. As a result, a shift is happening within organized crime circles to replace drugs with DVD

piracy as an important revenue stream. Film piracy is what the report calls an "intellectual property crime."⁴⁹ Of those engaged in this crime, the report identifies four groups whose actions "lead to terrorism."⁵⁰ Two of these are in Northern Ireland, one in Paraguay in the tri-border area, and one in Pakistan. Of these, Mazer provided the Irish and Paraguay examples in 2001, indicating that not much new has happened in the ensuing years.

The groups identified by the report as terrorist organizations are the key to understanding the link between movie piracy and terrorism. They are, thus, worth describing in detail. In Paraguay in the tri-border region, "specially designated global terrorist" Assad Ahmad Barakat has built up a criminal network that includes the sale of pirated movies so that he can donate money to Hezbollah. His network continues to operate even though he has been jailed on tax evasion charges.⁵¹ Furthermore, his Lebanese-focused, Shi'a organization is linked by association in the report to al-Qaeda because they have operated in the same geographical space and possibly have met with each other.⁵² Of course, after reading several pages describing the illegal activities of Barakat, it turns out he is not the guy involved in film piracy, he just happens to run the shopping mall terrorist/crime organization in the tri-border region where Ali Khalil Mehri sells pirate movies. A raid of Mehri's home in 2000 produced evidence of his intellectual property crimes and his sympathies to Hezbollah.⁵³ Based upon this narrative evidence and the now 11-year-old arrest of Mehri and the 8-year-old arrest of Barakat, the Rand report concludes:

Thus, one of the dominant modes of terrorist financing in the TBA [tri-border area] was enabled by both violating international IPR and at the same time enforcing a corrupt intellectual-property regime in Paraguay.⁵⁴

It is actually not clear how such a conclusion can be reached based upon the evidence presented in the report. Each of these organizations is also associated with a series of other illegal activities, including drugs, weapons sales, and additional forms of counterfeiting. To suggest that IPR piracy, with the implied claim that movie piracy is the "dominant mode of terrorist financing" stretches the links to the point of breaking.

The report goes on to describe the terrorist activities and movie piracy deployed by factions of the IRA in Ireland as a significant source both of global movie piracy and terrorism. It then turns to crime syndicate boss Dawood Ibrahim, whose Indian-based network called the D-Company has been linked to terrorist acts in India from as early as 1993.⁵⁵ The film piracy of the D-Company is primarily of Bollywood films, which it turns out they also financed prior to the government officially recognizing the legitimacy of the industry.⁵⁶ While the D-Company is linked to the Mumbai bombings in 1993, the evidence presented for the al-Qaeda link is a *National Review* Online article from 2006. Where the *National Review* gets their information is not disclosed, but instead there is more assertion. No other evidence in the report links this organized crime syndicate with terror, or even with pirating American movies.

So, what are we to make of this report and its claims regarding movie piracy and terrorism? At best, the report does little to corroborate the link already asserted by

copyright maximalists between copyright infringement and terrorism. The report does, however, help produce a narrative logic that implies that every pirated movie one might watch will support terrorism by glossing over distinctions between movie downloads and counterfeit goods, and between organized crime syndicates and terrorist groups; and perhaps most importantly, unless you read the details of the report, the largest conflation is the one left unsaid—that the terrorists whom the report discusses are those associated with the bombing of the World Trade Center and al-Qaeda. These links, however, are associational only and, given that none of the organizations specifically noted as terrorist in the report are al-Qaeda directly, we are left to infer the link at an even broader level of abstraction.

There is no doubt that those engaged in illegal activities such as drug running and human trafficking would also see movie piracy as a lucrative addition to their trans-global distribution networks. However, most experts working on the issue of terrorist funding point to other sources to make their claims. Just briefly, however, it is worth defending the notion that IP piracy is not the primary source of terrorist funding, especially the terrorists most directly responsible for the attack on the World Trade Center.

One possible avenue of terrorist funding described by conservative analyst Rachael Ehrenfeld in a 2002 report regarding terrorist funding attributes the vast bulk of this funding to the illegal trade in drugs. As with many post-9/11 analyses, Ehrenfeld combines Bin Laden, the Taliban, Iraq, and other aspects of the "evil nexus" into an indistinguishable mass that is implicated in narco-terrorism to support their efforts globally. Ehrenfeld includes a sentence in her 2002 report suggesting that along with drug running, video piracy is a possible fund-raising milieu for terrorists, but it is not given much space in her analysis.⁵⁷ Her focus remains centered on illegal drugs.

Ehrenfeld cites the anti-drug campaign of George W. Bush to help support her argument for why we must halt narco-terrorism:

President Bush used the Super Bowl to launch a new anti-drug use campaign saying: "It is so important for Americans to know that the trafficking in drugs finances the work of terror, sustaining terrorists. Terrorists use drug profits to fund their cells to commit acts of murder. If you quit drugs, you join the fight against terror in America." This effort to make the American people aware of the connection between drugs and terrorism brings home the President's message that: "if you harbor terrorists, feed them, or finance them, you are the enemy of the United States and we will find you and fight you."⁵⁸

It is easy to see how substituting the words video piracy or copyright theft gives us an entirely new way to understand the illegal uses of copyrighted works and that this logic is also behind the efforts of the content industries to associate piracy with terror. Their claim might sound like this:

It is so important for Americans to know that the trafficking in illegal DVDs and video games finances the work of terror, sustaining terrorists. Terrorists use the profit of piracy to fund their cells to commit acts of murder. If you quit

purchasing illegal DVDs, you join the fight against terror in America. ... if you harbor terrorists, feed them, or finance them, you are the enemy of the United States and we will find you and fight you.

A second significant source of funding, and perhaps the most significant, for terrorism is oil money channeled through legitimate charity organizations world-wide. SourceWatch, for example, cites an essay by David Kaplan identifying Saudi Arabian oil profits sent to charitable donations as the primary source of terrorism.⁵⁹ Wikileaks documents also demonstrate that the U.S. State Department is primarily concerned with terrorist funding via charitable institutions and indicate that it is "the most significant source of funding to Sunni terrorist groups worldwide."⁶⁰ Neither mentions movie piracy or intellectual property piracy more generally as a significant source of funding.

Furthermore, a report published in 2004 by the National Commission on Terrorist Attacks in the aftermath of 9/11 was unconvinced that terrorist funding, especially al-Qaeda, even comes from illegal drugs, and they didn't even mention IP piracy. They note:

No persuasive evidence exists that al Qaeda relied on the drug trade as an important source of revenue, had any substantial involvement with conflict diamonds, or was financially sponsored by any foreign government. The United States is not, and has not been, a substantial source of al Qaeda funding, although some funds raised in the United States may have made their way to al Qaeda and its affiliated groups.⁶¹

At least for the purposes of the government report, the idea of intellectual property piracy as being a primary method of raising funds was not even raised. In fact, the words are not mentioned in the 155-page document.

Obviously, somewhere along the way, things have changed. While the initial terrorist attacks of 9/11 were not funded by DVD piracy, conflating organized crime, terrorists, and states that harbor such nefariousness has clearly become part of the public policy discourse. The securitization of the language of intellectual property should come as no surprise given the post 9/11 American concerns over security and potential future terrorist threats. There are of course the realities of technologically dependent trade, which is easily subject to hacker attacks, and computer systems that can be easily taken over and controlled for nefarious use. There is no doubt that cyber-security is part of the conversation that will be had regarding the future. Security has gone virtual—the theft that matters in these scenarios is the theft of the intangible—our intellectual property.

However, the securitization of the approach to intellectual property seems to ignore the larger political context within which these arguments are made and of course the deeply problematic ways in which the lines between innovation, appropriation, and copying are drawn. Foucault asks rhetorically:

Could we not find a word to designate what I have called resistance, refusal, or revolt? How can we designate the type of revolts, or rather the sort of specific

web of resistance to forms of power that do not exercise sovereignty and do not exploit, but "conduct"?⁶²

One answer to his question might be piracy—piracy does not revolt against the state *per se*, but does resist the economic rationality of intellectual property and subverts the abstraction of these property rights by ignoring the obvious attempts to normalize individual behavior to the appropriate methods of purchasing the products associated with intellectual property.

Furthermore, the securitization approach makes inevitable specific types of solutions to the threat of piracy. These solutions rely heavily on more law enforcement, funding for surveillance, and the intrusion of the state into the private lives of content users as they raid homes and businesses looking for evidence of wrong doing. For example, the Obama Administration recently endorsed wiretapping to go after those who are engaged in criminal copyright and trademark infringement.⁶³ What is never mentioned in the discourse on intellectual property piracy in defense of the status quo is that its very existence demonstrates a market failure on the part of companies who create and distribute these products.⁶⁴ Such a claim stays well within acceptable boundaries of intellectual property and the inevitable result will be that content-based corporations will develop mechanisms for capturing profits from intangibles despite what they call piracy (witness the growing popularity of I-tunes).

The end result is that, after decades of attacking the problem, piracy has not been eliminated by stronger and harsher enforcement mechanisms. Instead, we have witnessed an explosion in what is called piracy as easier access via the internet has become possible. As we move further into the world of the infinitely copyable and easily distributed, the law cannot stand as the only boundary. What Foucault calls "counter-conduct"—"the struggle against the processes implemented for conducting others"⁶⁵ can be seen in the action of the downloader, the pirate, and the more generalized hacker—all deviants of the information age.

Efforts to norm individuals into appropriate uses have also been largely unsuccessful. Instead, if companies want to control more revenue streams globally, they should rethink their business practices and distribution mechanisms, and provide what consumers are clearly demanding. Create new markets that take the profit out of piracy instead of artificial scarcity of a digital product. Consumers want immediate access on demand and for affordable prices. The irony of focusing on counterfeit goods as a link to terrorism is that these products remain in the world of the tangible—meaning that people will actually *pay money* for them—just not as much as the copyright owners demand. The politics of arguing against piracy ignore this fact. A recent report published by the Social Science Research Council based upon 3 years of research in the developing world has concluded that the massive transformation of the legal system has failed to reduce piracy. Instead, "the problem of piracy is better conceived as a failure of affordable access to media in legal markets."⁶⁶

In May of 2013 Attorney General Eric Holder appeared before the House Judiciary Committee to discuss the controversial policy of obtaining the phone records of Associated Press reports. In the process of this hearing, Representative Mel Watt

followed a line of inquiry regarding copyright piracy, felony punishment for online streaming, and terrorism. In other words, the government continues to embrace the idea that IP theft is linked to terrorism and they are specifically using this argument to create "enhanced penalties" for intellectual property theft.⁶⁷

To quote Eric Holder:

As we saw organized crime get into a variety of other businesses in order to support their efforts, we're now seeing terrorist groups getting into the theft of intellectual property. Again, to generate money to support what they're trying to do for their terrorist means. So we have to broaden our enforcement efforts, broaden the investigative efforts that we take, to examine what are the precise reasons why people are engaging in this kind of intellectual property thievery. And to consider whether or not there's a terrorist connection to it. This is a relatively new phenomenon, but one we have to be aware of.⁶⁸

As Mike Masnick notes in his commentary of the interaction, these claims have been proven wrong and no credible links have ever been provided. However, when the U.S. Attorney General is "spreading known scare stories that have been proven bogus" in an effort to justify enhanced penalties, we should all see this as a moment of concern.⁶⁹

The language of piracy and the associated problems produced by industry reports frames the issue of copyright in terms of its most maximalist position. Economic innovation requires property rights, it is argued. The government must intervene to protect IP owners and enforce the laws, even in the climate of neo-liberalism, which sees only a limited role for government regulation. Terrorists, organized crime, anti-copyright activists, and file-sharing fans must be stopped through stronger and better laws. As the securitization of IP continues, the lines between terrorists and anti-copyright activists, file-sharing fans and organized crime will only become more blurred as the government uses the full force of the criminal law, including felony charges against these criminals.

A fractured global debate

The first two chapters have sought to demonstrate the scope of the IP maximalist position, primarily promulgated by the United States but constituting the global standard for international regulation and framing the debate on piracy and the value of intellectual property. However, the global arena of intellectual property policy is far more fractured than the U.S. position or the trajectory of trade agreements might suggest. Since the TRIPs negotiations, developing countries have been vocally concerned about the strengthening of intellectual property laws. Global resistance has also emerged that has proved to be important in keeping these otherwise quiet trade agreement negotiations in the public light.

In this final section, I want to compare a recent move in the UK suggesting that, even amongst its closest allies, the United States may confront differences on how to

proceed into the information age. To anyone who has observed the evolution of copyright law over the last 20 years, the announcement by Britain's Prime Minister, David Cameron, in the fall of 2010 that British copyright laws were too restrictive for the information age and must be relaxed appeared out of step with the general trajectory of copyright maximalism that is the current international norm.⁷⁰

Cameron was not calling for radical revisions to the law or an end to copyright as we know it. Instead, he claimed that the current regime may not produce the innovation that copyright advocates claim and that a different balance must be struck between copyright owners and those who use copyrighted works. Specifically, Cameron expressed interest in facilitating creativity through relaxing copyright law and instilling in British law something similar to the American fair use doctrine. His comments were spoken in the context of a plan to remake London's east side into a technological center that would be England's version of Silicon Valley. Google executives had told him that it would have been impossible for Google to have started in the UK because of its approach to copyright.⁷¹ Given the strong incentive that governments have to facilitate new technology and foster a hospitable business environment, Cameron evidently took this testimony to heart.

There are several thoughts that Cameron's statement inspires. First, the underlying assumption he makes is that it is *not* copyright law per se that provides the framework for innovation, but rather the *exceptions* to the law that do so. His reference to American law clarifies that the fair use provisions, which allow for others to use a copyrighted work without permission under specific circumstances, are what creates the possibility for innovation.⁷² Thus, Cameron is acknowledging, if only very narrowly, that, instead of absolute property rights, it is the legal ability to use someone else's property *without permission* that creates the conditions for technological innovation.

Second, his statement is interesting because, as a prominent political figure typically aligned with the U.S. approach, expressing an interest in relaxing copyright laws is a different move in the ongoing debate. Even though Cameron's comments suggest only a subtle shift in official attitudes, the regulatory and business environment within which new law can be made is so overwhelmingly pro-copyright and pro-maximalization, that any move in the opposite direction is both interesting and will be extremely difficult.

After he questioned the efficacy of the UK's intellectual property laws for the new economy, Cameron commissioned the Hargreaves Report in November of 2011.⁷³ Written by Professor Ian Hargreaves, the report offers suggestions for how the UK might improve its intellectual property laws for the digital economy. The tone and recommendations of the report were quite different from those found in any of the U.S. reports referenced here, in part because the UK version tapped scholars who study the impacts of intellectual property instead of politically oriented politicians and policymakers.

First, and much in line with the U.S. position, the UK report acknowledged the importance of intellectual property rights for the economy and that it will be important for future economic growth.⁷⁴ However, unlike the U.S. position, the report also recognizes that an "overly rigid and inflexible IP framework can act as a barrier to

innovation."⁷⁵ Instead of focusing on the deleterious impact of piracy, the report frames the future of UK intellectual property in terms of a digital economy with enhanced flexibility and openness.⁷⁶

Second, the report calls for evidence-based policy, an important part of which is to generate acceptable data. The report goes on to argue that, once looking at the existing evidence, a more flexible approach to intellectual property protection is a superior method. The report endorses EU-based copyright licensing agreements and support for orphan works protection.⁷⁷

Third, in its recommendations regarding enforcement, instead of securitizing the issue and equating all those who are involved with copyright infringement as criminals, the report acknowledges that many individuals do not see software piracy as a problem and many do not know the law.⁷⁸ The report refuses to embrace the statistics about monetary loss from file sharing published by industry sources, while at the same time acknowledging that individual artists have felt the impact of digital downloads. Instead, the report remarks that claims of piracy must be seen in the context of overall sales and increased profits during the same period of time.⁷⁹

Thus, enforcement measures were contextualized in terms of a new digital economy, not in terms of heightened punishments as in the United States. The report emphasized the importance of looking to new business models that would change the nature of the game entirely and render piracy less relevant. The report states:

Where enforcement and education alone have so far struggled to make an impact on levels of copyright infringement, there has been more evidence of success where creative businesses have responded to illegal services by making available lower priced legal products in a form consumers want.⁸⁰

Piracy in this context is not used as justification for deploying the national security state to halt it, but instead is framed more cautiously as part of a need to change the economic game.

All things considered, the scope and tone of the UK approach to intellectual property in the digital age is significantly different from that of the United States, though the UK's approach may be sufficiently aligned with larger global IP interests to suggest only a difference in rhetoric and not policy outcomes.⁸¹ The report acknowledges piracy but makes no effort to link it to organized crime or terrorism. IP theft is not seen as a national security issue but instead as linked to national culture and innovation. As the UK government seeks to implement the recommendations of the Hargreaves report, it is likely that their domestic laws will begin to pose challenges for relations between the United States and the UK, as well as the UK and the EU.

The UK report is just one example of many state-actors that have more complex and nuanced approaches to intellectual property than the can be found in the U.S. policy field. Other states have followed the copyright maximalist approach, with many introducing legislation that is more restrictive regarding digital piracy than even the United States currently embraces.⁸² Thus, the global scene has efforts going in the opposite direction, with "three strikes" laws being developed to punish file sharing

and copyright infringement, while some states have come to realize that perhaps the law has gone too far. That the law has gone too far does not make it less the law—and thus the institutional framework for the strong enforcement of intellectual property along the lines embraced by the United States remains the prevailing system. This existing system will have implications for any country wishing to relax its copyright systems. It is not only domestic law implicated by Cameron's statements, but international law as well.

For example, as Jim Killock with the Open Rights Group noted, despite Cameron's best intentions, the proposals offered may not meet the legal bar set by the EU copyright regime and thus would immediately be in conflict with regional and international law.⁸³ Given that the EU just extended the copyright protection for sound recordings from 50 to 70 years in the face of copyrights about to expire, the trajectory is not towards less copyright protection on that level.⁸⁴ Thus, no matter how good an idea it might be, changing the law is a matter of consequence. To begin to carve out exceptions to the broad-based laws currently constituting our intellectual property regime, legislators will need the political will to face up to the entertainment and software industries and to redesign legislation in an area where most of the public has little interest in the policy discussion, and they will need to do so from the national to the international level.

What Cameron wants for the UK is to further support the creation of jobs and economic opportunities for citizens. What this means within the paradigm of the neo-liberal state is that government must facilitate economic growth by creating the regulatory conditions for the private sector to flourish. Governments are pushed to establish the appropriate level of regulation—which generally means to deregulate and allow private industry to function without any serious oversight. However, when it comes to modern copyright laws, businesses embrace extensive government regulation and encourage the state to enhance the time and scope of these regulatory structures. Thus, a statement such as Cameron's, which indicates the government's interest in deregulating the copyright industry to allow more unauthorized uses of copyrighted works, would be strongly discouraged by the established players in the "free" market.

Despite efforts to monopolize creative capital, recent scholarship suggests that the conditions under which further innovation occurs include open systems and what is now considered piracy, but has often been understood as the free flow of ideas. What has not helped innovation is tightly controlled monopolistic systems with a rigid definition of private property.⁸⁵ Given the claim that we have entered into what has been called the "information" economy or even more recently, the "creative" economy, it is argued that cities especially, but states more generally, can only succeed if they create the conditions for innovation and creativity to flourish.⁸⁶

Cameron's words are situated in the center of these complex economic and political forces implicating the future of creativity, economic growth, and the role of the state in facilitating the process. He recognizes that, for the national project to remain legitimate it must create policies that facilitate economic growth and, in our new knowledge economy, innovation and technological progress. Without these

opportunities, innovative and creative citizens will simply move elsewhere to pursue their economic and creative interests. When it comes to governing, the state is anguishing from a position of waning control over the discourses of sovereignty, citizenship, economic development, and much more.⁸⁷ Instead, they are asked to reproduce the public relations messages of the major culture industries: a task they generally do quite well, with some minor deviations. Even these deviations, as Cameron's remarks suggest, are simply making a choice between one high-powered, information-based actor (Google) against others.

Intellectual property is an excellent example of the way in which the state constructs laws not for a generalizable public good but for the economic benefit of key industry actors. The obvious benefactors of the law help to illustrate where special interests have long governed the construction of intellectual property laws to protect their past innovations instead of facilitate future creativity.⁸⁸ For a conservative Prime Minister to acknowledge that the system may not work the way its proponents have argued signals not that change will be forthcoming, because changes in the law will be difficult. It does, however, highlight the state of cultural policy and the connection that governments would like to see between culture and their legitimacy to govern. It also suggests that, while the pro-maximalist position is evident and widespread, there is the possibility of fractures coming from the global community.

Conclusion

In the American Intellectual Property Commission Report, it was noted that even immigration law is not spared from concerns regarding intellectual property theft. Foreign students, it argued, are educated in the United States but then return home to use their "IP knowledge" to compete against America.⁸⁹ As the report suggests, these students turn into "walking IP" and take trade secrets with them when they leave.⁹⁰ This problem could be solved, the report argues, by changing visa regulations and immigration laws. What is most remarkable about the comments on students as walking forms of intellectual property is the scope to which the concept of property itself has come to dominate the government's understanding of knowledge and education.

Education and sharing knowledge within the U.S. pro-maximalist position has become a form of theft. Foreign students have become a new threat to our national competitiveness. Never mind that people pay to go to college, and so even a pro-capitalist policy report should be able to see that these foreign students have purchased what they take with them. Much like the use of the concept of intellectual property to govern everything about business, however, the very minds of these students are now seen to be holding something that isn't theirs. The very idea of learning is changing within the U.S. pro-maximalist discourses. What was once seen as a positive process of economic development for poorer or developing countries is being turned into a potential economic threat to the United States.

However, the concern felt by the report writers about the problem of foreign students as walking IP also highlights why the proprietization and securitization of

intellectual property is simply the wrong path to take. Without the ability to spread and share ideas, especially across cultural divides, future innovation is harmed. The nationalist discourses and the length to which these are shaping the American approach to intellectual property suggest how American policymakers will shape the future of the debate if left unchecked. For a country that lives and dies by its free market ideology, the fact that foreign students attend U.S. universities, and are far more likely to get post-graduate degrees in the STEM disciplines (science, technology, engineering, and mathematics), is a trend that close-minded xenophobic policymakers writing immigration laws have never figured out. At least the Intellectual Property Commission report writers were enlightened enough to recommend a more relaxed visa system rather than attempting to shut U.S. borders to foreign students altogether.

Chapters 2 and 3 were meant to establish the grounding of an IP maximalist discourse and the efforts made by the United States to extend that approach well beyond its borders to become the basis for all international actions. The maximalist approach has seen success, and the U.S. attempt to securitize the protection of intellectual property in the face of new threats by hackers will help solidify the justification for stronger intellectual property protection amongst policymakers. The next chapter continues to investigate the role of the state, but turns to look at the relationship between the state and cultural production. It takes up the issue of free flows of information as an ideological maneuver and investigates the relationship between culture and the state as mitigated by intellectual property laws.

Notes

- 1 Ian Hargreaves, "Digital Opportunity: A Review of Intellectual Property Growth," Text, *Intellectual Property Office*, May 18, 2011, 6, www.ipo.gov.uk/ipreview.htm.
- 2 Loren Yager, *Intellectual Property: Observations on Efforts to Quantify the Economic Effects of Counterfeit and Pirated Goods* (Government Accounting Office, April 12, 2010), 2, www.gao.gov/products/GAO-10-423.
- 3 The National Bureau of Asian Research, "The Report of the Commission on the Theft of American Intellectual Property" (The National Bureau of Asian Research, May 2013), 2, http://ipcommission.org/report/IP_Commission_Report_052213.pdf.
- 4 The EU, Switzerland, and Canada also participated in the negotiations but did not sign the agreement in 2011. Of those who have signed, as of 2012, only Japan is currently ratified the agreement.
- 5 Peter K. Yu, "ACTA and Its Complex Politics," *The WIPO Journal* 3, no. 1 (2011): 2-3.
- 6 Ibid., 1.
- 7 Carolina Rossini, Maira Sutton, and Gwen Huze, "Anti-Counterfeiting Trade Agreement," *Electronic Frontier Foundation*, accessed May 29, 2013, <https://www.eff.org/issues/acta>.
- 8 Erik Kain, "IP Protection Standards in TPP Represent the Downside of the Trans-Pacific Partnership," *Forbes*, January 25, 2012, www.forbes.com/sites/enkkain/2012/01/25/ip-protection-standards-in-tpp-represent-the-dark-side-of-the-trans-pacific-partnership.
- 9 The National Bureau of Asian Research, "The Report of the Commission on the Theft of American Intellectual Property."
- 10 Woolley and Peters, "George W. Bush: Remarks on Signing the Stop Counterfeiting in Manufactured Goods Act."

- 11 Julian Sanchez, "750,000 Lost Jobs? The Dodgy Digits Behind the War on Piracy," *Ar Technica*, October 7, 2008, <http://arstechnica.com/tech-policy/2008/10/dodgy-digits-behind-the-war-on-piracy>.
- 12 Patry, *Moral Panics and the Copyright Wars*, op. cit.
- 13 The U.S. government keeps track of injuries and deaths caused by consumer products. See: Spalovsky, "Injury Statistics," Text, April 15, 2013, www.cpsc.gov/Templates/cpsc/pages/LandingPage.aspx?id=63997&epslanguage=en.
- 14 Foucault, *Security, Territory, Population*, 108, op. cit.
- 15 Christopher Bodeen, "Chinese Hackers: Professional Cyberspies?" *Marine Corps Times*, February 25, 2013, www.marinecorpstimes.com/article/20130225/NEWS/302250306/Chinese-hackers-Professional-cyberspies-.
- 16 APT1: Exposing One of China's Cyber Espionage Units (Mandiant Intelligence Center, 2013), <http://intelreport.mandiant.com>.
- 17 Debora J. Halbert, *Intellectual Property in the Information Age: The Politics of Expanding Ownership Rights* (New York: Quorum Books, 1999), 77–100; Peter K. Yu, *The Second Coming of Intellectual Property Rights in China*, Occasional Papers in Intellectual Property from Benjamin N. Cardozo School of Law, Yeshiva University, no. 11 (New York: Benjamin N. Cardozo School of Law, Yeshiva University, 2002).
- 18 Michael Riley and John Walcott, "China-Based Hacking of 760 Companies Shows Cyber Cold War," *Bloomberg*, December 14, 2011, www.bloomberg.com/news/2011-12-13/china-based-hacking-of-760-companies-reflects-undeclared-global-cyber-war.html.
- 19 Ibid.
- 20 Gregory Ferenstein, "White House Anti-IP Theft Strategy Comes Out Swinging Against China," *TechCrunch*, February 20, 2013, <http://techcrunch.com/2013/02/20/white-house-anti-ip-theft-strategy-comes-out-swinging-against-china/>; U.S. Office of the President, *Administrative Strategy on Mitigating the Theft of U.S. Trade Secrets*, February 2013.
- 21 Mark Landler and David E. Sanger, "U.S. Demands China Crack Down on Cyberattacks," *The New York Times*, March 11, 2013, sec. World / Asia Pacific, www.nytimes.com/2013/03/12/world/asia/us-demands-that-china-end-hacking-and-set-cyber-rules.html.
- 22 Ibid.
- 23 Andrew Krepinevich, "Cyber Warfare: A 'Nuclear Option?'" (Center for Strategic and Budgetary Assessments, 2012), 80, www.csbaonline.org/wp-content/uploads/2012/08/CSBA_Cyber_Warfare_For_Web_1.pdf.
- 24 The National Bureau of Asian Research, "The Report of the Commission on the Theft of American Intellectual Property," 4.
- 25 "National Security Council," *The White House*, accessed May 29, 2013, www.whitehouse.gov/administration/eop/nsc.
- 26 The National Bureau of Asian Research, "The Report of the Commission on the Theft of American Intellectual Property," 3.
- 27 Ibid., 3–4.
- 28 "Cyberspace Policy Review: Assuring a Trusted and Resilient Information and Communications Infrastructure" (National Security Council), i, accessed May 29, 2013, www.whitehouse.gov/cybersecurity.
- 29 Greg Sandoval, "Foreign Hackers Steal More Than a Terabyte of Data Per Day in Ongoing Cyberwar," *The Verge*, February 27, 2013, www.theverge.com/2013/2/27/4035378/new-report-finds-hackers-stealing-terabyte-daily.
- 30 In a briefing to Congress, national security advisors said that, while everyone was focused on the possibility of cyberattacks on critical infrastructure, the real (and actual) threat is cybercrime and cyber espionage. These efforts critically undermine our economy. See: Tom Gjelten, "Is All the Talk about Cyberwarfare Just Hype?" *NPR* (NPR, March 15, 2013), www.npr.org/2013/03/15/174352914/is-all-the-talk-about-cyber-warfare-just-hype.
- 31 "2012 Republican Platform."
- 32 Jim Michaels, "Pentagon Expands Cyber-attack Capabilities," *USA Today.com*, April 21, 2013, www.usatoday.com/story/news/nation/2013/04/21/pentagon-expanding-offensive-cyber-capabilities/2085135.
- 33 Richard Lardner, "Pentagon Forming Cyber Teams to Prevent Attacks," *Yahoo! News*, accessed March 22, 2013, <http://news.yahoo.com/pentagon-forming-cyber-teams-prevent-attacks-183120743-finance.html>; Michaels, "Pentagon Expands Cyber-attack Capabilities."
- 34 Global Intellectual Property Center, *Intellectual Property: Creating Jobs, Saving Lives, Improving the World* (U.S. Chamber of Commerce, 2008), 1, http://gipcdev.blackbaron.net/sites/default/files/reports/documents/gipc_ipbook.pdf.
- 35 Ibid.
- 36 Colin Darch, "Ideology, Illusion and the Global Copyright Regime," in *The Rio Papers* (presented at the 3rd CopySouth Workshop: International Conference on Copyright Issues, Rio de Janeiro—Brasil, 2010), 1, <http://copysouth.org/portal/theriopapers>.
- 37 Global Intellectual Property Center, *Intellectual Property: Creating Jobs, Saving Lives, Improving the World*, 4.
- 38 "USTR Announces Results of Special 301 Review of Notorious Markets," *Office of the United States Trade Representative*, February 2011, www.ustr.gov/about-us/press-office/press-releases/2011/february/ustr-announces-results-special-301-review-notorious.
- 39 See specifically the chapters on the creation of the computer hacker and copyright pirate as threats. Debora Halbert, *Intellectual Property in the Information Age: The Politics of Expanding Ownership Rights* (Westport, CT: Quorum, 1999).
- 40 Roslyn A. Mazer, "From T-Shirts to Terrorism: That Fake Nike Swoosh May Be Helping to Fund Bin Laden's Network," *The Washington Post*, September 30, 2001.
- 41 Global Intellectual Property Center, *Intellectual Property: Creating Jobs, Saving Lives, Improving the World*, 13. They quote Mazer specifically: "In fact, it is believed that high-level players who controlled a counterfeit T-shirt ring were using the proceeds to support terrorist groups such as the one that bombed the World Trade Center in 1993."
- 42 Roslyn A. Mazer, "From T-Shirts to Terrorism: That Fake Nike Swoosh May Be Helping to Fund Bin Laden's Network," op. cit.
- 43 Ibid.
- 44 Ibid.
- 45 Quoted in David, *Peer to Peer and the Music Industry*, 99.
- 46 Gregory Trevorton et al., *Film Piracy, Organized Crime and Terrorism, Safety and Justice Program and the Global Risk and Security Center* (RAND Corporation, 2009), www.rand.org/pubs/monographs/2009/RAND_MG742.pdf.
- 47 Ibid., iii.
- 48 Ibid., 21–24.
- 49 Ibid., 34.
- 50 Ibid., 73.
- 51 Ibid., 76–77.
- 52 Ibid., 79–81.
- 53 Ibid., 81.
- 54 Ibid., 82.
- 55 Ibid., 91.
- 56 Ehrenfeld offers a broad definition of terrorists, and drugs seem to be her primary focus in terms of illegal funding, but she does from an early point on also identify video piracy as another source of funding. For a larger book-length analysis of this particular argument, see: Rachel Ehrenfeld and R. James Woolsey ("Foreword"), *Funding Evil: How Terrorism Is Financed—and How to Stop It* (Bonus Books, 2003); Rachael Ehrenfeld, "Funding Terrorism: Sources and Methods," in *Confronting Terrorism*, 2002, <http://library.lanl.gov/cgi-bin/getdoc?event=CT2002&document=30>; Rachael Ehrenfeld, "Turning Off the Tap of Terrorist Funding," *Middle East Forum*, September 19, 2003, www.meforum.org/572/turning-off-the-tap-of-terrorist-funding.

- 57 Idem.
- 58 Ehrenfeld, "Funding Terrorism: Sources and Methods," op. cit., 393.
- 59 "Funding Terrorism," *Source Watch*, accessed March 11, 2011, www.sourcewatch.org/index.php?title=Funding_terrorism.
- 60 Tim Lister, "WikiLeaks Cables Assess Terrorism Funding in Saudi Arabia, Gulf States," CNN, December 6, 2010, http://articles.cnn.com/2010-12-06/world/wikileaks.terrorism.funding_1_saudi-arabia-terrorist-funding-terrorist-groups?_s=PM:WORLD.
- 61 John Roth, Douglas Greenburg, and Serena Wille, *National Commission on Terrorist Attacks Upon the United States: Monograph on Terrorist Financing*, 2004, 4, www.9-11commission.gov/staff.../911_TerrFin_Monograph.pdf.
- 62 Foucault, *Security, Territory, Population*, op. cit., 200.
- 63 "Administration's White Paper on Intellectual Property Enforcement Legislative Recommendations," op. cit., 2.
- 64 Matt Mason, *The Pirate's Dilemma: How Youth Culture Is Reinventing Capitalism*, 1st edn (New York: Free Press, 2008).
- 65 Foucault, *Security, Territory, Population*, op. cit., 201.
- 66 "Media Piracy in Emerging Economies: A Report by the Social Science Research Council," 2011, <http://piracy.ssrc.org/about-the-report>.
- 67 Mike Masnick, "Eric Holder Claims Terrorists Are Involved in 'IP Theft,'" *Information Liberation*, May 20, 2013, www.informationliberation.com/?id=43881.
- 68 Ibid.
- 69 Ibid.
- 70 "UK Copyright Laws To Be Reviewed, Announces Cameron," *BBC News*, November 4, 2010, www.bbc.co.uk/news/uk-politics-11695416.
- 71 Ibid.
- 72 "U.S. Copyright Office—Fair Use," *Fair Use*, November 2009, www.copyright.gov/fls/fl102.html. There are four fair use provisions in American copyright law that are used to determine if an unauthorized use of a work is "fair" or has violated the copyright owner's rights. They include: the purpose and character of the use (for educational purposes or non-commercial purposes); the nature of the copyrighted work; the amount copied in relation to the work as a whole; and the effect of the copied work on the market for the copyrighted work. These general characteristics have been more specifically defined through the court's interpretation of what they mean. Furthermore, recent efforts have been made to establish best practices for fair use in the United States to help clarify for artists what would constitute a fair use. See: "Code of Best Practices in Fair Use," *Center for Social Media, School of Communication, American University*, accessed January 29, 2011, www.centerforsocialmedia.org/fair-use.
- 73 "UK Copyright Laws To Be Reviewed," *BBC*, November 4, 2010, sec. UK Politics, www.bbc.co.uk/news/uk-politics-11695416.
- 74 Hangreaves, "Digital Opportunity: A Review of Intellectual Property Growth," op. cit., 10–11.
- 75 Ibid., 11.
- 76 Ibid., 14–15.
- 77 Ibid., 38.
- 78 Ibid., 67–68.
- 79 Gerry Smith, "Report For NATO Justifies Killing of Hackers in a Cyberwar," *Huffington Post*, March 22, 2013, 74–75, www.huffingtonpost.com/2013/03/22/nato-hackers-cyber-war_n_2932531.html?utm_hp_ref=world&ir=World.
- 80 Hangreaves, "Digital Opportunity: A Review of Intellectual Property Growth," op. cit., 79.
- 81 Richard Taylor, "The Digital Economy Act 2010 and Online Copyright Infringement," *The Law Gazette*, September 9, 2010, www.lawgazette.co.uk/in-practice/the-digital-economy-act-2010-and-online-copyright-infringement.
- 82 South Korea's "three strikes" law is modeled after a strict enforcement approach to copyright piracy. Doctorow, "South Korea's U.S.-led Copyright Policy Leads to 65,000 Acts of Extrajudicial Censorship/Disconnection/Threats by Govt Bureaucrats—Boing Boing," op. cit.
- 83 Jim Killock, "Cameron: Copyright Is Out of Date," *Open Rights Group*, November 5, 2010, www.openrightsgroup.org/blog/2010/cameron-copyright-is-out-of-date.
- 84 Georgina Prodhan, "Artists Welcome EU Music Copyright Extension," *Reuters*, September 12, 2011, www.reuters.com/article/2011/09/12/us-europe-copyright-idUSTRE78B35B20110912.
- 85 Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (New Haven, CT: Yale University Press, 2006); Michele Boldrin and David K. Levine, *Against Intellectual Monopoly* (Cambridge: Cambridge University Press, 2008); Smiers, "The Abolition of Copyright," op. cit.; Henry Jenkins, *Convergence Culture: Where Old and New Media Collide* (New York: New York University Press, 2006); Roberto Verzola, *Towards a Political Economy of Information: Studies on the Information Economy* (Quezon City, Philippines: Foundation for Nationalist Studies, 2004); Clay Shirky, *Here Comes Everybody: The Power of Organizing Without Organizations* (New York: Penguin Press, 2008).
- 86 Richard Florida is one of the leading scholars writing about this transformation, which includes cities having a focus on arts, a large gay population indicated by what Florida calls civic tolerance, and the circulation of the creative class globally to seek out the best conditions for their creative work. See: Richard L. Florida, *The Rise of the Creative Class: And How It's Transforming Work, Leisure, Community and Everyday Life* (New York: Basic Books, 2002); Richard Florida, *The Flight of the Creative Class: The New Global Competition for Talent* (New York: HarperCollins, 2007); Richard Florida, *Who's Your City? How the Creative Economy Is Making Where to Live the Most Important Decision of Your Life* (New York: Basic Books, 2008); John Howkins, *The Creative Economy: How People Make Money from Ideas* (London: Penguin, 2002).
- 87 Wendy Brown, *Walled States, Waning Sovereignty* (New York and Cambridge, MA: Zone Books; distributed by the MIT Press, 2010). Brown argues that the recent popularity of walls along the borders of states is emblematic of their failure in the face of globalized economic systems and the flows of people and goods around the world. The public symbolism of national strength is, paradoxically, she argues, evidence of the waning authority of the state system.
- 88 The literature on this issue is quite extensive and the sources identified here provide a small glimpse at the range of scholars investigating this issue from a variety of disciplinary standpoints. Boldrin and Levine argue against IP as economists, May provides a critical history as a political scientist, and of course Lessig provides the perspective of someone trained in the law. Boldrin and Levine, *Against Intellectual Monopoly*, op. cit.; Christopher May, *A Global Political Economy of Intellectual Property Rights: The New Enclosures?* Routledge/RIPE Studies in Global Political Economy (London: Routledge, 2000); Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (New York: Penguin Press, 2004).
- 89 The National Bureau of Asian Research, "The Report of the Commission on the Theft of American Intellectual Property," 5.
- 90 Ibid., 13.

4

INTELLECTUAL PROPERTY
AND THE STATE

The territories of national culture

In my opinion, Radio Free Europe/Radio Liberty and Voice of America are, at their core, communications and marketing tools. Regardless of what they are reporting on or the programs they run, they are, in essence, selling and branding our Nation, America. Every day, Radio Free Europe/Radio Liberty and voice of America are on the front lines of shaping what the world is thinking about us.

Statement of U.S Representative David Scott, Georgia, before the
Committee on Foreign Affairs, July 2009¹

Marking off the boundaries of intellectual assets is like drawing lines in water.

Paul Goldstein²

The Estonian documentary, *Disco and Atomic War*, tells a humorous and compelling story about how culture, especially illegal access to Western culture, was part of the Cold War effort to win the minds of those living under Soviet state control. The documentary follows the film-makers as young Estonians growing up in the '70s and '80s who were subject to the clash between Soviet propaganda regarding the superiority of communism as a way of life and the vision of the West as seen in pirated American and Finnish television and radio programs. As part of the ideological battle that was the Cold War, American "soft power" was beamed through television and radio to Estonian viewers.

These broadcasts were picked up illegally using a variety of clever antenna systems, distributed via videocassette (once they became available) and narrated to friends and family who did not live close enough to the border to pick up their own signals. Despite the best efforts of the Soviets to block television transmissions, destroy antennas, and establish the iron curtain between Estonians and Western culture, popular television shows, such as *Dallas* and *Knight Rider*, as well as the disco craze of the '70s seeped through the cracks and "infected" communist viewers with what the

Soviets saw as "an ideological virus spreading from the West."³ The Soviets were seemingly helpless to stop the infiltration of the pirate television shows. Television became the "nation's judge."⁴

Film-maker Jaak Kilmi was a child during this information war and his documentary cleverly demonstrates how Western popular culture served as a Cold War ideological weapon that simply could not be fought by the Soviets. Former Foreign Service officer Yale Richmond's analysis of the power of cultural exchange concurs with Kilmi's film version. The cultural context of foreign films provided Russians with a visible representation of another way of life. Richmond notes, "Audiences were not so much listening to the soundtrack or reading the subtitles as watching the doings of people on the screen—in their homes, in stores, on streets—the clothes they wore, and the cars they drove. Such details, which showed how people lived in the West, were very revealing for Soviet audiences."⁵ These television programs cracked the state-sponsored cultural projects of the Soviets by providing a visual representation of another possible world. They also captured their audiences with the soap opera qualities of *Dallas*, where everyone wanted to know who shot J.R., and the adventures of Michael Knight and his intelligent car.

At a more mundane level, the other possible world was made visible through the ads seen on the television. Kilmi tells the story of the subversive impact of what in the West would have been a fairly unremarkable advertisement. The ad showed a well-stocked butcher store with an enormous array of meat cuts. To the Estonian viewer the abundance of the store was a marvel. Soviet propaganda sought to directly counter this otherwise innocent ad by claiming that the advertisement was itself propaganda and the butcher was a government agent.

The United States constructed the story of the Soviets as our arch enemies, a story in which the United States sought to promote cultural freedom and a free flow of information, while the Soviets embraced cultural censorship and authoritarianism. U.S. efforts to expose the world to American culture was strategically designed to provide a visible alternative, based upon the abundance of capitalism and the ingenuity of American artists, which was generated from the people and not controlled, as the Soviet system was, from the top down. Such is the discourse on culture during the Cold War.

From a copyright perspective, however, the United States and the USSR had more in common than one might think. The Soviets sought to stamp out cultural imperialism and halt the flow of "bourgeois" products by providing viewers with appropriate communist alternatives. On the American side, despite its international rhetoric about the free flow of information, the U.S. government had undergone its own censorship process via the House UnAmerican Activities Committee (HUAC) as well as numerous public and private censorship efforts to control and destroy obscenity and this involved private censorship of books, music, and movies.⁶ The presence of McCarthyism and anti-communism in the United States tested the limits of the U.S. cultural laissez-faire approach. While overseas libraries funded by the American government and stocked with books by American authors were designed to demonstrate the intellectual freedom available in the United States, the fervent

anti-communism at home meant that the Committee of Books Abroad, part of the United States Information Service (USIS), issued a ban on all literature by "communists, fellow travelers, and so forth."⁷ It would seem that the United States embraced a free flow of information as long as that flow did not sympathize with socialism, communism, or other leftist ideals, or in any other way violate the sensibilities of those with law-making power, much like the Soviets embraced only works that supported their ideological approach.

In terms of copyright, Soviet copyright laws were designed to support a socialist system of creativity, but by the 1970s they had aligned their copyright laws with international copyright standards. Thus, generally speaking, the substantive differences between a socialist copyright regime and a capitalist one had been mostly ironed out. For its part, during the height of the Cold War, America had not yet signed the Berne Convention and thus was also not aligned with international copyright standards either.

While the Soviets were concerned first with ideology and second with support of culture, it can certainly be argued that these two goals were also driving forces for the United States. Obviously, American ideological claims were different and the arguments revolving around how to support culture were different too, but both systems had similar goals—aligning culture with the ideological and nationalist goals of the state. Finally, while copyright advocates from the '50s through the '80s had not yet conceptualized copyright as a central and driving force in information exchange, it is safe to say that both the Soviets and American culture industry representatives agreed that the flow of American culture to the Soviet Union should be halted. The Soviets felt it should be halted because it represented a cultural paradigm that they resisted, and American industry sought to curtail this flow because they couldn't control the revenue stream. The U.S. government, while certainly lobbying for intellectual property control on the one hand, also undermined its own agenda when it sought to use American culture as an ideological weapon, thus elevating the "free" flow of information abroad over the property components of its circulation.

The Cold War helps demonstrate how culture becomes the subject of nationalist narratives regarding political supremacy. It also demonstrates how the state regulates and manages cultural flows for the benefit of larger economic and political interests. In an effort to counter the disco craze, for example, Soviets set up their own collective version of disco and established community dance nights. Youth culture, however, had already been co-opted by the autonomy and individualism of the West. They were not interested in the Soviet alternative to disco. Hindsight demonstrates that the Soviets were never able to fully neutralize the threat from American pop culture. Hollywood had won the minds of its viewers.⁸ The Soviet state could not halt this flow, and major culture industry players were helpless in the face of transnational sharing as well. It wasn't until 1973 that an international agreement existed that gave these economic players the ability to halt the flow of commercial products inside the Soviet Union.⁹

In this chapter I'd like to more fully explore the relationship of the state to the creativity of its people and the ways in which states align themselves with culture to

shore up national discourses of exceptionalism and use culture as a foreign policy tool to help communicate a national way of life globally. While culture aligned with the state may help support a narrative of nationalism, culture also threatens the state, given that regional governance and cultural flows make ideas of the nation less relevant in a global world.

Throughout the world, national identities only partially align with state practices and tend to be fragile, multiple, and easily altered when exposed to new ideas and possibilities. Thus, while states assert sovereign control over specific geographical territories, creativity and cultural communication disrupt the territorial control that states seek to manage. To allow for a free flow of culture and communication, the state risks a fractured identity for its nation-building project. To control the cultural dialogue in the name of nation-building is to stifle cultural expression and possibly create the conditions of resistance to the state. Neither option serves state interests consistently.

States of all types support art and cultural policy as nation-building projects. Arts policy is designed by the state to support the local arts with public funding.¹⁰ Cultural policy, in contrast is, "the ideological role prescribed by the state for arts and culture in the greater nation-building project, in which the state defines the meaning of art and culture and their relationship to society."¹¹ While this distinction itself may be less than relevant, government-sponsored arts funding, even while perhaps following a different trajectory than general cultural policy, will be governed by the more general sense of a state cultural policy.

States that are more interested in national discourses of authenticity—such as the careful alignment of French culture with the French state—will more assertively fund the arts and develop a cultural policy that shores up nationalist discourses. The same could be said for the former Soviet Union, a political entity that sought to derive its legitimacy by carefully aligning culture with politics and producing an ideological narrative that sought to unify the fractured territory of the Soviet Union into a single entity. All centralizing state practices require not simply an economic but also some sort of cultural unification. This chapter will highlight why states must participate in these processes, no matter their ideological constitution, if they seek to retain legitimacy.

This chapter also focuses on the state's efforts to regulate culture territorially. To tease out the multiple connections between culture and the state, I will first investigate a period in cultural exchange that now seems quite removed from contemporary battles over culture and copyright. Specifically, the ideological clash that emerged during the Cold War did not simply progress along political fronts, but was waged as a cultural war that tells an important story about the relationship of culture to the state and the different approaches one can take in the protection of intellectual property. From state-sponsored culture, to the ways in which the state appropriates the cultural innovation of its citizens as evidence of its legitimacy as a nation, the relationship of the state to culture is complex.

The Cold War was a moment in which nations clearly sought to align their cultural practices with the political ideology expressed by their respective states. For the United States, the Cold War produced what Lewis Hyde has called "democratic-propaganda

patronage."¹² The state often uses culture as a foreign policy tool—to help create the conditions of support for its larger empire-building projects, while at the same time creating a narrative that can focus the energy of other states on the people instead of state aggression.¹³

The cultural exchange that occurred between the United States and the Soviet Union during the Cold War and the ways in which culture was used to humanize the state, while at the same time the state engaged in efforts to halt the flow of culture, or use it as a vehicle for political ends, help to highlight the conflicting policy priorities between national efforts to promote the state as a unitary actor and the ways in which cultural exchange fracture these very same efforts. Ironically, the foreign policy interest in sharing culture can violate existing copyright structures and thus puts state protection of its national interests in direct conflict with state protection of its economic interests. The power of the bootleg as a politically subversive tool should not be underestimated. The story of the use of "soft power" during the Cold War highlights the relationship between culture, nationalism, and culture as a commodity, and challenges our understanding of authentic national culture.¹⁴

The remainder of the chapter will move from the national to the regional and global in order to highlight the threat to the state posed by culture unhinged from nationalism and the free flow around the globe. I will argue that the state's role in a globalized world is complex and multifaceted. States have adopted the paradigm of culture as a commodity produced by nationals, yet require these commodities to flow unrestricted across national boundaries. The circulation of culture also means the circulation of the artists who produce it, leading to arguments supporting the free flow of culture often at the expense of the integrity of national borders. In this way, the state seeks to remain relevant but becomes increasingly irrelevant to the flow of culture.

The Cold War and the clash of cultural policy

While numerous reasons are given to explain the collapse of the Soviet Union, the focus is often placed on military expenditures and economic competition. The importance of cultural exchange and the ways in which capitalist culture filtered through the iron curtain to provide the citizens of Soviet Russia with a vision of life substantially different from their own is less often discussed, at least within the discipline of political science. The "soft power" effect of Western culture is relevant here because the Cold War was at its heart an ideological battle over the minds of people. As such, cultural resources were mobilized to argue for the superiority of one system over the other, not only as a way of governing, but a way of life.

As the epigraph at beginning of this chapter suggests, political leaders have found the promotion of American cultural values abroad to be an important part of American foreign policy. The Department of State includes the Bureau of Educational and Cultural Affairs to help promote American culture abroad, and there are numerous exchanges that have been developed and a range of government entities that deal with information and culture at the international level. Thus, it must be made clear

that what the United States exports as American culture is as ideologically entangled as Soviet-era cultural exchange was, but the American ideology is much more hidden from view by those entrenched in its framework. American cultural diplomacy evolved from an effort to create a sympathetic environment for the United States abroad, or at the very least to "induce influential parts of the host country's public to give us the benefit of the doubt."¹⁵

Political rhetoric during the Cold War produced grand metanarratives in the service of the state project dealing with culture and its exchange. American culture specifically, but "Western" culture more generally, was depicted as one of openness that fostered a free flow of ideas.¹⁶ The argument for this liberal vision is that free people can exchange ideas without overt state censorship and that the state itself has a duty to foster such exchange instead of requiring citizens to adhere to a specific state-sponsored line of thought. Democratic regimes like the United States allowed for the free flow of ideas that a free people could create (never mind the home-based McCarthyism or even the puritanical systems of censorship that existed in the United States).

Communists, by contrast, controlled cultural expression within a closed society and thus were to be criticized for failing to allow citizens to fully express their creative, intellectual and innovative selves. Only the West, it was argued, could allow the individual *as an individual* to express his or herself fully. Of course, the "individual as the center of creation myth" has been central to concealing the ways in which creativity is located in social groups and that innovation does not emerge from isolation. Modern capitalists seem to only just be discovering this idea.¹⁷

The dichotomy between the freedom in the West and the control of the Soviets was an integral philosophical part of the politics of American foreign policy. As David A. Smith notes, "art became a weapon in the cold war."¹⁸ Members of Congress and President Eisenhower were both concerned with the Soviet depiction of Americans as, "gum-chewing, insensitive, materialistic barbarians," which required Americans to be concerned with cultural diplomacy.¹⁹ The American Assembly, an academic entity founded by Dwight D. Eisenhower to produce topical materials on policy issues described the cultural clash of paradigms between the United States and communists in their 1962 session on cultural affairs and foreign relations as such:

In a democratic society like the United States the delineation of government's role in these [cultural] affairs is a sensitive and difficult matter. The diversity within a democratic society does not permit the government to command the nation's cultural life. The communist countries have no such difficulty in reconciling their cultural tradition with their political purposes or in devising international policies and procedures consistent with what is done domestically. ... In America, the decentralized and highly diversified structure of educational and cultural life creates for the government the further problem of how most effectively to tap the resources—the artists, teachers, scientists and books—that are needed for international cultural activities, but that are not normally subject to government control.²⁰

Debates about support of the arts abroad made it essential to discuss support of the arts domestically, which raised controversies over the role of government in the arts more generally. Government funding could be perceived as government control over what should be free expression. While one could argue that, under this paradigm, the United States is less likely to use culture as a nation-building tool, in actuality, the United States is simply communicating a fundamentally different cultural ideology than the communist one. However, it is no less tied to the state; simply in the case of the United States, it is a capitalist state.

In the United States, government funding for the arts has historically been limited. It wasn't until 1938 that the U.S. federal government began to provide transnational cultural support, the last of the "major powers" to do so.²¹ In part, the claim that the United States spoke for freedom and that what it promoted abroad was not propaganda, but freely produced art, literature, music and ideas, made it impossible to fully fund the arts in a manner that might imply that the state helped create culture.²² The United States did not begin to enter the struggle to define its international interests through culture and what has come to be called public diplomacy until the Second World War.²³ Then, as a result of the Cold War, the United States entered the information war full force with the construction of the United States Information Agency (USIA), born in 1953.²⁴

As Ninkovich puts it, the 1950s' Cold War required a complex political balance:

Circumstances dictated an effective mobilization of national cultural resources and their use in an international power struggle at the same time that there existed the equally vital need to maintain the intellectual and organizational continuity of a nonpolitical, antinationalist tradition.²⁵

This conundrum meant that, while the United States did support a national cultural policy, it must do so by disavowing the cultural policy it sought to generate and promote globally. According to Dizard, the United States has always sought to balance the private interests of the commercial cultural centers with the national interest in spreading American ideas.²⁶

In fact, U.S. cultural policy during the early Cold War from the 1950s onward was as interested in promoting American culture abroad as Americans argued the Soviet system was, though the U.S. approach was seen as a justified defense against communist culture.²⁷ The United States offered a variety of programs funding culture abroad, with both the Department of State and the United States Information Agency playing a visible role.²⁸ The USIA was a significant funder promoting American cultural products overseas. Additionally, millions of dollars from the CIA were funneled through private foundations, literary magazines, conferences, festivals, and other channels that produced art to help publicize the American way of life abroad and the quality of American culture.

These efforts made the CIA our de facto Ministry of Culture, according to Frances Stonor Saunders, who has documented the depth and breadth of American covert funding for the arts during the Cold War.²⁹ Dizard argues that the CIA budget for

covert cultural activities outpaced the USIA budget "by a factor of five or six" with most of their efforts being "carried out by surrogates."³⁰ The CIA was a significant source of support for American private foundations, which allowed them to have a far more wide-reaching impact on intellectual life both domestically and internationally.³¹ As Dizard notes, the Department of Defense, the Department of State, and the CIA often had even more resources than the USIA in promoting American ideological agendas abroad.³²

The agenda of American foreign cultural policy during the Cold War was twofold. First, to stifle anti-American sentiment throughout Europe and in the process to demonstrate to the culturally high-minded Europeans (especially the French) that America had culture, and that this culture was of social value and worthy of their respect. While David Caute questions the scope of CIA funding, he agrees that one of the primary goals of U.S. cultural policy was to "convince Europeans that America was more than Walt Disney and Mae West, corned beef, chewing-gum, and nylons."³³ Prior to the First World War and the growing notion of cultural diplomacy that evolved during this war, American high culture had looked predominantly towards Europe for inspiration.³⁴ The U.S. government sought to change the position of U.S. culture abroad.

A second goal was to actively position American culture and way of life as an alternative to Soviet-style top-down cultural policy. While the Soviets controlled culture through state mechanisms and acted as a censor to ideas hostile to their ideological structure, the goal was to demonstrate that the United States functioned without any such state control. Of course, the U.S. policy was built upon supporting private cultural products, but it is impossible to claim that the United States won the hearts and minds of the world without the support of the federal government. The free market did not prevail, government support did.

The government was instrumental in the spread of American culture abroad. Besides direct government subsidies to private entertainment industry interests to control global media markets, the United States funded the Voice of America (VOA) radio broadcast and, perhaps less well known, but possibly more important, the Armed Forces Network (AFN), the Defense Department's radio and television broadcasts designed for U.S. military workers abroad, but whose broadcasting generated an enormous foreign audience.³⁵ Furthermore, the United States covertly supported non-communist leftist organizations that were often at odds with their overt foreign policy goals in order to shift the global debate away from communism.³⁶ The deepest irony behind these goals is that the United States designed and supported a top-down cultural policy in the name of freedom of ideas and openness.

To make matters more complex, even as the United States was covertly supporting American culture in all its forms as long as it aligned with the free market liberal tradition, it was heavily involved in censoring its own most popular form of entertainment—movies. The McCarthy era is but one example where the political expression of artists was actively crushed by the state. It is no accident that during the McCarthy era agents of the state sought to weed out radicals in Hollywood, given that such people were seen as an immediate and direct threat to the national integrity

of the United States. The foreign libraries supported by the USIA and funded by the U.S. government to help provide the world with a vision of what America was like were also placed under Congressional scrutiny, and books were censored and stripped from library shelves.³⁷ It should also come as no surprise that there was a long tradition of radical and leftist politics within American cultural communities, including the major Hollywood studios and, of course, within the American folk music tradition.³⁸

Despite American commitment to free speech and expression, the hysteria inspired by the possibility of cultural producers who were communists controlling the viewing habits of the American people in direct contradistinction with the interests of the state helps highlight how intense American policies of cultural control actually were. While American policymakers and elites criticized the Soviet Union for politicizing art, they were at the same time politicizing the cultural process in the United States by seeking to strip all possible radical and critical meaning from art itself in the name of free expression. President Eisenhower's words are illustrative of this point:

Our aim is more subtle, more pervasive, more complete. We are trying to get the world, by peaceful means, to believe the truth. That truth is that Americans want a world at peace, a world in which all people shall have opportunity for maximum individual development. The means we shall employ to spread this truth are often called "psychological". Don't be afraid of that term because it's a five-dollar, five-syllable word. "Psychological warfare" is the struggle for the minds and wills of men.³⁹

When art is caught in the battle between freedom and control by the state, the power of the state becomes visible. The Cold War demonstrates that, even in a culture claiming a dedication to free expression such as the United States, the pressures to produce appropriate cultural products can be immense.

Indirect funding of American arts, ideas, and culture from the '50s through the end of the '80s helped to solidify American cultural superiority (as planned) and to support the arts in the United States, even if it was done through unacknowledged channels. Perhaps yet another irony of American Cold War ideology is that the contemporary global cultural superiority attributed to the U.S. free market, and the hard work of our enterprising creative class, was given a substantial jump start through Cold War spending and propaganda efforts designed and implemented by the U.S. government. Dizard notes that the budget of the USIA made it an important client for commercial American media. "As a result," he notes, "large quantities of commercial media materials were exported, paid for, and distributed by the agency."⁴⁰

These early foreign policy efforts to make American culture globally ubiquitous and popular meant that American cultural domination is no accident or the result of the market's "invisible hand." Instead, many aspects of American culture were given a fairly substantial helping hand by public, if covert, funding. Dizard provides the example of the book-publishing industry, which received USIA subsidies to challenge British and French control in global book exports. He notes, "as a result, they

[publishers] are now the dominant factor in the global book industry."⁴¹ The result has been a dynamic American imperialism where "the precise effects of American soft power, and reactions it provokes, can be debated, but the reach of American soft power is indisputably global."⁴²

The United States was always embedded in an ideology of private capitalist investment that made government subsidy and support of the international spread of American culture fraught with tension, even as these powerful industries were able to create global markets with taxpayer funding. As the Cold War ended, so too did funding for cultural exchanges, even the most successful ones.⁴³ However, our cultural policy remains mired in politically motivated and ideologically driven trajectories. As Hyde notes, by 1990 with the demise of the Cold War, the United States entered the "era of market triumphalism" where public funding for the arts and sciences was cut drastically so that the market could prevail.⁴⁴ At least from the public sector, according to a report done by the National Endowment for the Arts, the United States spends less on public funding for the arts than other OECD countries.⁴⁵

It wasn't until 1965 that the National Endowment for the Arts (NEA) was created and it has always been a controversial agency.⁴⁶ Until the 1980s it was the largest source of support for artists available in the United States; however, after Ronald Reagan the NEA suffered budget cuts and additional attacks.⁴⁷ Federal appropriations in 2010 were half of what they were 25 years previously and all funding from state, federal, and local agencies is down 31 percent from 1986 once adjusted for inflation.⁴⁸ Public funding remains controversial because conservative voices seek to censor art that they disagree with, while free market voices believe art should be able to fund itself if it is worthy. For the state to overtly impose its ideological message on artists would publically highlight the hypocrisy of the United States' position regarding the free exchange of information. Thus, in the United States it remains inconsistent from an ideological perspective for the government to more fully support the arts, even though to do so would help to better align art with national goals. Furthermore, the United States has no department of cultural affairs that might make its mission the preservation of the vast cultural heritage generated over U.S. history. Instead, preservation is hindered by copyright and left to the private corporations who own the content, meaning the vast majority of American cultural heritage is lost or unavailable.⁴⁹

Artists in the United States understand that private philanthropy and personal resources are the avenues of choice for creative expression, placing even more emphasis on market-based cultural creation and of course in the process elevating copyright laws to an even higher position of importance within policy discussions. In this way artistic merit will be judged not by "ideological" criteria such as those imposed by communist or authoritarian regimes, but by market criteria. The vast majority of artists working in the United States under the free market system do not make a living at their art, a situation Ivey identifies as a lack of respect for artists.⁵⁰ From the American perspective, the work produced is not ideological and thus created in freedom because the interests of the state do not dominate the cultural discourse. Instead of consolidating copyright power in the state, the U.S. system consolidates copyright power in the culture industry.

Emphasizing private funding for the arts and reducing the role of state-sponsored cultural policy is of course exactly the ideological message the United States wishes to communicate globally. It is one reason why copyright law has become such a key policy issue internationally for the United States—culture is a form of private property that must be respected no matter where it flows. Prior to the last few decades, when copyright has come to dominate our international models of cultural exchange, the United States saw the flow of culture and information as central to its ideological war against communism, and the dominant theme was not the privatization and ownership of culture but the ways in which the flow of culture, especially its flow behind the iron curtain, could be accomplished.

Today, the United States structures its cultural policy as a “free market” policy with relatively little oversight regarding what type of art is produced but substantial oversight over art as property and how it is purchased and used. To highlight just how much our dialogue about culture has changed to become even more brand saturated and market conscious, contrast the “branded” communications of the modern Radio Free America as understood by our elected officials with the statements made by George N. Shuster below.

George N. Shuster, writing for the American Assembly volume on cultural relations in 1962 summarized his analysis of the primary experience gained so far in constructing American cultural policy. He noted that exchange of people and promoting the idea of freedom were both central to our policy goals. He followed these two objectives with the idea that “books, periodicals and documentation in forms associated with the term ‘visual aids’ (including radio and television broadcasts) are important resources of cultural policy, especially when distributed in ways which themselves illustrate the character of American life—one such way being the open shelf library.”⁵¹ Shuster’s claim is interesting because it shows how far removed our contemporary ideology of cultural exchange is from that embraced by academics and policymakers interested in foreign policy in the ‘60s.

Shuster suggests that we should be distributing these cultural materials not simply to help familiarize those living abroad with American values and ideas, but also using the library as a vehicle to do so. The library is evidence of democracy at work and the United States sponsored over 200 open libraries throughout the world.⁵² What is most striking is his claim that an open library system, where books and audiovisual materials would be shared freely best exemplifies, to him, the American values associated with our way of producing and exchanging knowledge. Such a view seems under threat within the United States from 40 years later where libraries struggle with funding and find themselves to be labeled serious copyright infringers: so much so that they have established their own lobbying group to seek to preserve the free flow of information that copyright owners seek to shut down.⁵³ Additionally, as the last chapter demonstrated, foreign students seeking knowledge from U.S. educational sources are now understood as walking intellectual property thieves who take our knowledge and return home to compete against us.

Conversely, the Soviet approach is a substantially different one. Soviet cultural policy meant that artists were state employees, considered a prestigious position

within the state bureaucracy. The Soviets funded innovative work through research institutes but not through the allocation of private rights for innovation.⁵⁴ Soviet creators were guaranteed their positions as long as they created art within a system of “ideological conformity.”⁵⁵ Thus, many artists held relatively secure positions with guaranteed incomes.

In their 2002 book, *Socialist Cultures East and West*, co-editors Dubravka Juraga and M. Keith Booker argue that most of what we know about communist cultural policy has been so filtered through the lens of Western ideology as to misrepresent the system at many levels. While it was generally understood by Americans that the Soviets were experts at propaganda, in the experience of the authors:

Cold War visions of brutally effective communist mind control are inaccurate to the point of being almost comical. It is, after all, the West, especially America, that has perfected modern techniques of advertising, public relations, and other forms of attitudinal control. The Eastern European regimes, on the other hand, were almost totally inept at that kind of psychological manipulation at which the American media are so good.⁵⁶

It is perhaps difficult to discern just how effective American propaganda techniques during the Cold War were at stifling a truly free and open exchange of ideas between communist-styled regimes and Western capitalist ones.

In fact, Juraga and Booker argue, “the American propaganda machine was so effective that it, to a large extent, even won over the hearts and minds of the citizens of the Soviet bloc, even though those minds had supposedly been scrubbed clean by communist brainwashing.”⁵⁷ In contrast to the American story that only Western culture is pure, Juraga and Booker question why some of the most important works of literary quality coming from the Soviet Union were inaccessible to Western audiences and in fact were considered lesser art forms because of the political system under which they were produced. Strangely, Western culture—books, movies, and more—was available in the Soviet bloc countries while Soviet literature was almost impossible to acquire in the West unless it was work by dissident authors publishing without the express permission of the Soviet system.⁵⁸ The United States may not have censored its own authors overtly, but it was also not interested in a free flow of information.

There should be no doubt that the communists saw culture as political. There is also public evidence that the Soviet system prosecuted authors who were deemed anti-Soviet.⁵⁹ However, as is the case in the United States and elsewhere, despite the legal regimes and political conditions imposed by the state, Russian authors continued to write and distribute their works.

Politically, in an effort to align the people with the state, communists more generally expressed an interest in folk culture. Folk culture was seen as an authentic expression of “the people” and the Soviet regime sought to utilize this folk culture to align the communist state with authentic culture. As Reuss and Reuss clarify, “Artists in every field were faced with defining the new communist alternative culture as it

applied to their own discipline and instituting concrete programs of activity reflecting their definitions.⁶⁰ It is not surprising that Soviet cultural policies highlighted the prominence of a communist alternative.

The Cold War helps to put our contemporary copyright-infused cultural debates into the perspective of larger ideological global power struggles. These battles were fought not simply through the production of culture and arguments regarding cultural superiority, but also through the production of the laws necessary to protect culture within a free market or communist-based system. While the chapter so far has examined the general flow of ideas and culture as made manifest by the ideological clash of the metanarratives of the Cold War, I'd like to narrow my focus to the issue of copyright law and how the law itself produced fundamentally different ideological approaches to the protection of art and culture, though in the end the goals of the different copyright systems seem to have converged.

Cold War copyright

The first Russian copyright law was enacted in 1828 and was integrally tied to Russian efforts to control publishing.⁶¹ While Russia has a rich and long literary, musical, and artistic tradition, the 1828 copyright law established protection for literary works produced by nationals while retaining the right to publish and translate foreign works without permission of the copyright owner.⁶² Russia did not grant any protective rights to foreign publications until the revision of its copyright codes in 1911.⁶³ However, the reforms embraced by the 1911 law did much to align Russian copyright with international norms.⁶⁴

Of course, Russia was not alone in denying national treatment to foreign creators. Generally speaking, copyright helps define the boundaries of the nation by protecting those who publish within its borders while often failing to provide protection to those who publish without. A common complaint of nineteenth-century copyright law was its nationalist tenor, which extended protection only to works published within the national borders of the state. The free exchange of copyrighted works was helpful for development, and nations were hesitant to halt a system where domestic businesses were able to appropriate "free" foreign cultural material. American and British authors both complained about the lack of protection across borders and decried the loss of revenue that resulted from massive copyright piracy abroad. Russia was no exception.

The Soviet era ushered in a new paradigm of protection, where the state sought to nationalize cultural products and copyright laws were changed to reflect this intent. Socialist ideology placed more value on the contribution that the individual can make to the social good rather than the private benefit that the individual can gain from their creation, resulting in a copyright system designed to use the innovations of the individual for the betterment of society as a whole.⁶⁵ At a very specific level, the law was designed to support the larger social structure, while individual benefits were less supported, though not entirely without support. As Mira T. Sundara Rajan notes, "the Soviet treatment of culture would come to reflect the complex dynamic between

state, law, and literature in a society where the government aspired to totalitarian domination."⁶⁶ This included the nationalization of classic Russian literary works.⁶⁷

While other national copyright laws ostensibly create such a balance, for example, the United States includes language governing the "fair use" of copyrighted works, the Soviet balance endorsed "free use," which meant that remuneration was not required to "disseminate knowledge and culture freely to the general population."⁶⁸ While what might be included in "free use" is not clear, the underlying principle seems to be that derivative works are far more likely to be encouraged under the former Soviet copyright law than under American law; this goes beyond protections given by "fair use" in the United States.⁶⁹ Furthermore, Soviet law found the publication of works without permission for educational and scientific purposes to be acceptable and left unclear how much photocopying, especially of scientific materials, would be allowable.⁷⁰ Free use seemed also, at least during the '70s to include public broadcast of programs.⁷¹

The Fundamental Principles of Civil Legislation, the Soviet copyright law enacted in 1925, helped create the socialist paradigm for copyright protection. It was incorporated into the Russian Constitution of 1977, which "guaranteed Soviet citizens freedom of scientific and artistic creation 'in accordance with the goals of communist construction.'"⁷² Thus, the Soviets centralized control of all media and cultural outlets. Lenin's economic policies decentralized cultural production to some extent, but the Soviet state retained the right to nationalize works of authorship and did not extend rights to foreign authors unless they published their work in the Soviet Union.⁷³ For the Soviets, one of the important conceptual struggles was how to assert a system of copyright that was not reliant upon the notion of private property and at the same time protect the larger cultural benefit of wide dissemination outside a capitalist (and thus exploitative) system.⁷⁴

Given that neither the United States nor the Soviet Union had signed the Berne Convention during the Cold War (which the U.S. only did in 1989 and Russia in 1995), a separate treaty, the Universal Copyright Convention (UCC), administered under the auspices of UNESCO, governed both Soviet and U.S. international copyright law. In 1973, the Soviet Union notified UNESCO that it would sign on to the UCC, marking its acquiescence to its first international copyright regime.⁷⁵ Membership in the UCC required Russia to protect foreign works within its borders and initially their accession to the UCC was seen as a positive move within copyright circles.⁷⁶

However, concern was almost immediately voiced about the potential efforts the Soviet Union would make to censor foreign publication. The fear was that the Soviet state would use copyright law to further censor Soviet authors seeking to publish abroad and hinder the possibility of dissident writing.⁷⁷ The situation was more complex than the U.S. popular press reported, as Peter Maggs pointed out.⁷⁸ The Soviets did exercise much more centralized control over the distribution of foreign works than did countries such as the United States, but these regulations were already well established in Soviet copyright policy and signing the UCC did not change their underlying structure.⁷⁹

After 1973, the All Union Copyright Agency, created by the Soviets to centralize licensing and control of artistic work abroad, granted permission for foreign publications of domestic works.⁸⁰ This meant that foreign publishers also had to go through the All Union Copyright Agency to publish in the Soviet Union.⁸¹ Prior to the UCC, protection of foreign authors within the Soviet Union was tenuous, but after signing the UCC, the Soviets agreed to extend protection to unpublished works as well as works by non-Soviet authors if they were published after the date of accession to the treaty (thus previously published works may not receive protection).⁸² Furthermore, the UCC meant that Soviet authors would be given protection of their works within the United States.⁸³

However, much like the United States, the Soviet Union had fairly standard copyright laws that met international levels of protection, even as they sought to embrace a socialist paradigm for creative protection. The types of works protected were similar in both the United States and the USSR.⁸⁴ The requirement of originality is also similar between the two states. The Soviet system tends to value the concept of "social usefulness" as a measure of financial reward through their more centralized publication system.⁸⁵ One of the key differences was that the Soviets supported moral rights far more than the Americans.⁸⁶ U.S. law protects those things called "moral" rights under a system of unfair competition, defamation, privacy, or contract.⁸⁷

The politics of publishing in Russia were different from the United States. In the United States, it is the market that acts as a censor, for the most part (absent obscenity issues), and works that serve a market function are published despite their political content. A Russian author, by contrast, might produce what was called a *samizdat* work. Publishing through official channels assured the author copyright and royalties. An unofficial samizdat publication, typically by a dissenting author, would immediately enter the public domain and hence could be reproduced without authorial control.⁸⁸ A samizdat work might receive little in the way of foreign protection, too. However, if the ideas were considered essential, an author may choose this method of publication, again suggesting that ideology can trump economic incentives.

What is made clear by the UCC and becomes central to future international negotiations regarding copyright is that protection of intellectual property remains both the domain of the state and tied to concepts of national identity. The UCC demands "national treatment" of copyrighted works, not that the copyright laws established become internationally uniform.⁸⁹ This national treatment firmly links the creative works to a national identity, even as they might flow internationally. As the Soviets sought to unify

As the Soviets sought to unify culture with the state system, art provided a vision for a communist world. The Soviets were intent upon maintaining a monopoly on ideas.⁹¹ Edit Andráš argues that Western artists worked within the context of "booming consumerist capitalism," where art became "luxury goods, changing hands in the art market always at risk of being swamped by the flood of commercial objects that diminishes any distinction between common and art objects."⁹² Eastern European artists, by contrast, functioned under a "state-dictated official art."⁹³ To remain on the edge, Western artists began focusing more on the concept of art and less on

the object itself, rendering their work more aesthetically abstract. For the Eastern block, the object was sufficient to voice the message, and thus the context for art didn't change until after the 1980s.

In terms of art, the CIA was especially enthralled with abstract expressionism. The stark distinction between abstract expressionism and socialist realism was endorsed and supported by CIA funding so that "socialist realism would look even more stylized and more rigid and confined."⁹³ However, David Caute warns against placing too much emphasis on CIA involvement in the abstract expressionist movement. While there were clearly pro-capitalist forces (like the Rockefellers) subsidizing modern art, Caute points out in contrast to those who seek to highlight the covert role of the U.S. government in promoting art, that there was widespread dislike for avant-garde art on both sides of the iron curtain.⁹⁴ The point remains, however, that American cultural policy was wrapped into a larger ideological struggle where many types of artistic expressions were mobilized to create differences between the United States and its communist enemy. In the confused anti-communist world of American politics, even as some embraced avant-garde art, others decried it for being a communist tactic itself.⁹⁵

Juraga and Booker disagree with the assessment that socialist art is rigid and confined and instead suggest that a much more complex and the ideological struggle was at work. The dichotomy between modernism and political art of socialism, where modernist art is seen as "the epitome of aesthetic achievement" while all other art is less authentic, is, according to them, "one of the central myths of American cultural history."⁹⁶ One can only imagine that, despite the political system within which Soviet art was produced, there were numerous avenues for a rich variety of cultural expression. Juraga and Booker argue that, "just as socialist societies are organized upon fundamentally different premises than contemporary bourgeois societies, so too is socialist art built upon different aesthetic principles than bourgeois art. One of the central driving principles of bourgeois aesthetics is to present bourgeois criteria as universal, so that all forms of art must be judged by those criteria."⁹⁷ If we extend to the Soviet system its own aesthetic paradigm and a different creative process, then it should come as no surprise that their approach to the legal protection of creative works is also different, but even given a different form of copyright protection, Soviet Union artists were able to produce great cultural work and technological innovation without the free market intellectual property system of the West.

In the case of Cold War politics, 30 years of cultural exchange beginning shortly after the death of Stalin in 1958 and culminating in the fracturing of the Soviet system in the late '80s was instrumental in undermining Soviet ideology.¹⁰⁸ The tight control of ideas most closely associated with Stalin was loosened after his death, though the Communist Party continued to attempt to control political ideas tightly.¹⁰⁹ Both formal and informal cultural exchange contributed to capturing the minds of the Russian people. Formal exchange included American symphonies, art, ballet, and musical groups performing with the permission of the Soviet government.¹¹⁰ These cultural exchanges also brought numerous Russian artists and performers to the West in an effort to highlight communist cultural talents. At the level of high culture, Russia saw itself very much within the same European tradition, with an emphasis on

ballet, classical music, and art. It also sought to communicate the talents of its people through traditional music and dance.

Informal exchanges include what today we consider intellectual property piracy by Russian citizens. Though, interestingly, the American approach to the Cold War kept most Russian culture safely out of American hands and thus the exchange was one-way. The subversion of Soviet ideology, it could be argued, was in part made possible through massive copyright infringement. From video pirates, first pirating television signals and then using VHS tapes to watch Western television and movies, to illegal viewing houses showing American films, it was piracy that allowed Western culture to spread rapidly through the Eastern bloc. Imagine the world where the United States had successfully shut down the flow of pirated work throughout the Soviet bloc, working in tandem with an authoritarian regime, which also had an interest in ensuring that these products did not get viewed.¹⁰¹

From a copyright perspective, the Soviet system marks one of the few examples of a different balance between the interests of the cultural producer and society more generally. One of the primary interests the Soviets had, for example, in nationalizing culture was to help spur literacy and development as Russia sought to modernize after the revolution, including access to foreign works that could contribute to development.¹⁰²

After the disintegration of the Soviet Union, state control over culture and the arts gave way to the evolution of cultural policy derived from Western Europe and the United States.¹⁰³ According to Rajan, reforms in Russian intellectual property law after the collapse of the Soviet Union were motivated by the concern that Russia was falling behind technologically and that greater freedom of expression was part of Gorbachev's policies of perestroika, and, finally, because the United States began exerting even greater pressure on Russia to protect works of foreign authorship.¹⁰⁴ One consequence of the radical changes brought about by the collapse of the Soviet Union was that previously state-funded artists were no longer sponsored and instead culture became market based.¹⁰⁵ Such a transition was very difficult for Soviet artists to make because formerly secure positions were gone and new rules were developed.

While the copyright tensions with Russia predate the collapse of communism, with the ideological battles of the Cold War behind, in the 1990s, the United States intensified its pressure to fight copyright piracy.¹⁰⁶ At the end of the 1980s the first efforts to work out an agreement between the Soviet Union and American industry players over official access to Soviet entertainment markets were made.¹⁰⁷ Prior to the fall of communism the Soviet state had funded and supported strong technological research, but had not focused on information technology. This meant that the post-Soviet era was one where Russians sought to jumpstart their own technological development through piracy.¹⁰⁸

When the Iron Curtain fell, and the United States began negotiating Most Favored Nation (MFN) status for Russia, complaints about Russian copyright piracy grew louder.¹⁰⁹ Decades of Russian piracy of U.S. entertainment products without payment was placed high on the agenda once the West "won" the Cold War. In 1991, Jack Valenti argued that the rampant piracy of movies threatened untapped markets

for American films and violated copyright law.¹¹⁰ Valenti and the Motion Picture Export Association of America banned the distribution of movies to the Soviet Union and boycotted the Moscow international film festival.¹¹¹ Furthermore, Valenti's efforts to protect intellectual property stalled the passage of a United States-Soviet Union Trade Agreement until stronger protection of copyrighted materials were included in the agreement.¹¹² In 1999, piracy of intellectual property goods in Russia was called an epidemic and there was already in place pressure by the United States to enforce existing laws.¹¹³

The United States and the pull of international organizations including the WTO and WIPO have been instrumental in getting Russia to reformulate its copyright laws.¹¹⁴ Russia began to revise and enforce copyright laws. As Paul Krug notes about statutory developments:

Piracy has been the instrument by which chaos produces a cacophony of new production and transmission voices in the former Soviet Union. The new statute may cause a shake-out among broadcasters, cable operators, and the operators of viewing salons—forced to choose between entry into costly licensing agreements or to risk the sanctions associated with unauthorized showings. State broadcasters and the more financially secure independents now have a powerful weapon against upstart entrants in the marketplace of ideas.¹¹⁵

As Russia embraces capitalism, it uses copyright law the way the West does—to allow entrenched and powerful interests to halt the development of competition and instead monopolize copyrighted content within a web of corporate control.

Of course, the United States is very interested in controlling the evolution of Russian copyright law and it has used its influence to assure that the law continues to be developed and enforced in a manner consistent with U.S. interests. Specifically, the United States uses the United States Trade Representative's Special 301 provisions to keep Russia on the "priority watch list" as well as keeping Russia focused on its international obligations under the TRIPs agreement.¹¹⁶ The 1993 Russian Copyright Act, while retaining provisions that protect a larger public good in the law, mirrors international standards.

One interesting contribution that Russian copyright law makes is the way in which it protects moral rights in public domain works. Their policy seems to link public domain works to national culture. According to Rajan, the moral rights of authorship, name, and reputation remain linked to public domain works and a special fund designed to collect a royalty from works in the public domain was established by the law and this will go towards an author's fund to be administered to current and future creative artists.¹¹⁷ These moral rights provisions are one way in which Russia has retained some connection to the copyright laws of the Soviet era, while still working to meet the international standards required by the TRIPs agreement.¹¹⁸

The story of Russian copyright piracy, the erosion of Soviet ideology in the face of a persistent ideological battle with the West, and the efforts of the West to secure its cultural superiority through intellectual property rights help to define the tensions

that exist between the cultural flows put into motion that link even the most opposite of states. It is also the case that both the United States and the Soviet Union established and protected creative work under a system of copyright law, albeit very different laws. In the end, however, what the flow of communication tells us about state control over its sovereign territory is that exposure to the world of expressions and ideas can sound the death knell for state control.

The ideological battle that was the Cold War also demonstrates the efforts by the state to use the national border as an impermeable boundary even as it is constructing laws to help to facilitate the foreign exchange of ideas. Aside from the struggle between the ideological discourses of capitalism and communism at work here, a struggle that co-opted cultural expression as part of its weapons systems, the tale told by Cold War cultural politics is one of culture in the service of the state and its unifying project while also dealing with the ways in which cultural flows fragment and disrupt national cultural identity. The modern Soviet state was a monolithic entity that brought out local traditions when they served state purposes. The American nation was presented globally as a unified project that served freedom of expression. However, both grand narratives concealed the diversity of culture and expressive acts that were locally generated or historically situated. As these grand narratives have been replaced with the logic of regionalization and cultural flows, a new way of looking at culture and its protection is emerging.

The state of national culture

The Cold War story helps demonstrate that even under the most rigid of political structures, the flow of culture across territorial borders has consequences for both state control and the evolution of culture. Efforts to promote cultural diversity instead of assimilation and recognize difference instead of cultural superiority, create dissonance for national projects of unification. The fragmented nature of contemporary identity politics is testimony to the difficulties of embracing a multicultural framework while at the same time shoring up the boundaries of the nation as having intrinsic meaning.

States often have an uneasy relationship to the culture they are supposedly in line with in that culture tends to be plural, diverse, and ever changing, and many cultural expressions are politically charged. In fact, cultural expressions are often the location of a discourse that is highly critical of nation building and state-based projects. In many times and places, it is through art that key political ideas and expressions that critique state power and policies are made, thus putting artistic expression directly at odds with the state's attempt to legitimize itself. Even as the state establishes policies regarding culture, those actively producing culture use their talents to fight the state. For authoritarian states this might mean seeking to resist control over artistic expression as it is forced to align with state interests. In capitalist countries resistance takes the form of a critique of the market and the elimination of all aspects of artistic creation but the profit-based ones.

From the earliest inception of laws protecting the copy, copyright has been part of the foundational legal structure that demonstrates the role (and importance) of the

sovereign in the protection of cultural production. The free market alone cannot create the regulatory conditions through which to guarantee the protection of intangible works; for this the state is needed. One way in which states seek to be relevant within the domains of culture is by erecting laws that are ostensibly designed to help support innovation and creativity. Nation-states are instrumental in developing formal and informal cultural policies to support creative and innovative work. In doing so, policy makers and governments appropriate the discourse of creativity to help provide support for sovereign control over a territory.¹¹⁹ It is culture that can promote "national identity, unity, and sovereignty," as well as employment for citizens.¹²⁰ In the modern neo-liberal state, where citizens are clients and states are service providers, the state has the burden to help create jobs, which in a creative economy is done through cultural and innovation policy, and more specifically through the construction of intellectual property laws.

Aside from legal rules guiding the production, transmission, and scope of use of creative work, most states also tend to support the arts through grants, the commissioning of public art, and in many cases the creation of state agencies that control media-based creative works as a vehicle for national cultural products. Canada and France, for example, require established quotas of airtime for national artists who may not otherwise be able to compete with those imported from other countries. This "shelf space" exists so that Canadians (or the French) can view the products of their culture.¹²¹ Furthermore, virtually all cultures seek to establish a national artistic heritage through public art, museums, and monuments. These become visible icons of a city, state, or nation, which can tell the story of national unity, though they may also allow the viewer to experience the difference of culture as well.

National policymakers tend to reduce the complex narrative of culture and innovation to a discourse on national creativity and seek to fit it within national boundaries. Generally, state-based cultural policy has the goal of promoting national culture both at home and abroad. The state has an interest in the promotion of culture for several reasons. First, the state might have an interest in sharing insights into how people within its borders live, create and play. Such cultural projects humanize the state and its people, as well as increasingly 'branding' a specific state through the production of a unique cultural experience that can be had while within its borders. Furthermore, the exportation of a unique national culture through assorted products helps support a tourist industry where one might travel to a foreign country to experience the local culture and seek out something authentic and new to return home with.

Besides supporting culture as a tourist product and to facilitate cultural exchange, the state may support traveling performers or shows that exemplify something about the national culture. For example, the U.S. Department of State includes a Bureau of Educational and Cultural Affairs that in 2010 supported American Blues performances abroad as indicative of American culture. The Bureau of Educational and Cultural Affairs was also encouraging cultural exchange programs and it promotes American arts and music more generally as well.¹²²

It should be noted that, while each state makes claims to a unique national culture, to something that must be protected from outside forces, in most cases even these

vestiges of national culture—traditional music or dance—pre-date the formation of the state itself, or, as the case of blues suggests, did not evolve because the state created the conditions of survivability for creative people but because people create music, art, and culture even when the state actively oppresses and discriminates against them. Culture that derives primarily from the experience of immigrants and those disenfranchised by the state is only later appropriated as an example of a specific national narrative that can unite a country. Furthermore, as later chapters will illustrate, the notion of a unique national culture, or an authentic local, regional, or traditional culture, is simply inaccurate in the face of the always existing exchange of culture.¹²³

A second reason the state has an interest in the exchange of culture, and perhaps more important from the viewpoint of the culture industries, is that the state protects cultural products as an important international export and seeks to shore up national culture as a source of economic output, reconstituting very diverse industries from computer software to theatre as part of the same order of things that can be exported and purchased.¹²⁴ As Mark Banks notes, cultural policy defines institutional solutions: "policy utilizes linguistic and representational devices that seek to define the 'problems' of the industry in order to offer demonstrable (and politically desirable) 'solutions.'"¹²⁵ In the United States, while culture is promoted for its intrinsic value by the Department of State, the Office of the United States Trade Representative, which has cabinet level status in the U.S. government, works with trade associations and industry to ensure that cultural products are protected as consumable goods on the international market via copyright law. The USTR places countries on a "watch list" if they are deemed to constitute a significant threat to our economic interests as understood through intellectual property law.¹²⁶

Outside the United States, many countries have ministries of culture that focus specifically on shaping national policy and assuring that the unique culture of the state is promoted internationally. For example, Brazil's Ministry of Culture has tended to be fairly disruptive of the efforts by countries such as the United States to assert strong intellectual property protections through the TRIPS agreement and, instead, has sought to create space for open culture through its ministry.¹²⁷ However, other cultural agencies, like the UK's Department for Culture, Media and Sport embrace the language of culture as a commodity and uncritically function to preserve culture industries as valuable national exports.¹²⁸

A final reason why the state has an interest in cultural protection and export is that culture becomes one of the ways in which the nation-state seeks legitimacy as defining and mapping out the boundaries of similarity against those of difference. The nation appropriates and free rides on cultural creation to produce national narratives that help provide coherence for the arbitrary boundaries of state control.¹²⁹ National cultural policies help create and perpetuate a discourse of authenticity and national culture, even as the possibilities of an "untarnished" culture are impossible to preserve. As Benedict Anderson notes, nationalism emerged in alignment with the "cultural systems that preceded it," identities that circulated via capitalist print-culture.¹³⁰ The sovereignty of the nation state is the safe territory upon which essentialized claims about belonging, citizenship, and national culture can be made—claims that project a

national homogeneity and unity onto the otherwise complex and fragmented field of physical territory.

Developing a "national" culture remains an important mechanism for defining what it means to belong to a given cultural group. It also conceals the diversity of expressions as well as the reality of cultural flows across what are the imagined boundaries of the nation-state. Despite the prevailing narrative of cultural authenticity and culture as a commodity asserted through policy circles and dominating the law-making process, many artists and musicians still consider culture outside its commodity form and participate in a flow of culture that transcends and in fact even relies upon the breakage of national boundaries. The idea of national culture falls apart almost immediately upon the first contact it has with a critical eye. Who can claim that their opera or ballet is authentic? What about the musical as an artistic form, which has global popularity? Painting, carving, and other artistic techniques have been shared globally, often profoundly changing the cultural expressions of groups who are exposed to them.¹³¹ Artists themselves can be expatriates and often move outside their country of origin, thus further disrupting claims regarding nationalism and culture.

Despite its best efforts to shore up notions of national culture premised upon national territories, the state actually is only a player in the larger global flow of culture. Thus, it is only possible to understand legal efforts to control culture as property within the context of international cultural flows. To move to yet another level of abstraction, because culture moves easily across territorial borders, the creation of domestic laws to protect the copy and facilitate creative work has never been sufficient. Such domestic efforts were immediately compromised by the flow of creativity across national borders. Mark Rose, for example, documents the origins of the first copyright law in England as at least in part motivated by the emergence of a "pirate" book industry in Scotland that could undersell the London bookseller monopoly, thus hampering their profits.¹³²

Once the notion of culture as an exchangeable commodity is recognized, the state must also deal with the fact that culture does not, and cannot, stop at a national boundary. The struggles during the eighteenth and nineteenth centuries over cultural flows, often deemed piracy, set the stage for the need for an internationalization of regulation regarding copyright.¹³³ Prior to the nineteenth century Berne Convention, domestic laws often protected local artists while refusing to extend protection to foreign artists. Given that the state speaks for what it would like to consider "national" culture, the legal framework developed by the state initially was intended to shore up domestic creativity while allowing easy access to foreign works. Furthermore, while it was clear that some sort of international agreement was required, the only entities with the sovereign capacity to negotiate these agreements were states.

Led by advocates of author's rights, the Berne Convention included important provisions designed to better protect copyright owners, including that of national treatment of foreign authors, meaning that the national cannot be privileged at the expense of the foreign.¹³⁴ To ground the agreement firmly in the nation-state, the convention identified creative works by their country of origin, though, interestingly,

country of origin meant the country of origin for publication, not the nationality of the author.¹³⁵ Thus, if an American author published simultaneously in the United States and the UK, the country of origin would include both America and the UK. Many commentators have pointed out the irony of the long-standing piracy associated with early American law regarding foreign works.¹³⁶ The conundrum from the state perspective as it sought to protect national interests is how to secure control over cultural products that move internationally while retaining its self-interest in a much freer exploration of culture.¹³⁷ However, it was piracy, ironically enough, that made it possible to constitute a public sphere where a notion of "national citizen" became possible.¹³⁸

The initial legal guidelines established in the Berne convention continue to be instrumental for the protection of creative works as they move globally today, meaning that the global entertainment industry retains its legal protection from a state-based system. The internationalization of cultural policy through the Berne Convention means that the state has become one of the *defining* forces in international discourse over culture. The Berne convention provisions have been incorporated into the World Trade Organization's TRIPs agreement that even more concretely ties intellectual property to international trade. Such an international system disproportionately supports the creativity of the developed countries while assuring that the global South must regulate and protect these properties in ways that would not serve their national interests, but the interests of the primary producers of cultural material worldwide.¹³⁹

There is a key conundrum that is at the heart of international intellectual property protection. On the one side, despite the need for international protection and the construction of rules regarding national treatment, the tension between the cultural flow of ideas and a state-based system of regulatory controls means that the state itself acquires legitimacy as the protector of culture. It is, after all, only states that can negotiate for their interests within the international system. Private parties, non-governmental groups, lobbyists, and the rest can seek to influence their state representative, but do not have voting power of their own. Given the bias towards state power in the international system, the state attempts to establish a unified national narrative that will allow citizens to identify with a national culture that is broad enough to contain diversity, yet unique to that nationality.

On the other hand, however, while making culture property, and developing copyright laws to protect culture as property, the internationalization of copyright law functions to undermine culture as a national product. In this way, copyright law demonstrates the larger implications of neo-liberalism for the state. As Matthew Sparke notes, "Neoliberal regimes of governance are thereby both eclipsing nation-states from above and undermining them from below."¹⁴⁰ The reterritorialization associated with neo-liberal cultural flows can help undermine the nation-state, but Sparke warns that "hegemonic territorializations are going to remain normatively national," given the current political economy of globalization and the struggle over empire and Americanization.¹⁴¹

In the world of cultural production, cultural exchange erodes claims to national culture from below as individuals and groups are exposed to new and uncontrollable

ideas. From above, the world of economic globalization, with entertainment and software corporations that transcend any given national boundaries, means that states are resigned to protecting a flow of communication that may or may not serve their national interests but do serve the economic interests of corporate entities.

The nation-state project has always relied upon the imposed fiction of national territory; culture, in contrast, is not fixed. Scholars who focus on border regions have helped highlight the tension between the efforts of the state to mark territory absolutely against the fluidity of everyday life.¹⁴² While the border is a rich territory to see the visible mixing of cultures, it is not sufficient to stop there—the hybridity of culture is at the heart of all nations. The core and the periphery are not distinct places culturally—but linked together through the flow of culture. The larger question thus becomes, what, if anything, can be said to be "authentic" about national culture if indeed the English are reading American novels and Americans are playing Russian classical music, while Colombian pop stars appropriate Cameroon's musical heritage, and Manga has become a worldwide phenomenon?

To even make a claim about national culture is to imply that a state system adequately reflects the multiple cultural practices that can be found within its borders. While the concept of the nation-state is often used to speak of a territory as a unified national culture aligned with its governing political structure, such a system, it could be argued, is the exception and not the rule. States and their territorial boundaries, especially as they have come into existence in the post-colonial world, where political borders often show little respect of any underlying cultural unity, are political constructs. They just as often break apart local cultures and assert difference based upon the regulatory practice as borders as they do speak for something natural that unites all the people living within a territory. Conversely, territorial boundaries can also capture multiple languages, cultural practices, and peoples within its boundaries resulting in a national effort to unify people behind a single identity of state construction. In all these permutations, the role of culture, cultural policy, and creativity are instrumental to constructing the legitimacy of the state. If a state does not speak for "a people" then its claim to sovereign power as legitimately held can be undermined.

So what is European culture anyway?

In the last chapter, the UK report on intellectual property suggested that it was time to seek a more balanced approach as to how we perceive copyright infringement in the digital age. The words of the Prime Minister and the results of that report are not the only indications that there may be some movement away from a pro-maximalist approach. In November of 2010, Neelie Kroes, the European Commission Vice-President for the Digital Agenda highlighted the failure of EU laws to adequately facilitate cultural sharing across national borders and called for the EU to consider copyright law in the context of developing and facilitating European culture instead of placing national barriers and restrictive agreements in the way of cultural flows.¹⁴³

Specifically, she lamented the possibility that copyright may interfere with the digitalization of publications, including orphan works.¹⁴⁴ Most striking was the way

Kroes sought to articulate a European cultural identity that transcended national borders. As she noted:

Borders are now crossed more easily than ever before in history. It is a great opportunity for artists and creators of all kinds, as art has no limits but those of our minds. Art enriches itself by eliminating artificial barriers between people such as borders between countries.¹⁴⁵

Indeed, it would seem that Kroes is staging a future borderless Europe where these "artificial" boundaries (meaning the state) are eliminated, and art itself can triumph in uniting humanity where the state has failed to do so.

Given that intellectual property laws are designed to freeze the flow of culture, as Professor Johanna Gibson has noted,¹⁴⁶ the recognition that innovation occurs through the unregulated flow of ideas has become more popular as regional entities such as the European Union have begun to reconceptualize political identity along regional instead of national lines. In the larger regional identity structure, multiple claims of cultural ownership might be made as one moves from the specific to the general. For example, Shakespeare takes on broader cultural meaning, as evidence of "European" culture, instead of simply "English" culture. Shakespeare as a result enjoys widespread popularity around the world as a classic artist whose works have transcended nationality. His work helps to solidify a discourse of belonging and cultural refinement linked with "European," or "Western" art, often defined against what is *not* European.

There has been a recent effort to define a distinct "European culture" that will align cultural creativity and production with the broader boundaries of the European Union, which is otherwise merely an economic convenience that sees national borders as a barrier to economic trade.¹⁴⁷ As the European Union begins to integrate a disparate set of nation-states into a common economic whole, issues of culture bubble to the surface. EU representatives have recognized that a common economic goal will not be sufficient to create an integrated market, because an EU without attention to culture will not have a "soul."¹⁴⁸ Such a generalized "European" culture is now being asserted against the more localized cultures still functioning behind national borders and the even more local cultures hidden by national discourses. However, even as Europe struggles to define a single culture while embracing cultural diversity, immigration has also led to fears of "too much culture."¹⁴⁹

Despite underlying fears associated with "the other," Europe is consciously building a common sense of identity through cultural policy that uses culture "as a conduit of governance and for socializing people into European citizenship and into the changing composition of the EU and its labor markets."¹⁵⁰ To create a unified culture, funding is being offered to artists through a series of different grant processes. The EU has created the *Culture 2000* project, which has since been followed up by the *Culture 2007–2013* initiative. An effort to make travel easier for artists who want to move freely across national borders is also underway.

These top-down cultural policy choices have inspired national cultures to create similar projects to boost the relevance of national cultures as exportable products. The popular

"city of culture" program initiated by the EU has been adopted by the UK, which now hosts its own "city of culture" competition to boost visibility of local culture and arts in cities across the UK. These national projects are what Banks calls "creative governmentalization," a process that "promotes artistic and creative freedom while at the same time regulating identity and ensuring conformity to rational corporate objectives."¹⁵¹

Conclusion

State efforts to preserve and protect what might be seen as "national culture" are made within the context of increasing claims to globalization of culture as well as the regionalization of economic life. Even as "national fictions" become less relevant, many countries vociferously fight battles about the relevance of national culture. "European," "Western," "Eastern," or "Asian" culture are catch phrases that contain enormous political generalizations, yet include often very different national cultures. In other words, while we talk about culture and the nation as if these terms have solid meaning, upon even the shortest inspection, the concepts become so complex that the relationship between the state and culture turns into a puzzle instead of an answer.

As mentioned earlier, while culture flows easily as people communicate, migrate, and interact, the state's goal is to create the conditions for economic return for the culture industry and, of course, promote a specific brand of culture that reflects the ideological interests of the state worldwide. Often the goal of the state is to keep cultural products from being viewed, exchanged, or used (especially if done so without adequate payment or if they violate ideological principles of the state). While the United States likes to think of itself as merely exporting a cultural product to the world, it is also in the business of exporting a view of American life that can be absorbed globally. Culture was used by the United States and the former Soviet Union, as well as all current states, to humanize the state by allowing "the other" to view its people. In the case of the United States, the state seemed willing to ignore its laws governing copyright in a larger effort to convey to those living inside the Soviet Union that a different way of life existed.

The modern state has helped to produce the seeds of its own irrelevance by facilitating regional and global governance arrangements that help culture flow across borders instead of maintaining tight control over the borders themselves. While this may have been initiated with the intent of forming economic and cultural imperialism on the part of powerful state actors, it also has created conditions under which the territorial boundaries of the state have come to mean even less, and national identities have been even further disrupted by a growing global community. In the next chapter I'd like to turn the focus to the cultural flows and methods of appropriation that link creativity to the state but also help us challenge the notion of an authentic cultural identity.

Notes

- 1 David Scott, *Radio Free Europe/Radio Liberty and Voice of America: Soft Power and the Free Flow of Information* (U.S. Government Printing Office, 2009), 3.

- 2 Goldstein, *Intellectual Property*, op. cit.
- 3 Jaak Kilmi, *Disco and Atomic War* (OU Eetriksus and Helsinki Filmi, 2009).
- 4 Ivan Zassounsky, *Media and Power in Post-Soviet Russia* (Armonk, NY: M.E. Sharpe, 2004), 4. Quoting R. Paasilinna.
- 5 Yale Richmond, "Cultural Exchange and the Cold War: How the Arts Influenced Policy," *Journal of Arts Management, Law & Society* 35, no. 3 (Fall 2005): 241.
- 6 Wu documents how one man was able to develop a system of movie censorship that "might have satisfied the Taliban" and in the process limit free speech in films for decades based upon his own understanding of morality. See: Tim Wu, *The Master Switch: The Rise and Fall of Information Empires*, Reprint (New York: Vintage, 2011), 115–24.
- 7 For a full description of the relevant government agencies and the details of the censorship of communist and leftist ideas, see: Charles Thomson and Walter Laves, *Cultural Relations and US Foreign Policy* (Bloomington: Indiana University Press, 1963), 101.
- 8 Morozov's argument about the impact of Western culture behind the iron curtain is important here. He suggests that studies showed that people who had access to Western television were less likely to want to revolt than those who did not. In other words, access to entertainment Hollywood style is a sufficient depressant of revolutionary efforts. People will put up with authoritarian regimes if they are at least entertained. While Morozov rejects the idea that cultural diplomacy (soft power) worked, even his examples suggest that it works quite well—that the ideological project of the culture industry was successful. It is important to remember that there is not much about the culture industry that is pro-democracy, simply pro-capitalism. See: Evgeny Morozov, *The Net Delusion: The Dark Side of Internet Freedom*, Reprint (New York: Public Affairs, 2012).
- 9 Jon A. Baumgarten, *US-USSR Copyright Relations Under the Universal Copyright Convention* (New York: Practising Law Institute, 1973).
- 10 Terrence Chong, "The State and the New Society: The Role of the Arts in Singapore Nation-building," *Asian Studies Review* 34 (June 2010): 132.
- 11 Ibid.
- 12 Lewis Hyde, *The Gift: Creativity and the Artist in the Modern World*, 25th anniversary edn, 2nd Vintage Books edn (New York: Vintage Books, 2007), 371.
- 13 As Thomson and Laves point out in the early 1960s, since the late '30s, the U.S. has understood the value of cultural exchanges, especially once it became important to offer an alternative to communism. See: Thomson and Laves, *Cultural Relations and US Foreign Policy*, op. cit.
- 14 Soft Power is a term coined by political scientist Joseph Nye to describe methods through which America gains legitimacy globally not through coercion but through the spread of our culture, political ideology, and policies. See generally: Joseph S. Nye, *Soft Power: The Means to Success in World Politics* (New York: Public Affairs, 2004).
- 15 William Glade, "Issues in the Genesis and Organization of Cultural Diplomacy: A Brief Critical History," *Journal of Arts Management, Law & Society* 39, no. 4 (Winter 2009/2010): 242.
- 16 Fraser documents that the "free flow doctrine" was countered by UNESCO in the 1980s with the notion of a "New World Information and Communication Order" that would challenge the monopoly claimed to be controlled by Western media. Matthew Fraser, *Weapons of Mass Distraction: Soft Power and American Empire* (New York: Thomas Dunne Books, 2005), 20.
- 17 Shirky is one of the recent scholars making arguments about the power of crowds for economic innovation. Shirky, *Here Comes Everybody*, op. cit.
- 18 David A. Smith, *Money for Art: The Tangled Web of Art and Politics in American Democracy* (Lanham, MD: Ivan R. Dee, 2008), 38.
- 19 Quoting Representative Charles Howell. Ibid., 37.
- 20 Robert Blum, "The Flow of People and Ideas," in *Cultural Affairs and Foreign Relations* (Englewood Cliffs, NJ: Prentice-Hall, 1963), 5.
- 21 Thomson and Laves, *Cultural Relations and US Foreign Policy*, op. cit., 31.

- 22 Ninkovich makes this argument in his study of American cultural policy before and through the Cold War. Thomson and Laves take care to elaborate that U.S. government programs wanted to avoid replacing private networks of cultural exchange so that they could clarify that government funding for the arts and thus control over them was only minimal. See: Frank A. Ninkovich, *The Diplomacy of Ideas: U.S. Foreign Policy and Cultural Relations, 1938–1950* (Cambridge: Cambridge University Press, 1981), 176–77; Thomson and Laves, *Cultural Relations and US Foreign Policy*, 40.
- 23 Wilson Dizard, *Inventing Public Diplomacy: The Story of the U.S. Information Agency* (Boulder, CO: Lynne Rienner Publishers, 2004), 3.
- 24 Ibid., 4–6.
- 25 Ninkovich, *The Diplomacy of Ideas*, op. cit., 177.
- 26 Dizard, *Inventing Public Diplomacy*, 4–5, op. cit.
- 27 Georg Glasze, "The Discursive Constitution of a World-Spanning Region and the Role of Empty Signifiers: The Case of Francophonie," *Geopolitics* 12, no. 4 (Winter 2007): 245.
- 28 Thomson and Laves, *Cultural Relations and US Foreign Policy*, op. cit., 109–11.
- 29 As Saunders puts it:

Cultural freedom did not come cheap. Over the next seventeen years, the CIA was to pump tens of millions of dollars into the Congress for Cultural Freedom and related projects. With this kind of commitment, the CIA was in effect acting as America's Ministry of Culture.

Frances Stonor Saunders, *The Cultural Cold War: The CIA and the World of Arts and Letters* (New York: New Press, 2000), 129

- See also Olga Zaslavskaya, "From Dispersed to Distributed Archives: The Past and the Present of Samizdat Material," *Poetics Today* 29, no. 4 (Winter 2008): 687–88. Zaslavskaya details the U.S. memorandum that established the covert CIA funding for media-related activities to fight Soviet ideology.
- 30 Dizard, *Inventing Public Diplomacy*, op. cit., 141.
 - 31 Saunders, *The Cultural Cold War*, op. cit., 134–35; Dizard, *Inventing Public Diplomacy*, 140, op. cit.
 - 32 Dizard, *Inventing Public Diplomacy*, op. cit., 5, 134.
 - 33 David Cauter, *The Dancer Defects: The Struggle for Cultural Supremacy During the Cold War* (Oxford: Oxford University Press, 2005), 542.
 - 34 Jessica Glenow-Hecht, *Sound Diplomacy: Music and Emotions in Transatlantic Relations, 1850–1920* (Chicago, IL: University of Chicago Press, 2009), 219.
 - 35 Dizard, *Inventing Public Diplomacy*, op. cit., 135.
 - 36 Saunders, *The Cultural Cold War*, op. cit., 70, 98; Fraser, *Weapons of Mass Distraction*, op. cit., 28.
 - 37 Dizard, *Inventing Public Diplomacy*, op. cit., 180.
 - 38 Paul Buhle, *Radical Hollywood: The Untold Story Behind America's Favorite Movies* (New York: New Press, 2002); Richard Reuss, *American Folk Music and Left-wing Politics, 1927–1957* (Lanham, MD: Scarecrow Press, 2000); Fraser, *Weapons of Mass Distraction*, op. cit., 51–63. Buhle argues that indeed there were numerous progressives and communists working in Hollywood during the McCarthy era. Fraser also documents the radical politics of many within Hollywood. However, he also is clear that the owners were interested in supporting the capitalist agenda, even where writers and actors might be more distinctly communist. Reuss traces the history of folk music and the interest it spawned both in U.S. radicals as well as the Soviet regime.
 - 39 Quoted in Saunders, *The Cultural Cold War*, op. cit., 148.
 - 40 Dizard, *Inventing Public Diplomacy*, op. cit., 6.
 - 41 Ibid., 7, 183–85.
 - 42 Fraser, *Weapons of Mass Distraction*, op. cit., 32.

- 43 Glade, "Issues in the Genesis and Organization of Cultural Diplomacy," op. cit., 247.
- 44 Hyde, *The Gift*, op. cit., 376.
- 45 The report finds that the U.S. spends an average of \$6 per person on direct support of the arts, compared to most other OECD countries where direct art spending can be as high as \$85 per person (Germany). Instead, the United States tends to encourage indirect arts funding through private tax-related write-offs. See: National Endowment for the Arts, Research Division, *International Data on Government Spending on the Arts*, 2000, www.nea.gov/research/ResearchNotes_chrono.html; Ivey puts the numbers of U.S. spending on the arts at 50 cents per person compared to \$60-\$80 spent in European countries. Bill Ivey, *Arts, Inc.: How Greed and Neglect Have Destroyed Our Cultural Rights* (Berkeley: University of California Press, 2010), 237.
- 46 Smith, *Money for Art*, op. cit., 78.
- 47 James Heilbrun and Charles M. Gray, *The Economics of Art and Culture* (Cambridge: Cambridge University Press, 2001), 278.
- 48 Angela Han, "Public Funding for the Arts: 2010 Update," *Grantmakers in the Arts*, 2010, www.giarts.org/article/public-funding-arts-2010-update.
- 49 Ivey, *Arts, Inc.*, op. cit., 51-54.
- 50 Ibid., 63-64.
- 51 George N. Shuster, "The Nature and Development of U.S. Cultural Relations," in *Cultural Affairs and Foreign Relations* (Englewood Cliffs, NJ: Prentice-Hall, 1963), 22-23.
- 52 Dizard, *Inventing Public Diplomacy*, op. cit., 179.
- 53 "Library Copyright Alliance," accessed February 10, 2011, www.librarycopyrightalliance.org/about/index.shtml.
- 54 Susan Tiefenbrun, "Piracy of Intellectual Property in China and the Former Soviet Union and Its Effects upon International Trade: A Comparison," *Buffalo Law Review* 46 (Winter 1998): 46.
- 55 Sofia Tchouikina, "The Crisis in Russian Cultural Management: Western Influences and the Formation of New Professional Identities in the 1990s-2000s," *Journal of Arts Management, Law & Society* 40, no. 1 (Spring 2010): 79, doi:10.1080/10632921003603950.
- 56 Dubravka Juraga, *Socialist Cultures East and West: a post-Cold War Reassessment* (Westport, CT: Praeger, 2002), 4.
- 57 Ibid.
- 58 Ibid., 5.
- 59 Mira Sundara Rajan, *Copyright and Creative Freedom: a Study of Post-socialist Law Reform* (London and New York: Routledge, 2006), 205.
- 60 Reuss and Reuss, *American Folk Music and Left-wing Politics, 1927-1957*, op. cit., 40.
- 61 Sundara Rajan, *Copyright and Creative Freedom*, op. cit., 80.
- 62 Connie Neigel, "Piracy in Russia and China: A Different U.S. Reaction," *Law and Contemporary Problems* 63 (Fall 2000): 181.
- 63 Ibid., 181-82.
- 64 Included in the changes were the idea of an exclusive right to the author and extension of the copyright term to the life of the author plus 50 years, a protection of oral culture and folklore, as well as protection for the moral rights of the author. See: Sundara Rajan, *Copyright and Creative Freedom*, op. cit., 76.
- 65 Tiefenbrun, "Piracy of Intellectual Property in China and the Former Soviet Union and Its Effects upon International Trade: A Comparison," op. cit., 48.
- 66 Sundara Rajan, *Copyright and Creative Freedom*, op. cit., 89.
- 67 Ibid., 90.
- 68 Lana C. Fleishman, "The Empire Strikes Back: The Influence of the United States Motion Picture Industry on Russian Copyright Law," *Cornell International Law Journal* 26 (Winter 1993): 196-97; Michael A. Newcity, *Copyright Law in the Soviet Union* (New York: Praeger, 1978), 108-09.
- 69 Peter B. Maggs, "New Directions in US-USSR Copyright Relations," *The American Journal of International Law* 68, no. 3 (July 1974): 85-86.

- 70 Ibid., 87-90.
- 71 Ibid., 98.
- 72 Tiefenbrun, "Piracy of Intellectual Property in China and the Former Soviet Union and Its Effects upon International Trade: A Comparison," op. cit., 47.
- 73 Neigel, "Piracy in Russia and China: A Different U.S. Reaction," op. cit., 182.
- 74 Sundara Rajan, *Copyright and Creative Freedom*, op. cit., 96.
- 75 Pauline B. Taylor, "Recent Developments in Soviet Copyright Policy," *The Russian Review* 32, no. 4 (October 1973): 421-24.
- 76 Ibid., 421.
- 77 Ibid., 422.
- 78 Maggs, "New Directions in US-USSR Copyright Relations," op. cit., 392.
- 79 Ibid., 394-95.
- 80 Ibid., 400.
- 81 Ibid., 401.
- 82 Ibid., 13-14.
- 83 Ibid., 29-30.
- 84 Ibid., 68-69.
- 85 Ibid., 74.
- 86 Tiefenbrun, "Piracy of Intellectual Property in China and the Former Soviet Union and Its Effects upon International Trade: A Comparison," op. cit., 50; Maggs, "New Directions in US-USSR Copyright Relations," op. cit., 80-83.
- 87 Maggs, "New Directions in US-USSR Copyright Relations," op. cit., 83.
- 88 Ibid., 409.
- 89 Ibid., 57.
- 90 Sundara Rajan, *Copyright and Creative Freedom*, op. cit., 111.
- 91 Edit Andráš, "Dog Eat Dog: Who Is in Charge of Controlling Art in the Post-Socialist Condition?" *Third Text* 23, no. 1 (January 2009): 66.
- 92 Ibid.
- 93 CIA staffer quoted in: Hyde, *The Gift*, op. cit., 373.
- 94 Caute, *The Dancer Defects*, op. cit., 539-41; Dizard, *Inventing Public Diplomacy*, op. cit., 9-10.
- 95 Caute, *The Dancer Defects*, op. cit., 544. Caute makes specific reference to anti-communist Representative George Dondero, who saw modern art as a communist plot to subvert America.
- 96 Juraga, *Socialist Cultures East and West*, op. cit., 8.
- 97 Ibid., 10.
- 98 Richmond, "Cultural Exchange and the Cold War," op. cit.
- 99 Sundara Rajan, *Copyright and Creative Freedom*, op. cit., 122.
- 100 Richmond, "Cultural Exchange and the Cold War," op. cit.
- 101 In fact, it has been argued that the underlying scope of a Western "public sphere" was made possible through piracy, specifically literary piracy:
- Piracy shaped it [the public sphere] in several ways. First, it assisted the sheer distribution of books and periodicals, especially beyond the metropolis. Second, it had an impact on the kind, quality, and price of books. Pirates reprinted the most profitable works in smaller formats and at far cheaper prices, mixing and matching contents as they saw opportunity. They therefore facilitated, third, a certain casualness of reading: their books were portable and relatively disposable.
- Adrian Johns, *Piracy: The Intellectual Property Wars from Gutenberg to Gates* (Chicago, IL: University of Chicago Press, 2009), 48.
- 102 Sundara Rajan, *Copyright and Creative Freedom*, op. cit., 100.
- 103 Tchouikina, "The Crisis in Russian Cultural Management," op. cit.
- 104 Sundara Rajan, *Copyright and Creative Freedom*, op. cit., 153.

- 105 Tchouikina, "The Crisis in Russian Cultural Management, op. cit."
- 106 Neigel, "Piracy in Russia and China: A Different U.S. Reaction," op. cit., 186-87.
- 107 Dizard, *Inventing Public Diplomacy*, op. cit., 209.
- 108 Sundara Rajan, *Copyright and Creative Freedom*, op. cit., 160-61.
- 109 According to Rajan, MFN status was linked to Russia joining the Berne Convention and thus further defining its own copyright laws in connection to international norms. See: *ibid.*, 162.
- 110 Keith Bradsher, "Hollywood Bars Films To Protest Soviet Piracy," *The New York Times*, June 12, 1991, sec. Movies, www.nytimes.com/1991/06/12/movies/hollywood-bars-films-to-protest-soviet-piracy.html?pagewanted=1&pagewanted=1.
- 111 Peter Krug, "Piracy's End? Breakthrough in Copyright," *Post-Soviet Media Law & Policy Newsletter*, December 22, 1993, www.vii.org/monroe/issue03/krug.htm.
- 112 Fleishman, "The Empire Strikes Back: The Influence of the United States Motion Picture Industry on Russian Copyright Law," 215.
- 113 Tim Kuik, "Piracy in Russia: An Epidemic," *Whittier Law Review* 20 (1999): 831-37.
- 114 Sundara Rajan, *Copyright and Creative Freedom*, op. cit., 161.
- 115 Krug, "Piracy's End? Breakthrough in Copyright," op. cit.
- 116 Sundara Rajan, *Copyright and Creative Freedom*, op. cit., 162-63.
- 117 *Ibid.*, 178.
- 118 *Ibid.*, 184.
- 119 Johanna Gibson, *Creating Selves: Intellectual Property and the Narration of Culture* (Aldershot and Burlington, VT: Ashgate, 2006), 21. Gibson argues that the language of a creative economy becomes the method through which governments appropriate culture.
- 120 Archibald Lloyd Keith Acheson and Christopher John Maule, *Much Ado About Culture: North American Trade Disputes* (Ann Arbor: University of Michigan Press, 2001), 15.
- 121 *Ibid.*, 16.
- 122 "Bureau of Educational and Cultural Affairs," *Department of State*, accessed September 10, 2010, <http://exchanges.state.gov>.
- 123 Tyler Cowen, *Creative Destruction* (Princeton, NJ: Princeton University Press, 2002). Tyler Cowen amply illustrates the pre-existence of cultural exchange, which substantially undermines any claims to originality or cultural evolution that is devoid of contact. He further argues that, while exchange may cause the demise of some permutations of culture, the end result of contact with others is a flourishing of ideas and creativity, hence the tension between creativity and destruction.
- 124 Russell Prince, "Globalizing the Creative Industries Concept: Travelling Policy and Transnational Policy Communities," *Journal of Arts Management, Law & Society* 40, no. 2 (Summer 2010): 123-24.
- 125 Mark Banks, *The Politics of Cultural Work* (New York: Palgrave Macmillan, 2007), 48.
- 126 "Office of the United States Trade Representative," accessed September 10, 2010, www.ustr.gov. The United States also supports the arts through the controversial National Endowment for the Arts. Other regulatory agencies such as the Federal Communications Commission (FCC) and the U.S. Copyright Office also play a role in American cultural policy. What all these entities have in common is an interest in supporting "culture" as a commodity that can be bought, sold, and exported.
- 127 "Ministério Da Cultura—MinC," accessed September 10, 2010, www.cultura.gov.br/site.
- 128 "Department for Culture Media and Sport," accessed September 10, 2010, www.culture.gov.uk.
- 129 David Laven and Timothy Baycroft, "Border Regions and Identity," *European Review of History* 15, no. 3 (June 2008): 264.
- 130 Benedict R. O'G. Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (New York and London: Verso, 1991), 12.
- 131 Cowen, *Creative Destruction* op. cit.
- 132 Mark Rose, *Authors and Owners: The Invention of Copyright* (Cambridge, MA: Harvard University Press, 1993).
- 133 Johns, *Piracy*, op. cit., 211.
- 134 Peter Burger, "The Berne Convention: Its History and Its Key Role in the Future," *Journal of Law & Technology* 3 (Winter 1988): 11-12.
- 135 *Ibid.*, 17.
- 136 Catherine Seville, "Nineteenth-century Anglo-US Copyright Relations: The Language of Piracy Versus the Moral High Ground," in *Copyright and Piracy: An Interdisciplinary Critique*, ed. Lionel Bently, Jennifer Davis, and Jane C. Ginsburg (Cambridge: Cambridge University Press, 2010), 19-43; Lewis Coser, Charles Kadushin, and Walter Powell, *Books the Culture and Commerce of Publishing* (New York: Basic Books, 1982), 20.
- 137 Burger, "The Berne Convention: Its History and Its Key Role in the Future," op. cit., 6.
- 138 Johns, *Piracy*, op. cit.
- 139 Alan Story, "Burn Berne: Why the Leading Copyright Convention Must Be Repealed," *Houston Law Review* 40, no. 3 (2003): 763-801.
- 140 Matthew Sparke, *In the Space of Theory: Postfoundational Geographies of the Nation-state* (Minneapolis: University of Minnesota Press, 2005), 236.
- 141 *Ibid.*, 237.
- 142 Laven and Baycroft, "Border Regions and Identity," op. cit.
- 143 Neelie Kroes, "A Digital World of Opportunities," *Europa*, November 5, 2010, <http://europa.eu/rapid/pressReleasesAction.do?reference=SP/ECH/10/619&format=HTML&aged=0&language=EN&guiLanguage=en>.
- 144 *Ibid.*
- 145 *Ibid.*
- 146 Gibson, *Creating Selves*, op. cit., 68.
- 147 Banu Karaca, "The Art of Integration: Probing the Role of Cultural Policy in the Making of Europe," *International Journal of Cultural Policy* 16, no. 2 (2010): 121-37.
- 148 *Ibid.*, 124-25.
- 149 *Ibid.*, 125.
- 150 *Ibid.*, 128.
- 151 Banks, *The Politics of Cultural Work*, op. cit. 92.

5

EXPORTING AUTHENTICITY AND THE HYBRIDITY OF CULTURE

The king asked the fellow, "What is your idea, in infesting the sea?" And the pirate answered, with uninhibited insolence, "The same as yours, in infesting the earth! But because I do it with a tiny craft, I'm called a pirate: because you have a mighty navy, you're called an emperor."

Cicero's anecdote, quoted in Adrian John's *Piracy*, 36–37

The World Cup is the place I begin this chapter, not because of the soccer (football), but because of FIFA's (the International Federation of Association Football's) choice for the 2010 theme song, *Waka Waka—This Time for Africa*. The geography of World Cup football aligns with the already designated national boundaries of the state and keeps narratives of nationality easy—Brazil plays Chile, England plays the United States, while national flags are flown. The complexities of identity, citizenship, and the global flow of people are erased in the temporary allegiance to a national team pulled together for this specific event. While the football teams represent a unified national narrative, the 2010 theme song unintentionally demonstrates the complexities of culture, identity, nationalism, and the power of musical diaspora. Thus, the geography of the World Cup anthem aligns with the hybridity of our expressive cultures against both nationalist impulses and state control.

Much to the disappointment of many South Africans, Colombian pop star Shakira was chosen to sing the World Cup opening song, though South African musicians *Freshly Ground* were brought in to collaborate with her at the last minute.¹ While there is some dispute over what the words "waka waka" meant, there was no dispute that the words and music were adapted from a song by the Cameroon band *Golden Sounds* who recorded the original in the 1980s.² *Golden Sounds* are not the original creators of the song either, but adapted it from military marches of unknown origins that go back as far as World War II. Despite this appropriation from the public domain, the location of original authorship for the purposes of remuneration has been attributed to *Golden Sounds*.³

To make matters more complex, it is unlikely that Shakira heard the original *Golden Sounds* recording when she made her own version, because the words, music, and style of *Waka Waka* has been moving around the globe for decades. Songwriter Wilfrido Vargas, who played with "several African diasporic styles in creating his high energy version of 80s synth Merengue," seems to have adapted this tune for the band *Las Chicas del Can*, who performed the song in the 1980s in South America.⁴ According to radio station WFMU, their version in turn inspired other versions in numerous other countries.⁵ All told, *Waka Waka* has previous versions available by other artists in France, The Netherlands, Rwanda, Suriname, The Dominican Republic, Senegal, Liberia, and Cameroon, and probably elsewhere.⁶

A conclusion of musical piracy, loss of monetary reward, and the global exploitation of African signers and songwriters by the corporate music industry can certainly be reached, all justifying tighter and more restrictive copyright laws and more powerful enforcement mechanisms. The political economy of music can be seen here too—*Golden Sounds* didn't have the resources to hire lawyers and sue Sony (Shakira's label).⁷ However, the international visibility of the song put Sony in the awkward position of having visibly pirated music, despite its own efforts to take the moral high ground on efforts to curb copyright piracy. Therefore, unlike dozens of other African musicians, whose works have been used without attribution or payment over the decades, *Golden Sounds* received a settlement from Sony.

Despite the conventional piracy narrative, a counter-conclusion from those more interested in the flow of music can also be made. As the DJ for WFMU who followed the trail of this song around the world put it, "we were able to track down the origin and proliferation of a truly global song that proves language is no barrier to a great melody."⁸ The *Waka Waka* song is emblematic of how music can disrupt national borders and demonstrates how cultural expressions evolve through direct contact and inspiration. In almost every musical genre, the boundaries of ownership are difficult to enforce against the way musicians collaborate and share.

For example, Christopher Dennis argues that, for Colombian hip hop, "the initial emergence of hip-hop in Columbia often had less to do with the development of global communication systems and the marketing and exportation of U.S. pop culture, and more to do with a combination of unique processes of migration flows and direct cultural contact."⁹ The same story could be told about jazz, blues, rock, bluegrass, and virtually all other genres. In other words, great music flows even as national narratives seek to bind it within the borders of the state, and corporate interests seek to own it for profit.

The controversy over *Waka Waka* is multi-layered. A blonde Colombian pop star singing a remixed version of an already globalized song for the World Cup hosted by South Africa could be seen as resisting a simple nationalist representation and instead embracing the global flow of culture and meaning. The music video also subverts the idea of a unitary allegiance to a single country, given that American choreographers created an African-inspired dance routine for the singer and backup dancers. Additionally, the subtitle for the song, "This time for Africa," and the lyrics, which include the phrase, "We are Africa," imply a larger continental if not global affinity.

on the part of all who identify with the song. However, these subversions take place within a corporate-owned cultural milieu. Shakira's performance can also be seen to represent the corporate globalization of music and the devaluing of the local at the expense of the global as concentrated musical interests such as Sony monopolize music and turn it into what Matt Calahan calls anti-music.¹⁰ Might this also be a form of piracy that takes what once freely flowed and renders it static? At that level, the song and video, with cuts to inspirational football players dressed in their nation's colors, is also simply part of a global entertainment spectacle devoid of any type of subversive ability.

An effort to assert nationalist discourses dominated the controversy around the song. Some South Africans complained about Shakira's pronunciation, suggesting that her version was not "authentic." Cameroonians were "proud to think that the song comes from their country."¹¹ Thus, while symbolizing the globalization of music and the ways in which a melody can move around the globe, the origins of the song as coming from a specific nation was an important element in staking out identities in the process of cultural creation. While assertions regarding the authentic were made, the song also demonstrates that cultural products are anything but purely authentic and that cultural innovation most often occurs in the "contact zone" that creates the third space of cultural hybridity.¹² Within this third space, claims of piracy are much more difficult to make because it is almost impossible to locate the origins of an "authentic" (read isolated and not inspired by cultural context) creative moment.

Music, while an excellent example of how cultural traditions are shaped by the interaction between people, is not the only art form reliant on the hybridity of culture. In this chapter I turn from the analysis of the role of the state as explored in the first chapters in order to examine the power of artistic expression to ignore borders all together. While the state seeks to control culture as a national expression and a commodity, culture itself flows through human contact, demonstrating the ways in which the law does not reflect the human impulse to share and be inspired, but instead reflects other interests to control and stabilize the act of sharing. Furthermore, the flow of culture tends to disrupt claims about cultural authenticity that are contingent upon the nation-state and nationalist discourses. In the face of global migration and the limits of the nation-state to adequately capture the diversity of cultures that might exist within its borders, much more complex stories about culture, property, and the search for authenticity must be told.

Even as states seek to shore up their borders and establish an authentic sense of identity, cultural diasporas scatter people across the globe.¹³ Furthermore, in the age of modern travel, global nomads ignore the boundaries of the nation-state to fuse cultural traditions as they seek moments of personal authenticity and ways of escaping the globalized dominance of corporate culture, a theme I will return to in the last chapter of the book.¹⁴ These counter-trends not only challenge the nationalization of some sort of authentic culture but also highlight how diasporic movements facilitate cultural flows and are key to cultural development.¹⁵

Claims about national culture and stable cultural traditions tend to serve reactive ideological and political interests rather than interests that would embrace, celebrate

and be inspired by difference. Telling a more complex story of cultural contact problematizes the nation-state as the guardian of "authentic" national culture, and the notion of authentic culture itself. It also helps to contextualize claims of piracy within the larger global landscape of cultural flows.

The world tends to see the "Western" as the "universal" and often ignores or renders invisible the ways in which this universal appropriates from the local and cultures that are not hegemonic. This chapter will identify several moments of appropriation, not considered piracy, but instead seen as "inspiration" that help conceal the ongoing privileging of "Western" culture while discounting the ways in which these innovations are globally contextualized within a history of colonialism and power relations. In terms of copyright, the general narrative "truth" is that the global South is one of the greatest threats to innovation and creativity via piracy. At the same time, these broad narratives of piracy are only possible if one ignores the importance of what is appropriated via cultural contact and exchange that falls outside the legally acceptable definitions of piracy.

To examine the issues raised by nationalized culture, cultural fluidity, intellectual property, and authenticity I will first discuss the concept of culture as it relates to the nation-state. Second, I examine the complexities of the cultural landscape by raising questions about cultural authenticity and documenting that the flow of culture is not always from the hegemonic West to the periphery, but also flows from the periphery to the core, though often in unacknowledged ways. This chapter makes the argument that, while it may be grounded in the local, culture itself is implicated in the exchange of ideas and thus offers the possibility of hybridity within the context of globalization. This chapter also serves as a precursor to the next one, which will focus specifically upon the possible pathways for indigenous cultural expressions. Indigenous cultural expressions offer a unique perspective on the theory of hybridity as well as the legitimacy and function of the nation-state. However, in this chapter, the focus will be on the broader theoretical frame of hybridity and its complex relationship to the nation-state.

Hybridity and the nation-state

The state-formation process in the early post-colonial era suggests that new states were the "uncritical successors of the colonial state."¹⁶ When it comes to intellectual property laws, for example, post-colonial states simply inherited European intellectual property regimes and joined the international intellectual property system as independent nations. Early international agreements on intellectual property were signed by the signatory nation on the part of their national territory and the colonies they controlled. The fact that many new post-colonial nations joined international organizations such as the World Intellectual Property Organization indicates that little critical thought was given to the value of intellectual property to a developing nation.

As these new states struggled with identity formation, infrastructure development, and efforts to industrialize and mirror the economic policies of the West within the Cold War politics of the twentieth century, cultural policies were already framed by

intellectual property laws, despite the fact that few new states had the legal infrastructure or ideological frameworks to use and enforce these laws. To take just one example, the African nation of Chad has struggled since its independence to retain the semblance of national control and has generally failed to supply basic infrastructure needs to its population. However, it has been a member of several of the WIPO-administered treaties on copyright since its "birth" as an autonomous state.¹⁷

States such as Chad continue to exist because they were integrated into an international system of states that relies heavily upon the fantasy of national sovereignty to function, despite the fact that "empirical sovereignty," the ability of a state to actually govern its territory, may be absent.¹⁸ In other words, the idea of the nation-state for a country like Chad is imposed from the outside to give form to an international system of states that might otherwise be seen as the continuation of empire under a different name. As Ioana Puscas argues:

[In] the post-colonial space, sovereignty exists, to a large extent, *through* the empire's will, through the consent and support of an international legal system and order, mostly inspired and created by Western hegemonic powers, which allows these states to possess juridical sovereignty, in parallel with their frailty.¹⁹

The international regime, built upon the concept of national sovereignty, creates the myth of equal nations interacting on a level international playing field. The myth of the equal "family of nations" for international copyright conceals the hegemony of Western powers that is built into the very structure of the international system. Claims regarding international intellectual property piracy are made within a field of already existing assumptions; they are enshrined into international law and constituted as a legal regime that all nations must adhere to. However, there is no equality amongst states, given the vast differences in resources that can be dedicated to the international domain.

Within contemporary debates over nationalism, culture, and globalization, we have taken what globalization scholar Jan Nederveen Pieterse calls a "cultural turn."²⁰ This cultural turn poses a change from understanding national differences to instead framing difference in terms of culture. These cultural differences are further framed by modernity, which has acted like a "steamroller, erasing cultural and biological diversity in its way."²¹ In this chapter, while highlighting the tension between the exportation of what nations would like to see as authentic national culture, I would also like to further support the larger concept of global hybridity as a means of understanding cultural evolution. As Paul Hopper notes, culture travels, creates networks and webs, and given the mobility of people and ideas produces a deterritorialized culture that flows globally.²²

In the contemporary discourse on culture, creativity, and copyright, global flows of culture are almost always narrated as moving from the north to the south, and thus globalization is seen primarily as Westernization. Vast oceans of piracy, it is argued, exist where cultural consumers of the third world take the creative work of cultural producers in the first. Almost always the flows of culture are described as one-way,

where creativity, originality, and innovation are located in the West and appropriation, copying, and theft are practices of the global South and the East. As Pieterse puts it, the literature on globalization tends to ignore the countercurrents—"the impact nonwestern cultures have been making on the West," while "it overrates the homogeneity of western culture and overlooks the fact that many of the standards exported by the West and its cultural industries themselves turn out to be of culturally mixed character if we examine their cultural heritage."²³

These claims discount the impact of the colonial legacy on previously colonized territories as well as the vast disparities of wealth, income, and opportunity that structure global life. Western discourses of copyright piracy treat each state as an equal within the "family of nations," given that each has been extended sovereignty over its territory.²⁴ Despite the illusion of international equality, the expectation is that the state will produce and enforce copyright laws in keeping with U.S. and European ones, no matter what the domestic situation might require or how weak or impoverished the state may be. Claims regarding appropriation and theft by the global South further ignore the enormous effort put into exporting Western culture as a commodity, which is consumed legally and illegally around the globe, and the reliance of Western markets on these forms of consumption. It is worth remembering, as noted in Chapter 4, that the success of American culture globally is really based upon massive government subsidies to promote American culture and win the world to an American way of life, thus even the ideology of the free market in culture is distorted in ways that remain invisible.

In producing the narrative of piracy, negotiators for the United States and its advocates ignore the ways in which intellectual brain drain siphons off the creative from the global South and also the ways in which cultures of the "other" are used and appropriated, called "inspiration" when done by Western artists using the cultural works of the global South.²⁵ As Western industrial interests have developed a global discourse of intellectual property piracy to shore up their own efforts to privatize cultural work and concentrate ownership, their claims erase and render ahistorical the production of Western culture itself as a hybrid of practices and appropriations that rely upon the colonization of the global South.

Furthermore, the political economy of international copyright law can only exist if cultural expression can be clearly narrated as authentic, original, and tied to a nation-state. Adrian Johns notes that the long history of piracy is implicated in the "development of a system of interacting nation-states," where the practice of piracy and its defense became vehicles "for national, and nationalist, passions."²⁶ As Johns goes on to say, piracy is "essentially a phenomenon of geopolitical thresholds" that is always associated with the uncivilized who pirate—a group that extends out over time.²⁷ According to Johns, "it is accordingly destined to be superseded through the civilizing process that leads to a neoclassical, globally integrated economy," an argument that the continued existence of piracy helps confirm as a myth, but an important myth that helps to mobilize specific types of economic and national interests.²⁸

The edifice of copyright and its ability to function at the international level depends upon the stability of all these concepts, as well as a commonly understood

definition of piracy. In order to undermine the myth that piracy creates, it is helpful to acknowledge that concepts such as the nation-state, authentic culture, and intellectual property are not stable and should not be used uncritically. This chapter is designed to undermine the edifice itself by calling into question the stability of all the terms in the discourse—those of original cultural expression, claims to property, and the idea of the nation-state. While the previous paragraphs should call into question the stability of an international family of nations, the next few paragraphs will take up the problematization of cultural expressions and culture more generally.

First, there is nothing stable about the idea of culture or claims that one might be able to own culture as property. As noted in the introduction, the literature on culture does not reference copyright law. Those creating culture only seem to begin thinking about property rights in artistic expression once it has entered a market economy. By contrast, those who think about copyright always think about property rights and assume the only reason to create is if you can command a price in a market economy. In this section, I want to develop the concept of culture outside the assumption that it should be commercially exploited.

It is difficult to pin down exactly what culture might be—expressions, languages, music, art, literature, and social structures are all considered part of a cultural milieu. The symbols of culture—the play, the piece of music, the oil painting, or book, while having been “fixed in a tangible form” to use the language of American copyright law, are in actuality not easily defined. These tangible representations of what we call culture might also be understood as multiple sites where knowledge is produced and categorized in such a manner that everyday life and commonly shared values are expressed through a discourse of who we are as a people.

In the literature, there are a variety of ways to understand culture from the post-modern to the Marxist. Cultural critic Harry Read documents that the first use of the word “culture” in its modern sense was in 1510 and that it has always been aligned with an emerging capitalism that pulls culture out of everyday life.²⁹ Anthropology has long grappled with the concept of culture, studying the cultural variation of others and narrating culture through the local terrain of everyday life.³⁰ Coombe clarifies that the traditional anthropological study of culture had “orientalizing tendencies” that “delineated cultures as discrete formations,” and the introduction of a critical cultural studies revealed the underlying Eurocentrism regarding art and literature that framed global discussions of culture.³¹ Thus, any discussion of culture rests upon an already politicized foundation, where culture is utilized in battles of the local against the global, the national against the other, and the authentic against the inauthentic.

To render the discussion more complex, culture is produced performatively.³² The performative, while it is produced locally, is less about location and is instead contingent upon sharing ideas and expressions. Indeed, despite efforts to pin culture down as part of the national or as existing somehow removed from outside forces is simply inaccurate. Peggy Levitt makes this point:

Continuing to study cultural products within discrete containers and assuming beforehand the boundaries and levels of the appropriate spatial units of analysis

blinds us to important ways that contemporary life is actually lived and the power hierarchies that underlie it.³³

Thus, despite playing out within local spaces, culture is already transnational and is not rooted solely in the local or the national. Instead, even our most “national” of products might be implicated in the already connected world founded upon cultural hybridity and of course indebted to a colonial past of nearly invisible appropriation.

Nestor García Canclini suggests a deterritorializing of culture has been the result of globalization, which he takes to mean the “loss of the ‘natural’ relation of culture to geographical and social territories.”³⁴ This deterritorialization produces a trade-off for Canclini between the hybridity of culture and the nation-state. As Steger and James put it, the social whole which used to be “contiguous with the nation-state” and thus “society” was assumed to exist up to the boundaries of the nation.³⁵ However, society is no longer coterminous with the nation-state and instead we are witnessing a “thickening of our consciousness of the world as an interconnected whole.”³⁶ The reshaping of our global understanding produces double-edged results for culture. As Canclini puts it, while culture loses an exclusive relation with territory, it gains in “communication and knowledge.”³⁷ There is a need to understand the distinction between territorial culture and translocal culture, one of which assumes a geographic and nationalist base, while the other looks outward.³⁸ While it may become impossible to preserve the concept of “the authentic,” the communication between previously disconnected territorial domains also heightens the possibilities for new fusions of ideas and expressions.

In an effort to reterritorialize, or at the very least make culture and the products of culture contingent upon the state, many countries have created cultural policies that aim to articulate an authentic national culture, protect their citizens from the influence of too much “outside” culture, as well as export the unique creative products of their national culture for consumption within the global market. These cultural policies developed to create a specific way of ordering the world and creativity.³⁹ Developing national cultural projects, while helping to define the scope of the nation, fosters uneasiness for many, given the modern multi-ethnic, multi-cultural state that is fractured along so many lines that a unified national narrative becomes difficult to conceive.

Despite the many fractures and possibilities of culture that emerge from the critical scholarship, the prevailing narrative framing modern culture is the viewpoint that culture is the circulation of products of the culture industry tied to specific nations. The globalization of culture has not happened outside the market, but instead has been significantly implicated in the marketing of culture as products worldwide. The culture industry as the engine for consumer culture is a theme interwoven throughout this book and I will return to its critique in future chapters. To transform culture into a commodity, the modern ideology of the individual author as the owner of cultural property must fully inform our understanding of cultural production.⁴⁰ Once we can allocate ownership rights to the individual, the circulation of culture as property can commence.

Mark Banks notes that culture and commerce have long been narrated as ideologically opposed:

Culture offered an aesthetic realm distinct from the vulgar incursions of modernization which threatened to replace 'authentic' values with a calculative economic rationality. Where art and culture promised individual freedom, the economy appeared to provide only collective enslavement to the commercial imperative. Thus, the worlds of art and commerce have long been judged diametrically opposed.⁴¹

Banks goes on to argue, however, that the distinction between art and commerce is essential to a functioning oppressive system, which conceals the manner through which modern artistic expression is exploited within a corporatized environment that uses the illusion of the autonomous artist to mask a system of oppressive work conditions.⁴² The culture industries are able to perpetuate this system of exploitation because of our underlying assumptions about the value of artistic expression, authentic autonomy, and a widely held assumption that art is the vehicle of original expression and not as a type of labor or a collective activity. However, most of these values are what Canclini calls "fragile fictions."⁴³ When culture becomes subordinate to the market, which it does in capitalist systems, it loses much of its autonomy.⁴⁴

The case for hybridity rests upon the frailty of our most stable imagined truths about nationalism, culture, and originality. In essence, culture is already implicated in the flow, sometimes invisible and other times much more visible, between otherwise distinct practices. I'd like to use three different examples to help elaborate on these ideas.

A. "Pablo Picasso was never called an asshole"—Jonathan Rickman, *The Modern Lovers*

As the story goes, Picasso was looking for new inspiration for his art when, in the Spring of 1907, Henry Matisse showed him an African sculpture that he had just purchased.⁴⁵ Picasso, Matisse, and other avant garde artists found the Western tradition to be "corrupt and exhausted of ideas."⁴⁶ The art of Africa, by contrast, was refreshingly new to them because it allowed them to view art through a completely different aesthetic sensibility.

As a result of seeing Matisse's African sculpture, Picasso went to the Trocadero Museum of Ethnology where he was able to view other examples of similar sculptures. He said of that trip:

A smell of mould and neglect caught me by the throat. I was so depressed that I would have chosen to leave immediately. But I forced myself to stay, to examine these masks, all these objects that people had created with a sacred, magical purpose, to serve as intermediaries between them and the unknown, hostile forces surrounding them, attempting in that way to overcome their fears

by giving them colour and form. And then I understood what painting really meant. It's not an aesthetic process; it's a form of magic that interposes itself between us and the hostile universe, a means of seizing power by imposing a form on our terrors as well as on our desires. The day I understood that, I had found my path.⁴⁷

Picasso's search for the authentic became contingent upon the colonized "other" for inspiration. As Bendix notes about the quest for the authentic, it is for something "beyond texts, history, and language."⁴⁸ This authentic could not be captured in the modern and "civilized" world of Europe, but was instead found in the museum where the masks spoke to a "sacred and magical purpose."

Western countries sought the authentic in the traditions of the "common" people, or folk, but also in the cultures and practices of the "uncivilized" other who were seen as less alienated by modernity and thus closer to the "real."⁴⁹ For Picasso, African art spoke to that authentic impulse that could resist the banality of civilization. He began collecting African art, primarily masks and figures from West Africa, which served as inspiration for his work during what has come to be known as his "African" period.⁵⁰ For Picasso, African art was a turn "against the rational and sensory contents in favour of metaphysics and the irrational."⁵¹ These distinctly colonial paradigms inform the types of appropriation and inspiration that help render European art "universal" while the sources from which they draw are not relevant because, in part, they are not modern or even rational.

It is not too broad a stretch to say that the cubist tradition, was "borrowed" from African art, and hybridized by Picasso.⁵² In 2006, an exhibit held in South Africa placed Picasso's work next to examples of the African art that inspired him.⁵³ While the original African artists are unknown, Marilyn Martin, the Curator of the Iziko South African National Gallery, notes, "This gives us a way of validating an anonymous artist—we pay tribute through this exhibition to those artists."⁵⁴

When initially produced, Picasso's cubist masterpiece, *Les Femmes d'Alger*, was "met with incomprehension and distaste from those who saw it," in part because of its non-Western inspiration and Picasso's interest in disrupting art.⁵⁵ The comparison between Picasso's work and the African masks is striking. In *The Trees*, another famous Picasso painting, Martin states that "His encounter with African art was a critical moment in Picasso's development as a painter." *The Trees* was painted right after Picasso visited the museum. "You can see what Africa did for the European landscape tradition," Marilyn Martin says. "This was pre-cubism—but you can see it is an early cubist painting."⁵⁶

Much like African music has been an inspiration for global music, the inspiration found in the contact with the "other" is often ignored as a creative debt in an effort to place property boundaries around the results.

Martin highlights the creative and artistic talent that Picasso brings to his work. She states:

Picasso never copied African art, which is why this show does not match a specific African work with a Picasso. He took its point of view to express his

own art. ... But then he creates a metamorphosis in which he creates something phenomenal and new."⁵⁷

Central to the narrative of original creativity is the idea of fundamental transformation. However, under current copyright traditions, such transformation is not sufficient and it is likely that Picasso would not be able to appropriate so freely, or at least could have been challenged in the courts for his appropriation.⁵⁸

For South Africans who saw the exhibit, the idea that a famous Western painter had been inspired by African art was both new and validating. As viewer Mothibedi Lecage said, "All South Africans need to see this show. They will see how others are inspired by our culture. We copy European or American culture too much." A second attendee Johan van Zyl said that "It's eye-opening to see how the leading artist of the past century was influenced by African art."⁵⁹ That such an inspiration has been all but erased and forgotten is testament to the power of the hegemony of Western cultural superiority.

Unlike the quest for the authentic expression of national culture or the purity of creativity itself, the South African exhibit helps highlight the cultural flows that are ever present in the creation of art and the underlying fact that there is nothing unique to national culture—we are always already implicated in hybridity. Constructing the sole author who can create something original is simply not an accurate description of any creative act from painting to music to literature. Neil Cox, who wrote about Picasso succinctly positions the ideological problems of the artist as genius within modernity. He states:

Thinking about Picasso always means being caught in the trap that is the category of the individual, being seduced by the modern idea of the artist as genius. The main symptom of this is the predominance of biographically inspired writing about the artist, an approach that constantly emphasizes the artist's self-determined nature, isolating him from his contemporaries and, crucially, seeking to tie 'the meaning' of every work to a life event. There is a circular argument here: the act of biography reinforces the notion of the individual genius, which in turn feeds the biographical project. More importantly, however, seeing Picasso and Picasso's work in terms of biography is ideological: it conceals from view the fact that the categories of the individual of genius, of lived life and of the work of art are all constructed in modernity, are all forms of contemporary representation that permit social relations to be how they are, and reinforce them.⁶⁰

One of the main advantages of the African exhibit is that it helps deconstruct the modern ideology of the genius, despite efforts to help shore that ideology up through the narrative of Picasso's talent as an artist. It also helps to clarify how inspiration defies national borders and identity.

Picasso painted during a period less fraught with the copyright battles than we encounter today. Additionally, his work was produced within a colonial world,

which rested upon a dichotomy of authorship that remains somewhat intact today, where "traditional" works such as the African masks were the production of an anonymous people, which allowed them to speak more "authentically" to human experience. However, it is the artist who can be inspired by these traditional, pre-copyrighted works, to produce true works of genius, who can then be protected via copyright.

For the Western artist, the allure of the primitive was to tap into the authentic and the "pure." Bendix argues that authenticity was located in the "anonymity of entire social groups," and became a way for the alienation of modernity to be assuaged by the fantasy of a purer, more authentic rural or savage life.⁶¹ Picasso manifests this desire for authenticity by appropriating the style and work of non-Western African artists who, through a process of othering and through cultural processes that did not place significance on the author function as it related to individual works of creation, remained anonymous and easy to exploit. As Karaca notes regarding recent controversies surrounding immigration and culture, such a dichotomy helps perpetuate the assumption that "the 'West' (in this case Western Europe) has culture and produces art (read as individual expressions), while non-Western immigrants and others subsumed under the label 'immigrant' produce—well—culture (i.e., their artists expressions tend to be read as collective ethnic markers.)"⁶² In this example, Picasso of course produces art while the original African mask makers simply live in a "magical" culture that can serve as inspiration.

I do not tell the story of Picasso because I want to condemn his appropriation of African art, though its appropriation should be theorized within the space of colonization. Instead, I tell this story because it is essential to understand that appropriation, inspiration, and cultural flows are the foundation upon which creativity and culture function. However, we often tend to assume or project that "Western culture" stands for universal values and aesthetics. It must be remembered that Western culture is not devoid of contact with other cultural milieus, but entirely integrated into such contact. My argument is that culture should be able to flow, but we must recognize the political and colonial framework within which current understandings of property rights over cultural products are made.

The life of Picasso, as is true for many artists, also helps problematize the possibilities of understanding art as belonging to national culture. Born in Spain, Picasso lived his adult life in France.⁶³ In fact, France owns one of the larger collections of Picasso's work, given to the state as payment of inheritance tax.⁶⁴ Thus, how might one place Picasso's work within a national tradition? Art history narratives see him as part of a modern art tradition and a person who was in conversation with other key artists of many nationalities at the time. To nationalize Picasso's work is to confine it to a discourse that it is unclear Picasso would have found meaningful. As his African period suggests, Picasso found inspiration for his work in many places and saw his place as pushing boundaries of conventional art. He demonstrates the hybridity of culture through his own work and life, while undermining the notion of authentic culture as somehow remaining untouched by others. He was perhaps a pirate, but his piracy is invisible.

Culture flows not simply through books moving from country to country, but because the authors themselves travel. Modernity demonstrates the diasporic nature of human flows against the static boundaries of the state. Thus, the important space for future culture can be found not in the nation-state but in the diasporic public spheres of a post-national present and future, as articulated by Arjun Appadurai.⁶⁵ While Appadurai speaks about our globalized present, it could be said that culturally these diasporic public spheres have always existed.

Many early American writers associated with a growing American literary tradition lived as expatriates in Europe, even as they assumed the mantle of American authors. Washington Irving, for example, wrote that he lived in England and produced his work there for copyright reasons.⁶⁶ Prior to the Berne Convention, the British required an author to be a resident to get a copyright in England. Given that the book market was larger there, some American authors found it advantageous to live abroad.⁶⁷ Others simply moved to Paris or London because they found the cultural scene more civilized than America. Despite their expatriate status, however, many remain symbols of American national culture. Why would it be that expatriated authors, some of whom lived abroad their entire lives, become symbols of a national culture? How might they represent the authentic in their culture? Or, as Bhabha has clearly argued, perhaps the movement of people and culture helps to demonstrate that culture is always and already a hybrid and there is nothing authentic to preserve.

B. The world is flat—global corporate convergence and the market of creativity⁶⁸

Corporate interest in globalizing culture via the consumption of consumer products is a form of hybridity that has been labeled convergence by media scholars interested in the way in which globalization is influencing communication, technology, and art. Used in a commercial sense, the concept of convergence describes media consolidation: how to most efficiently capture culture as a product and sell it in an age where technology has created innovative methods for bypassing old controls. Thus, convergence is another way to think about corporate conglomeration and the tools, including copyright law, that are used to consolidate control over the global flow of products. It tends to ignore national boundaries in an effort to promote products globally, and some of these products have transcended the nation-state to become truly global commodities. Convergence is also a way to think about cultural flows across national borders, but this time instead of the inspiration of the artist, we are looking at the appropriation of the corporate model. The focus is on viral and spreadable media worlds made available through the internet.⁶⁹ Where the first example spoke to the inspiration of personal contact, global corporate convergence is a top-down model of corporate control over culture.⁷⁰

A top down convergence model targets product placement and appropriating local culture for global marketing purposes. It is possible to see cultural globalization as allowing "the dominant symbolic systems of meaning of our age—such as individualism, consumerism, and various religious discourses—[to] circulate more freely and

widely than ever before."⁷¹ Convergence utilizes the tools of the information age to co-opt and control the purchasing habits of consumers.⁷²

The USTR, for example, closely monitors cultural appropriation expressed through intellectual property piracy and lists annually the countries that have failed to adequately address issues of piracy. A flattened and converged corporate world makes it difficult to identify the context and history of a given product or cultural artifact. Friedman is correct in asserting that global capitalism has flattened out the world, but the type of flattening I want to talk about is the destruction of local cultures as they become just another product line. Within a globalized world, both the economic forces of concentrated capitalism and the unifying presence of the nation-state act to colonize the lifeworld, to use Habermasian terms, and make it into a commodity. So, the world is flat, but the more serious form of flattening—the flattening of culture as it becomes part of the commodity form—is part of this convergence.

One example is the popular energy drink, Red Bull. Austrian businessman Dietrich Mateschitz was sitting in a bar in Hong Kong when he got the idea to take the Thai energy drink, Krating Daeng, a drink inspired by a Japanese energy drink, and develop the product for the European and global market. Krating Daeng, which means "Red Bull," had been produced in Thailand since the 1970s and Mateschitz teamed up with Chaleo Yoovidhya and his son, who were the Thai producers of the original drink.⁷³

Red Bull GmbH added carbonation and slightly changed the ingredients, but essentially marketed the original Thai drink outside Thailand. In the process they created the energy drink market, which now hosts almost 150 different products. Red Bull was first marketed in Austria in 1987. In 1992 Red Bull began expanding outside Austria.⁷⁴ Hungary was the first foreign market. In 1997 Red Bull entered the U.S. market and now sells over 4 billion cans a year.⁷⁵ It continues to use the same logo and slogan as the original Thai energy drink, though *Beverage Manager* claims that Austrian owner Mateschitz created the name.⁷⁶

Red Bull is an example of corporate convergence. First, it functions as an identity and a brand as much as an actual product. Red Bull litigates against trying to pass off other energy drinks as Red Bull in the club and drink scene and has successfully won damages for this practice.⁷⁷ Furthermore, its branding is sophisticated and the website has little product information but instead focuses on associating the drink with extreme sports and sports participants,⁷⁸ even though medical research suggests that dangerous heart-associated risks may result from using the drink while exercising.⁷⁹ Second, this product exists because of a network of licensing agreements that converge business interests across national boundaries. By integrating the original creator of the Thai energy drink, some of the largest problems were averted. The drink continues to exist because of the efforts of Red Bull to manage the brand internationally and carefully control its image.

Third, its international ubiquity and brand recognition has erased any connection to local culture and the peoples who originally popularized the product. Red Bull has gained its international popularity through intense marketing, promotions that highlight extreme sports, and successfully mixing the caffeinated beverage with alcohol in the club scene. In a combination of viral marketing and intensive saturation of

targeted populations, Red Bull hires attractive people, usually women, to give away cans for free at concerts, sporting events, parks, or wherever they can. They drive around in cars prominently displaying the Red Bull image with a giant can on top. There is no cultural context for this drink that suggests its indebtedness to a Thai beverage. Red Bull is an international phenomenon whose link to its working class Thai past has been virtually eliminated.

Once flattened by corporate convergences, the local context of any given cultural artifact or practice is lost. To add an additional variable, the legal protection of culture as it flows through corporate channels links culture with the nation-state and national identity. This type of convergence can have any number of different players. The rules of the game are transnational and set out by the WTO, and most countries in the world have agreed to them. This convergence is reliant upon a framework protected by copyright law and controlled from the top down.

While, within the media environment, even the top-down model offers room for complexity and subversion, as Ford has discussed,⁸⁰ most of what happens to create flows in culture is outside control by top-down forces. The convergences discussed here deal with the flow of goods across national boundaries and the ways their histories and origins are forgotten once they enter a transnational economic structure. The global convergence of Red Bull is an issue of licensing and trademark but also highlights what the global sphere of intellectual property protection is for—the transnational product placement of corporate products. A maximalist approach is necessary to secure revenue streams and control all aspects of the corporate brand and product line. While Red Bull has successfully lifted a local product from its origins to demonstrate the pull of convergence culture, the next example suggests it is possible to have a flow of culture that might result in more flexibility regarding copyright law instead of less.

C. Convergence culture and copyright flexibility

While we tend to associate the comic book genre with the American superhero, it is the global travels of the American comic book that are relevant to this story. When American soldiers brought their comic books with them to Japan in the aftermath of World War II, they created an unintentional cultural export that accompanies the flow of people across the state boundaries that typically demarcate and frame their lives. Inspired by the graphic novels they saw, Japanese artists developed their own unique image-based story telling, called Manga.

Evolving from the 1950s onward, Manga became immensely popular in Japan and then jumped back to the United States as its own animated genre and a key Japanese cultural export. In 2007, Japan created a Nobel Prize of Manga to help highlight the importance of the genre for Japan's economy and culture. According to Alexandra Munro, senior curator of Asian art at the Guggenheim Museum in New York, the decision by the Japanese government to award a Nobel prize of Manga is "a very strategic move by the government to kind of sanctify and legitimize an area of Japanese cultural production that has traditionally been—although economically a huge portion of Japan's publishing industry—it has been officially a subculture."⁸¹

Manga may have begun as a subculture, but it has become not only one of Japan's most interesting exports, having a cultural impact around the world, but central to what Cory Doctorow calls the Manga Cultural Complex. As he notes, "trace any of Japan's most successful media franchises back to their origins and you'll likely end up inside a colorful brick of newsprint, where 20 pages of exquisitely matched words and drawings tell the inaugural story."⁸² It is an example of what Henry Jenkins calls convergence culture.⁸³ Furthermore, Japanese anime and Manga has become widely popular in the United States where it is being rearticulated through the drawings of American artists using the styles of Japanese artists.

The story does not end with a widely popularized cultural flow from one nation to another, which happened fluidly and without state-based bilateral negotiation. Instead, the evolution of American graphic novels and Japanese Manga demonstrates how creativity is inspired by contact and how ideas flow despite the divides of nation, language, and culture. The story, however, continues on to see modern Japanese Manga become corporatized and mainstreamed. As Manga became more lucrative and driven by top-down market-oriented values, according to critics, it lost its energy.⁸⁴ Corporate culture seeks to sell Manga to the widest popular audience possible and thus it makes decisions based upon profitability instead of creativity. Additionally, technological changes have turned the Japanese audience to cell phones instead of printed texts for entertainment, and those producing traditional Manga have had to survive in a much more challenging environment. However, despite lagging sales and growth within the now traditional Manga market, there was a place where the graphic novels continued to thrive.

Enter the copyright pirate. Self-published Manga, known as *dojinshi*, is an enormously lucrative industry in its own right in Japan. *Dojinshi* is Manga made by individuals that looks highly professional, but takes the characters of others without authorization to tell their stories. According to Pink: "The copyright violations are flagrant, shameless, and widespread."⁸⁵ Specific characters from popular stories are reproduced, with new storylines, but these characters are clearly appropriated from the original authors without permission. This is fan fiction—a genre of creative writing done by the fans of a fictional world that expands on the possibilities and permutations of character life within that world.⁸⁶ Such acts of creative transformation violate both Japanese and American copyright law. However, according to Pink, *dojinshi* is not a threat to the industry, but instead might possibly be capable of reviving both the form and the industry itself.⁸⁷

Copyright-based creative industries tend to have a hostile relationship to fan-based creative works, preferring instead to tightly control the fictional universe and the characters themselves. Generally, the approach taken by copyright owners when facing what they see as the threat of fan-based work is to issue cease and desist letters and try to limit unauthorized expressions. If money is being made, then efforts to shut down fan creativity is even more aggressive.

Take, for example, the lawsuit initiated by J.K. Rowling and Warner Brothers over the potential hard copy publication of a compendium of information about Harry Potter produced by fan Steven Vander Ark. The Harry Potter series is another cultural product that has reached the status of global icon and is read by children and

adults alike all over the world. Vander Ark, a former children's librarian and avid Potter fan, had produced an online compendium entitled *The Harry Potter Lexicon*. Prior to the litigation, Rowling acknowledged that she had used it as a reference and she had even given it an award.⁸⁸ However, when small publisher RDR books sought to produce a hard copy of the book, Rowling and Warner Brothers intervened, arguing that such an action violated copyright law because the lexicon copied too much of her original work.

Despite the fact that the online compendium was also a violation of copyright, according to reporter David Caruso, these fan-based copyright violations are usually allowed to slide because there are simply too many to litigate.⁸⁹ It is also bad PR to sue your best customers. However, when Vander Ark sought to publish the lexicon and profit from his work in the Harry Potter universe, Rowling and her lawyers saw the action as direct competition with her own potential encyclopedia.⁹⁰

The case generated considerable hostility towards Rowling, discussion about the litigation, and bad will in the popular press over the limits of appropriation and the importance of fair use. In the end, the judge sided with Rowling and the hard copy of the lexicon was deemed only publishable if it significantly changed its content. The Lexicon, the judge said, had taken too much and thus violated the "substantial similarity" test either through the use of direct quotations or paraphrasing from the series. RDR was fined \$6,750 dollars for copyright violations.⁹¹ While a revised version of the Lexicon did ultimately go to press, it was only after significant legal intervention. Enormous numbers of legal hours were spent protecting the ownership boundaries of the Harry Potter universe from unauthorized entry. While it may be unrelated, RDR books no longer survives. A visit to the website says that the publisher is now closed and all back catalogue issues can be purchased elsewhere.⁹²

The Japanese approach to Manga and its unauthorized reproductions has followed a much different path than that pursued by Rowling and Warner Brothers. The Japanese publishing industry has decided to allow the pirate versions to continue to exist because they have come to realize that the "dojinshi are creating a market base" which will bring new buyers into the commercial markets.⁹³ Pink argues that Manga has found a third way, by leaving copyright violations "unsaid." He notes:

Instead of rewriting a national statute or hashing out separate individual contracts or crafting special licenses, it leaves everything unsaid in order to simply give the new arrangement a test drive. It takes the situation out of the realm of law and plops it into the realm of economics and game theory. It places the established publishers and the dojinshi creators in something resembling the prisoners' dilemma: If they cooperate—that is, if they honor the terms of *annoku* no *ryokai* [translated as unspoken or unwritten agreement]—they both gain. But if one overreaches—if publishers crack down aggressively or if dojinshi creators go too far—they both suffer.⁹⁴

In other words, the laws stay on the books but are not enforced. The outcome is a decriminalization for copyright infringement.

The Japanese response to an energetic "pirate" industry where people are using fictional worlds and characters that they did not create can be one possible lesson for the future of copyright law. As Eduardo Moises Penalver and Sonia K. Katyal have recently argued, those who violate property laws help improve our ownership structure.⁹⁵ Specifically, restrictive enforcement of the law does not foster the conditions of creativity but instead stifles the underlying flow of ideas that is necessary for creative work to retain its vitality and energy.

Manga and dojinshi highlight the problems with the current copyright system and its lack of connection to the ways in which creative work is made. Johanna Gibson argues that intellectual property attempts to capture a moment of value in the flow of ideas.⁹⁶ However, by capturing that value, the law also freezes as property the essence of the creative act, thus hindering future acts of creativity that must now deal with a monopolistic block. What has been recognized by the Manga industrial complex is that capturing and freezing these moments of value means that the energy emanating from the flow of ideas is lost. The question becomes, how to create a law that allows for the underlying flow of ideas when the law is almost by definition designed to capture, control and make static what it regulates? The evolution of Manga, its international popularity, and the pirate industry is an example of the troubling relationship between law, the state, and creativity.

Conclusion

The evolution and continued existence of Hawaiian slack key guitar helps to illustrate the flow of cultures and how hybridity is intrinsic to authenticity. It also provides an important segue to the next chapter, which will focus in more detail on issues of traditional knowledge and traditional cultural expressions. Hawaiian slack key guitar evolved from contact between the Mexican and Spanish cowboys hired by King Kamehameha III to help herd cattle on the big island during the middle of the nineteenth century and Native Hawaiians. The result of this convergence is the blending of songs played by those who brought them, and traditional Hawaiian music to create the slack key style. As slack key guitarist Keola Beamer notes, early on, the slack key tunings were guarded family secrets, but as many seek to preserve Hawaiian traditions, these tunings have been shared with those who want to learn.⁹⁷

Beamer writes that there has always been a fluidity of music between Hawaii and other parts of the world. During the early twentieth century Hawaiian slack key guitar influenced guitar tunings and sounds that came to be associated with blues and country western music. In other words, locating the authentic in music and assigning it a national or cultural identity would be difficult. At best, one can identify debts of inspiration. However, the resulting beauty of slack key, as well as the future of music within this tradition, rests upon a firm foundation of cultural sharing. Had the Kingdom of Hawaii resisted the introduction of the guitar as not part of "traditional" culture and instead insisted that Native Hawaiians only express themselves through music as it was prior to contact, the world would be deprived of a beautiful musical legacy. In this example, questions are raised regarding what part of traditional culture

is essential to slack key guitar and what is preserved as "authentic." One caveat must be mentioned—the music played by Native Hawaiian musicians may evolve over time, as may the general principles of cultural practice, but there still exists an identity of Hawaiian that can be a powerful place from which to develop an alternative epistemology of the world.

Artistic work shares similarities with other cultures, and everyone borrows, appropriates, and is inspired by the exchange of ideas. While such an attitude reflects how cultures evolve, grow, and remain alive, the law is designed to halt such a flow and enable a static sense of cultural life. Furthermore, to recognize the changes in culture means to acknowledge that a living culture will not be the same tomorrow as it is today. As one of my colleagues noted regarding Hawaiian cultural practices, what Hawaiians do is a cultural practice—so what if it is not rooted in a long historical tradition, it is the practice today.

Hopper notes that "today's cultures can be so full of such 'foreign' elements that it is difficult if not impossible to detect authentic culture."⁹⁸ In light of cultural flows, the state functions as a mask that covers the diversity of cultures that exist within its borders. It creates a view that the state stands for its peoples and that its peoples are united in a single culture. However, the state can also flatten out cultural diversity and, in some instances, assumes that it can speak for otherwise marginalized peoples. The hybrid, or convergence model, discussed here, requires cross-cultural contact.⁹⁹ According to Marwan Kraidy, "There is a growing recognition that hybridity is a *prima facie* global condition caused by voluntary and forced migration, wars, invasions, slavery, intermarriages, and trade."¹⁰⁰ The concept of the nation-state intervenes to make boundaries on culture appear natural.

The state enters the game not only to provide a national identity upon which to hang cultural products, but often as the repository for innovation, creativity, and knowledge, as if the state and local cultures were one and the same. However, increasingly, the state is not "the only game in town" as "international institutions, transnational transactions, regional cooperation, subnational dynamics, and non-governmental organizations expand in impact and scope."¹⁰¹ In the convergence from the top-down model—the state plays a critical role by framing the law, enforcing the law's mandates, and establishing the "rules of the game," which almost always favor corporate entities. Under that model, the global reach of copyright plays the role of censor and the state becomes the negotiating body between global hybridity and nationalism.¹⁰²

So, the dilemma of cultural diversity, claims to authenticity, and the role of copyright is that respecting cultural diversity means allowing for all cultures to interact and produce something new from that interaction. Furthermore, the ability of marginal groups and cultures to adapt mainstream culture and transform it into something different challenges the concept of the nation-state. Christopher Dennis in his essay on the political power of Afro-Colombian hip-hop notes that:

minority discourse, like that of this rap, can evoke the ambivalent margins of the nation-space and challenge any claims made by dominant culture to

supremacy. ... Although these youths are never completely autonomous from basic power inequalities, hegemonic value hierarchies or nationalist projects (meta-narratives) guided by elites, they are not basing their manifestations solely on the master narratives of the nation-state.¹⁰³

What is true for rap in the Afro-Colombian context is true for the ways in which culture flows transnationally: It can be appropriated and remixed into something new locally.

Dennis also reminds us that the hegemony of Western music tends to stifle what could be a flow of culture back into the center from the periphery.¹⁰⁴ The West, especially the United States, tends not to acknowledge its cultural debts, even while demanding that the rest of the world pay it for its originality and commercial cultural products. Would *The Hunger Games* exist without *Battle Royal*? *Star Wars* owes its original story line to Akira Kurosawa, and yet these are considered "inspirational" not appropriative.¹⁰⁵ However, as the World Cup theme song demonstrates, that flow exists as well, even if it is unacknowledged by hegemonic discourses of cultural superiority. In all cases, interaction fundamentally changes whatever the original culture might have been. There is no static national or local identity from which to move from—instead we are always adapting and changing—because modernity is a system of constant flux.

These processes of deterritorialization are central to globalized flows of information and culture. We must of course be wary of the reterritorializations that structure the global information age, where "a few postcolonial metropolises may enter the network," while "billions of impoverished people around the world will remain off the grid."¹⁰⁶ So the flows of culture that can and should exist must be considered within the concern of "neocolonial reterritorialization."¹⁰⁷

Bhaba argues for a third space of culture that emphasizes the hybridity and flow over the static and the absolute. He notes:

For a willingness to descend into that alien territory—where I have led you—may reveal that the theoretical recognition of the split-space of enunciation may open the way to conceptualizing an *international* culture, based not on the exoticism of multiculturalism or the *diversity* of cultures, but on the inscription and articulation of culture's *hybridity*. To that end we should remember that it is the 'inter'—the cutting edge of translation and negotiation, the *in-between* space—that carries the burden of the meaning of culture. It makes it possible to begin envisaging national, anti-nationalist histories of the 'people'. And by exploring this Third Space, we may elude the politics of polarity and emerge as the others of our selves [emphasis in original].¹⁰⁸

Such a political move marks a very different understanding of the geography of intellectual property, one that is yet to be envisioned legally or within policy circles. Of course, to recognize the hybridity of culture, to de-emphasize the national, and to facilitate cultural flows would mean a systematic drawdown in legal copyright regimes.

Creating authentic things is an impossibility. To the degree that such a thing as authenticity exists, it must happen outside nostalgic efforts to retrieve a past or efforts to entrench permanent cultural preservation as a symbol of a nation or people. The authentic is already a hybrid. Authenticity is a face-to-face process. It is an exploration that can be found in the moment and shared fluidly—but even this is not without its history or politics: experience is always already wrapped up in the colonial and post-colonial imaginings of self and other.

The quest for the authentic is a search for an elusive idea that is not located in culture. When a property law seeks to put boundaries on a cultural product and export it as a symbol of the nation, it interrupts the otherwise global flow of creativity. People can take cultural products and use them to create something authentic, but the same is not true in reverse—culture cannot be appropriated and sold as a commodity that is authentic. Instead, to the degree that individuals living within the modern and globalized world of the present wish to find something authentic, they will have to make it themselves, not consume it or appropriate it from an imagined “authentic” culture, themes that will be returned to in later chapters. The fallacy is cultural purity—it is cultural hybridity that is the norm.¹⁰⁹

Acknowledgement

I would like to thank Professor Manfred Steger for his very helpful comments in revising this chapter, as well as my colleagues in the collaborative research network on intellectual property at the Law & Society meeting for their constructive comments as well.

Notes

- 1 Shakira—Waka Waka (This Time for Africa) The Official 2010 FIFA ... 2010, www.youtube.com/watch?v=pRpeEdMmmQ0&feature=youtu.be.
- 2 Dibussi Tande, “Undermining African Intellectual and Artistic Rights: Shakira, Zangalewa & the World Cup Anthem—Dibussi Tande: Scribbles from the Den,” May 23, 2010, www.dibussi.com/2010/05/undermining-african-intellectual-and-artistic-rights.html; WAKA WAKA Remix—Shakira Vs. Golden Sounds.m4r, 2010, www.youtube.com/watch?v=Ukz9PhV5KZo&feature=youtu.be.
- 3 Tande, “Undermining African Intellectual and Artistic Rights: Shakira, Zangalewa & the World Cup Anthem—Dibussi Tande: Scribbles from the Den,” op. cit.
- 4 Waka Waka (El Negro No Puede) Original 1982–89, 2010, www.youtube.com/watch?v=Lm0gvm7DfwE&feature=youtu.be.
- 5 Chief Bolma, “Around the World ... Waka Waka Hey Hey!,” *WTMU's Beave of the Blog*, March 2, 2010, <http://blog.wfmu.org/freedom/2010/03/waka-waka-hey-hey.html>.
- 6 Ibid.
- 7 Tande, “Undermining African Intellectual and Artistic Rights: Shakira, Zangalewa & the World Cup Anthem—Dibussi Tande: Scribbles from the Den,” op. cit.
- 8 “Around the World ... Waka Waka Hey Hey!,” op. cit.
- 9 Christopher Dennis, “The ‘Afro-Colombianization’ of Hip-Hop and Discourses of Authenticity,” in *Postnational Musical Identities: Cultural Production, Distribution, and Consumption in a Globalized Scenario*, ed. Ignacio Corona and Alejandro L. Madrid (Lanham, MD and Boulder, CO: Lexington Books, 2008), 186.

- 10 Mathew Callahan, *The Trouble with Music* (Edinburgh and Oakland, CA: AK Press, 2005).
- 11 Mahamadou Houmfa, “Shakira Used Cameroonian Pop Song for World Cup Anthem ... Without Asking,” *The Observers*, May 5, 2010, <http://observers.france24.com/en/content/20100513-shakira-used-cameroon-pop-song-world-cup-anthem-without-asking?page=2>.
- 12 Ferdinand de Jong, “Hybrid Heritage,” *African Arts* 42, no. 4 (Winter 2009): 1–5; Homi Bhabha, *The Location of Culture* (New York: Routledge Classics, 1994).
- 13 Arjun Appadurai, *Modernity at Large: Cultural Dimensions of Globalization* (Minneapolis: University of Minnesota Press, 1996).
- 14 Anthony D’Andrea, *Global Nomads Techno and New Age as Transnational Countercultures in Ibiza and Goa* (London and New York: Routledge, 2007).
- 15 Kraidy argues that hybridity and not national self-sufficiency is the cultural norm. Marwan Kraidy, *Hybridity, or the Cultural Logic of Globalization* (Philadelphia, PA: Temple University Press, 2005), 1.
- 16 Ioana Puscas, “On Vulnerability in the South: Sovereignty in the Post-Colonial Space,” *Alternatives: Turkish Journal of International Relations* 8, no. 4 (Winter 2009): 86.
- 17 For an overview of copyright and cultural protection in Chad as well as a critique of the effectiveness of WIPO, see: Debora J. Halbert, “What If ... WIPO Never Existed?” *CopySouth Research Group*, September 7, 2009, <http://copysouth.org/portal/node/10>.
- 18 Puscas, “On Vulnerability in the South,” op. cit., 87. The concept of “empirical sovereignty” was developed by Robert Jackson and Carl Roseberg.
- 19 Ibid., 88.
- 20 Jan Nederveen Pieterse, *Globalization and Culture: Global Mélange* (Lanham, MD: Rowman & Littlefield, 2004), 43.
- 21 Ibid.
- 22 Hopper, *Understanding Cultural Globalization*, op. cit., 37–48.
- 23 Nederveen Pieterse, *Globalization and Culture*, op. cit., 75–76.
- 24 Puscas, “On Vulnerability in the South,” op. cit., 81.
- 25 Verzola, *Towards a Political Economy of Information*, op. cit.
- 26 Johns, *Piracy*, 13.
- 27 Ibid.
- 28 Ibid., 14–15.
- 29 Herbert Read, *To Hell with Culture: And Other Essays on Art and Society* (London and New York: Routledge, 2002), 10–13.
- 30 Pierre Bourdieu, *The Field of Cultural Production* (New York: Columbia University Press, 1993); Clifford Geertz, *The Interpretation Of Cultures* (New York: Basic Books, 1977).
- 31 Rosemary J. Coombe, “Contingent Articulations: A Critical Cultural Studies of Law,” in *Law in the Domains of Culture*, ed. Austin Sarat and Thomas R. Kearns (Ann Arbor: University of Michigan Press, 2000), 22.
- 32 Bhabha, *The Location of Culture*, op. cit., 3.
- 33 Peggy Levitt, “Not Just Made in the U.S.A: Seeing National Culture Transnationally,” *New Global Studies* 4, no. 1 (March 1, 2010): 1, doi:10.2202/1940-0004.1107.
- 34 Néstor García Canclini, *Hybrid Cultures Strategies for Entering and Leaving Modernity* (Minneapolis: University of Minnesota Press, 1995), 229.
- 35 Manfred Steger and Paul James, “Three Dimensions of Subjective Globalization,” *Protosociology* 27 (2011): 64.
- 36 Ibid., 53.
- 37 García Canclini, *Hybrid Cultures Strategies for Entering and Leaving Modernity*, op. cit., 261.
- 38 Nederveen Pieterse, *Globalization and Culture*, op. cit., 85.
- 39 Prince, “Globalizing the Creative Industries Concept,” op. cit., 123.
- 40 Martha Woodmansee, “On the Author Effect: Recovering Collectivity,” *Cardozo Arts & Entertainment Law Review* 10 (1992): 279–92; Peter Jasz, “On the Author Effect: Contemporary Copyright and Collective Creativity,” *Cardozo Arts & Entertainment Law Review* 10 (1992): 293–320.

- 41 Banks, *The Politics of Cultural Work*, op. cit., 6.
- 42 Ibid., 10–11.
- 43 Néstor García Canclini, *Hybrid Cultures: Strategies for Entering and Leaving Modernity*, op. cit., 76.
- 44 Ibid., 37.
- 45 Andrew Meldrum, "How Much Did Picasso's Paintings Borrow from African Art?" *The Guardian*, March 15, 2006, www.guardian.co.uk/artanddesign/2006/mar/15/art.
- 46 "Primitivism," *Tate Gallery*, accessed June 4, 2010, www.tate.org.uk/imap/pages/animated/keyterms.htm.
- 47 Quoted in: Meldrum, "How Much Did Picasso's Paintings Borrow from African Art?" op. cit.
- 48 Regina Bendix, *In Search of Authenticity: The Formation of Folklore Studies* (Madison: University of Wisconsin Press, 1997), 34.
- 49 Ibid., 25–44.
- 50 "The Nasher Museum of Art—Exhibitions—Picasso and the Allure of Language," accessed June 2, 2010, www.nasher.duke.edu/exhibitions_picasso_africa.php.
- 51 Max Raphael and John Tagg, *Proudhon, Marx, Picasso: Three Studies in the Sociology of Art* (Atlantic Highlands, NJ: Humanities Press, 1980), 131.
- 52 "The Nasher Museum of Art—Exhibitions—Picasso and the Allure of Language," op. cit.
- 53 When reporting on the curated Picasso exhibit in South Africa, BBC News placed Picasso's work side by side with African masks that demonstrated the source of Picasso's inspiration. You can see the original comparisons at: "Picasso and Africa, Idea Behind the Art," BBC News, accessed June 2, 2010, http://news.bbc.co.uk/2/shared/spl/hi/picture_gallery/06/africa_picasso_and_africa/html/1.stm.
- 54 Ibid.
- 55 Neil Cox, *The Picasso Book* (London and New York: Tate, Distributed in the United States and Canada by Harry N. Abrams, 2010), 72–73.
- 56 "Picasso and Africa, Idea Behind the Art," op. cit.
- 57 Meldrum, "How Much Did Picasso's Paintings Borrow from African Art?" op. cit.
- 58 In the U.S. case *Rogers v. Koons* 960 F.2d 301 (2d Cir. 1992), Jeff Koons was found to have violated copyright law by using a photograph taken by Art Rogers entitled *Puppies* and depicting a man and a woman holding a bunch of puppies for his own *A String of Puppies*—a sculpture of the same scene. Koons wanted to use the image for an art show on the banality of everyday items. Rogers sued Koons and the court found for Rogers, that the photograph and sculpture were "substantially similar," sufficiently so to create a copyright violation; "Fair Use: Koons Wins Appeal in Copyright Suit (*Blanch v. Koons*)," *NEWSgrist*, November 3, 2006, http://newsgrist.typepad.com/underbelly/2006/11/koons_wins_appeal.html; Kal Raustiala and Chris Sprigman, "What Can the Jeff Koons Lawsuit Teach Us about Copyright Law? A Guest Post," *Freakonomics*, February 17, 2011, www.freakonomics.com/2011/02/17/what-can-the-jeff-koons-law-suit-teach-us-about-copyright-law-a-guest-post.
- 59 Meldrum, "How Much Did Picasso's Paintings Borrow from African Art?" op. cit.
- 60 Cox, *The Picasso Book*, op. cit., 11.
- 61 Bendix, *In Search of Authenticity*, op. cit., 15–16.
- 62 Karaca, "The Art of Integration: Probing the Role of Cultural Policy in the Making of Europe," op. cit., 131.
- 63 Charles Moffat, "Pablo Picasso—The Most Famous Artist of the 20th Century," *The Art History Archive*, accessed July 22, 2010, www.lilithgallery.com/arthistory/cubism/Pablo-Picasso.html.
- 64 Cox, *The Picasso Book*, op. cit., 8.
- 65 Appadurai, *Modernity at Large*, op. cit., 21–23.
- 66 Ernest Penney Earnest, *Expatriates and Patriots: American Artists, Scholars, and Writers in Europe* (Durham, NC: Duke University Press, 1968), 22.

- 67 Ibid.
- 68 Thomas L. Friedman, *The World Is Flat: A Brief History of the Twenty-First Century*, 1st, further updated and expanded hardcover edn (New York: Farrar, Straus, and Giroux, 2007).
- 69 Sam Ford, "If It Doesn't Spread It's Dead (Part One): Media Viruses and Memes," *Convergence Culture Consortium*, February 11, 2009, www.convergenceculture.org/weblog/sam_ford.
- 70 Henry Jenkins, in *Convergence Culture*, op. cit., demonstrates that the issues associated with convergence emerge when unauthorized use of proprietary and owned cultural objects occurs in an atmosphere where corporations seek to control culture.
- 71 Steger, *Globalization*, 2013, op. cit., 70.
- 72 Barber discusses the flattening impact of global consumer culture. See: Benjamin Barber, *Jihad vs. McWorld: Terrorism's Challenge to Democracy* (New York: Random House Digital, Inc., 2010).
- 73 "Red Bull GmbH—Company History," accessed April 27, 2011, www.fundinguniverse.com/company-histories/Red-Bull-GmbH-Company-History.html.
- 74 Ibid.
- 75 "Red Bull: The Wind Beneath Wings That Travel Around the Globe," *The International Business & Technology Newspaper for the Beverage Industry*, accessed April 27, 2011, http://beveragemanager.net/Article-Single-News.176.0.html?&tx_ttnews%5Btt_news%5D=4007&tx_ttnews%5BbackPid%5D=118&cHash=0126c6c198a8c95cb895d2062a793aeb.
- 76 Ibid.
- 77 Gene Quinn, "Red Bull Wins Trademark Lawsuit," *IPWatchdog.com*, May 2, 2008, <http://ipwatchdog.com/2008/05/02/red-bull-wins-trademark-lawsuit/id=169>.
- 78 Monique A. J. Mets et al. "Positive Effects of Red Bull® Energy Drink on Driving Performance During Prolonged Driving," *Psychopharmacology* 214, no. 3 (November 2010): 737–45, doi:10.1007/s00213-010-2078-2.
- 79 Fiona Macrae, "Red Bull Gives You ... Increased Risk of Heart Disease, Say Scientists," *Mail Online*, August 15, 2008, www.dailymail.co.uk/health/article-1045195/Red-Bull-gives-increased-risk-heart-disease-say-scientists.html.
- 80 Ford, "If It Doesn't Spread It's Dead (Part One): Media Viruses and Memes":

Talking about memes and viral media places an emphasis on the replication of the original idea, which fails to consider the everyday reality of communication—that ideas get transformed, repurposed, or distorted as they pass from hand to hand, a process which has been accelerated as we move into network culture. Arguably, those ideas which survive are those which can be most easily appropriated and reworked by a range of different communities. In focusing on the involuntary transmission of ideas by unaware consumers, these models allow advertisers and media producers to hold onto an inflated sense of their own power to shape the communication process, even as unruly behavior by consumers becomes a source of great anxiety within the media industry. A close look at particular examples of internet "memes" or "viruses" highlight the ways they have mutated as they have traveled through an increasingly participatory culture.

- 81 Sara Bonisteel, "Japan to Give 'Nobel Prize' for Foreign Comic-Book Artists," *Text. Article*, May 22, 2007, www.foxnews.com/story/0,2933,274673,00.html.
- 82 Daniel Pink, "Japan, Ink: Inside the Manga Industrial Complex," *Wired Magazine Issue 15.11*, October 22, 2007, www.wired.com/techbiz/media/magazine/15-11/ff_manga. The same is true in the United States, where an enormous number of contemporary action movies are based upon graphic novels' superheroes.
- 83 Jenkins, *Convergence Culture*, op. cit.
- 84 Pink, "Japan, Ink: Inside the Manga Industrial Complex" op. cit.
- 85 Ibid.

- 86 Rebecca Tushnet is one of the first scholars to begin the discussion over fan fiction and its place within copyright law. See: Rebecca Tushnet, "Payment in Credit: Copyright Law and Subcultural Creativity," *Law and Contemporary Problems* 70 (2007): 135-74; Rebecca Tushnet, "Legal Fictions: Copyright, Fan Fiction, and a New Common Law," *Loyola of Los Angeles Entertainment Law Journal* 17, no. 3 (1997): 651-86.
- 87 Pink, "Japan, Ink: Inside the Manga Industrial Complex," op. cit.
- 88 David B. Caruso, "'Harry Potter' Copyright Case Illustrates Blurry Line on Fan-produced Content," *USA Today.com*, April 20, 2008, www.usatoday.com/life/books/2008-04-20-harrypotter-lawsuit_N.htm?loc=interstitialskip.
- 89 Ibid.
- 90 Ibid.
- 91 Judge Robert P. Patterson, *Warner Bros. Entertainment Inc. et al. v. RDR Books et al.* (Southern District Court 2008).
- 92 "RDR Books," accessed February 16, 2011, www.rdrbooks.com/rdrbooks/RDR_Books.html.
- 93 Pink, "Japan, Ink: Inside the Manga Industrial Complex," op. cit.
- 94 Ibid.
- 95 Eduardo Peñalver and Sonya Katal, *Property Outlaws: How Squatters, Pirates, and Protesters Improve the Law of Ownership* (New Haven, CT: Yale University Press, 2010).
- 96 Johanna Gibson, speech presented at the Digital Tradition/Archive Knowledge: International Conference on the Protection and Application of Indigenous Traditional Cultural Expression in the Digital Era, Taipei, Taiwan, December 10, 2010.
- 97 Keola Beamer, "Sending Aloha From Maui, Hawaii," *A Brief History of Slack Key Guitar*, accessed June 9, 2010, www.kbeamer.com/sk_history.html.
- 98 Hopper, *Understanding Cultural Globalization*, op. cit., 49.
- 99 Kraidy, *Hybridity, or the Cultural Logic of Globalization*, op. cit., 5.
- 100 Ibid., 46.
- 101 Nederveen Pieterse, *Globalization and Culture*, op. cit., 88.
- 102 Kraidy, *Hybridity, or the Cultural Logic of Globalization*, op. cit., 157-58.
- 103 Dennis, "The 'Afro-Colombianization' of Hip-Hop and Discourses of Authenticity," op. cit., 201.
- 104 Ibid., 202.
- 105 Michael Kaminski, "The Influence and Imagery of Akira Kurosawa," *The Secret History of Star Wars*, 2007, <http://secrethistoryofstarwars.com/kurosawa1.html>.
- 106 Jeffrey Attieberry, "Information/Knowledge in the Global Society of Control: A2K Theory and the Postcolonial Commons," in *Access to Knowledge in the Age of Intellectual Property*, ed. Gaëlle Krikorian and Amy Kapczynski (New York: Zone Books, 2010), 341.
- 107 Ibid.
- 108 Bhabha, *The Location of Culture*, op. cit., 56.
- 109 Bendix, *In Search of Authenticity*, op. cit., 9.

6

CRITICAL COPYRIGHT, CULTURAL FLOWS, TRADITIONAL KNOWLEDGE, AND THE FUTURE¹

Despite example after example of Western atrocities, it is always someone else who is the cruel and pitiless barbarian.

(Deborah Root, p. 7)

On April 1, 2011 Survival International, an NGO dedicated to issues of indigenous survival, ran an article stating that a UN Intellectual Property Tribunal had just granted South American Indians a 1 percent share of profits on all potatoes sold in the world "in recognition of the fact that potatoes as we know them are effectively an indigenous creation."² The article highlighted the contribution of indigenous peoples to the evolution of the potato, among other vital foods that feed the globe. Indymedia picked up the story and it made the circles of activists interested in indigenous and food security issues.

The story of course was an April Fool's joke. There is no such thing as a UN Intellectual Property Tribunal and the director of this tribunal, Dr. Desirée Dauphinoise, has a last name that is a recipe for a potato dish. While many working on food security issues with limited acquaintance with intellectual property laws may have believed the story, it was indeed false.

Survival International issued a follow-up to their fake news report to explain why it was produced:

Many people ask, "What can tribal peoples teach the rest of the world?" Most don't know that tribal peoples have already given the world some of its most important foodstuffs, which sustain billions of people and which have already saved countless lives, particularly in poorer countries.

The purpose of the 2011 Survival April Fool was to shock people into realising, and remembering, this important fact, which tends not to be taught to young people or covered by the mainstream media.

Tribal peoples obviously did not develop advanced machine-based technology; they did however develop most of the world's staple food crops. When allowed to, they often still choose a way of life different to that of industrialised society. This does not mean they are "backward" or "primitive". They are a vital component of the world's human diversity, but are routinely treated with contempt, their rights abused, and their lives and ways of life denied them. Survival seeks to change this. Its April Fool is just one of many tools used to do so.³

In other words, Survival International sought to highlight the hypocrisy of an intellectual property system that does not acknowledge the debt of human innovation owed to indigenous knowledge systems, which remain unprotected by modern intellectual property regimes. From the vantage of the twenty-first century, the logic of private property not simply over land, but over ideas themselves, has prevailed.⁴

Indigenous communities see traditional cultural expressions and knowledge as part of the larger struggle for autonomy, sovereignty, and self-governance. From the perspective of indigenous communities, history is a story of the West benefiting from indigenous knowledge and practices while imposing a colonial politics over the world.⁵ As a result, many indigenous peoples have come to realize that they must play a move in the intellectual property game. Intellectual property discourses have become one important avenue through which indigenous groups establish their difference in the face of the homogenizing forces of the nation-state, modernity, and the international order that supports this conceptual ordering of the world.

As indigenous people in myriad communities across the globe have sought to establish their autonomy, to resist the colonial powers of the settler state, and to articulate authentic positions from which to ground their daily lives, they have turned to international governance systems to forge relations with each other that bypass the nation-state. Gaining international visibility has been instrumental in disrupting the idea of the unitary state that speaks for all its citizens. Furthermore, the efforts of indigenous peoples to redefine the debate over creativity and control of ideas has served as a catalyst for others who are also interested in a future for creativity that is more flexible than that advocated by the culture industry. For indigenous peoples who have struggled to retain traditional culture in the face of modernity and the powerful pull of the nation-state system, making protection of traditional knowledge and traditional cultural expressions a political issue has helped create the possibility of a paradigm of creativity and cultural integration that retains knowledge, art, music, and dance as part of a culturally integrated whole that is not easily located within an individual author or bought and sold as commodities.

While traditional culture may stand outside culture industry practices, or seek to retain authenticity outside commercial culture, as the Survival International article illuminates, commodified culture appropriates and privatizes what indigenous people have created. Copyright was designed to protect knowledge that could be assigned to an individual author and to facilitate the commodification and exploitation of culture as a private right controlled by a copyright owner. Making this step, which many indigenous peoples have now done, will have an impact on how culture and

traditional creative expressions are perceived and protected. This means that what is most difficult to negotiate is how one might make arguments about protecting traditional knowledge, facilitate the preservation of traditional cultures, or perhaps even resist the extension of a copyright-based property discourse in traditional knowledge without resorting to claims of private property and individual ownership.

However, for many indigenous communities, seeking to offer property-like protection over traditional cultural expressions and knowledge may seem like the logical approach to preserving the community from further colonial harm. Furthermore, to achieve legal protection, indigenous peoples must rely upon the state, a governance structure many groups do not see as having legitimate sovereign control over their everyday practices. In other words, there is no easy answer to the issues posed by a history of colonial appropriation of knowledge and culture, the continued use of traditional knowledge without appropriate protocols because it is perceived as in the public domain, and the struggle for sovereignty that many indigenous peoples around the world see as an important political goal.

The complexity of the policy space regarding indigenous knowledge is described by Christoph Beat Graber as one of double fragmentation—where not only is there a multi-layered international agency policy response to the issue, but multiple different indigenous responses as well.⁶ Such policy fragmentation makes the debate enormously complex as well making multiple different potential outcomes possible. This chapter looks specifically at the claims regarding indigenous knowledge in an effort to tease out the complexities of possible protective measures. Associated with different arguments made by those advocating for protective measures of intellectual property are different policy outcomes and trajectories along which future action may develop.

The first section will elaborate on why intellectual property law is ill fitted to protect the culture of indigenous peoples and can be understood as antithetical to traditional ways of life. To study the relationship between indigenous knowledge, traditional cultural expressions, cultural preservation, and copyright law, this chapter will explore the ways in which "authentic" expressions of a specific group are often conceptualized and also attempt to locate claims about cultural authenticity within the larger tension between tradition and modernity. Furthermore, the tension between tradition and modernity and how these relate to our understanding of the future must be thoroughly investigated.

In the second section, I would like to elaborate on three possible political pathways regarding the future protection of traditional knowledge. These three narratives fall upon a continuum of protection of intellectual property that are commonly used to help explain the place of culture, knowledge, and art within indigenous societies. They offer different choices for indigenous people and governments as they think about what the best way to protect culture might be and, as the concept of path dependency suggests, will offer fundamentally different futures as possible outcomes. My goal is not to *prescribe* a specific path, but to outline several different paths related to the future of indigenous culture and the ways it ought to be protected. Thus, the last section uses the example of Nunavut, traditional cultural expressions, and modernity to elaborate on the arguments floating in the policy space of international

discourses about the protection of traditional cultural expressions and the complexities of global cultural flows.

Each pathway recognizes that the story we tell about the past and the relationship of indigenous peoples to their history and culture sets up different possible futures. Within these different stories we can puzzle through the complexities and controversies of the issue of traditional knowledge. Each pathway also represents an effort on the part of indigenous peoples to preserve their autonomy and culture, and groups can and often do use a combination of all of these different arguments when seeking to protect their communities. My interest here is to tease out the implications of each claim as it falls along the continuum from maximum protection to no protection at all and provide some analysis of what types of laws and policies might best help facilitate each one.

The colonizing practices of copyright

Valuing cultural diversity and being tolerant of other cultures is a relatively recent phenomenon. The colonial projects that have framed both capitalism and the modern nation-state demanded a range of accommodations from those colonized, from assimilation to intentional cultural destruction.⁷ European voyages of discovery, for example, often treated the people, the wildlife, and local plant species as the same. What the Europeans saw as "primitive" cultures were understood as the object of study or as curiosity pieces to be displayed for entertainment and educational purposes; indigenous people were not seen as subjects of mutual discussion about knowledge or culture.

Western exploration and colonization went hand in hand with the evolution of research. However, as Linda Tuhiwai Smith points out in her path-breaking book on the colonial implications of research methodologies:

When discussing the scientific foundations of Western research, the indigenous contribution to these foundations is rarely mentioned. To have acknowledged their contribution would, in terms of the rules of research practice, be as legitimate as acknowledging the contribution of a variety of plant, a shard of pottery or a 'preserved head of a native' to research. ... Thus, indigenous Asian, American, Pacific and African forms of knowledge, systems of classification, technologies and codes of social life, which began to be recorded in some detail by the seventeenth century, were regarded as 'new discoveries' by Western science. These discoveries were commodified as property belonging to the cultural archive and body of knowledge of the West.⁸

Smith details how research, and the enlightenment project generally, were built upon the appropriation of knowledge "discovered" through the act of colonizing indigenous peoples and claiming new territories. Because Western scholars understood indigenous peoples as the objects of research instead of equal subjects in a collective research process, Smith argues that the very act of research is itself part of the colonizing process, the effects of which remain intrinsic to the research process today.⁹

Colonial projects of discovery are integrally linked to the enlightenment ideal of sharing knowledge. Furthermore, the resulting state-based colonial systems entrenched a way of understanding the world that was at odds with pre-existing indigenous understandings of the land and their place within it. In the "post-colonial" world, while some indigenous communities may be able to claim alliance with a nation-state, many communities find that they remain minority voices within the state system, a system that has come to overlay multiple different groups, often in a manner that pits one group against the other.

Contemporary struggles are typically framed over issues of diversity and multiculturalism that, while perhaps having some resonance with indigenous ways of life, tend to push for diversity within the context of the national system instead of multiple and fractured sovereignties located in the individual identities of different indigenous groups. National discourses on multiculturalism are of course important, but they are required because state boundaries not only fail to consider how colonial practices brought together diverse groups of people who migrated either voluntarily or by force, but they also ignore the claims of the indigenous peoples trapped within the nation-state system.

While most modern state discourses embrace claims of cultural diversity, tolerance of difference, and multiculturalism, which can have the unintended consequence of fracturing the unifying narrative of a national project, state actors still seek to construct a viable national narrative, which has the intended effect of making the claims of indigenous sovereignty less visible. National identities are designed to support the state-building project against other possible alliances. The nation-state, as identified by Paul Hopper, consolidates under a "national culture," which by definition must entail "excluding those who were perceived as not belonging and the dismissal of other cultures as inferior."¹⁰

Claims of indigenous sovereignty by contrast illuminate the fictional basis of a unitary national system and at least some of the voices that have been historically excluded from the narratives of the nation-state. Telling the story of colonization and its impact on indigenous communities highlights the fact that efforts to construct the state required that not all people within its boundaries be considered citizens, and it also required the illusion that the state spoke for all the people within its boundaries, when all too often it only spoke for specific settler groups. What decolonization practices have been excellent at doing is unpacking the unifying narrative of the nation-state.

Into the larger flow of decolonization strategies and challenges to the concept of the nation-state, indigenous peoples offer a unique moment of disruption for the national project, given that most, if not all of indigenous peoples, have been overwhelmed by settler states.¹¹ Lorenzo Veracini highlights the problems produced by settler colonialism and argues that to date there has been no way possible to envision a future that would be genuinely post-settler. He contrasts the relative ease with which multicultural futures were imagined with the inability to envision decolonial futures:

Discontinuing settler colonial forms requires conceptual frames and supporting narratives of reconciliation that have yet to be fully developed and narrated.

Nation-building in formerly colonised contexts can be difficult, but at least it can be conceptualised; enacting genuine post-settler passages in white settler nations is another matter. (As mentioned, multicultural remaking was comparatively easier to approach, as it does not involve unsettling foundational settler narratives. Multiculturalism allows for an expanded definition of who can claim belonging to the settler body politic that leaves settler colonial structures unchallenged).¹²

Within the context of settler colonialism, decolonization was not a choice. Instead, indigenous efforts have had to struggle against, adapt to, or integrate with the dominant frame of modernity and the colonizing framework of a national state system that strips them of sovereignty, land, and often the option to practice their culture. As Veracini notes, the prevailing discourse of the nation-state could not conceive of returning sovereignty to indigenous groups, meaning that often the decolonizing efforts associated with a transfer of sovereignty to post-colonial administrators is not available to indigenous peoples who remain trapped within settler-state political systems.¹³

The complexity of the settler colonial system is compounded by the fact that arguments regarding the sovereignty and preservation of traditional cultures are made within the constraining conditions of modernity and the nation-state system—both concepts heavily indebted to previous colonial occupations and imperial ways of controlling the world.¹⁴ At a general level, assertions of cultural autonomy are historically linked to democracy movements and efforts to decolonize throughout the global South.¹⁵ More specifically, colonial systems have little room to understand the arguments made by sovereign indigenous groups regarding their history or culture. However, conceptually, the nation-state, and modernity more generally, are so hegemonic as to make alternatives virtually invisible or unthinkable.

Indigenous people, however, problematize these otherwise “natural” relationships, as argued by Dirlik:

Indigenous people have added a whole new dimension to the understanding of colonialism by pointing to their colonization at the hands not only of the First but also of the Second and Third Worlds, themselves victimized in different ways by colonialism. The continued colonization of indigenous peoples raises questions about assertions concerning the end of colonialism. It also underlines the fundamental character of the nation-state as a colonizing force, enforcing cultural homogeneity and assimilation even where they do not exist. The indigenous idea of community directly challenges the claims of the nation as “community,” while the indigenous search for a political space that exists above the nation presupposes a higher legal authority than the nation-state. In either case, sovereignty is shifted from the nation-state to the local community, or the supra-national organizational and legal context of the nation-state.¹⁶

Indigenous sovereignty claims challenge the power of the nation-state. As Dirlik suggests, there are multiple possible fields from which indigenous peoples can locate

arguments about sovereignty other than the nation-state. How might this relate to intellectual property and the protection of traditional cultural expressions and knowledge?

Within the larger system of settler colonialism and the ideology of modernity, copyright itself is an ideological practice. When I say that copyright is an ideological practice with colonizing tendencies, I am speaking about several layers of colonization. First, intellectual property systems play out within the larger system of Western colonial projects and modern imperialism. As Europe colonized the world, it imposed its legal systems, including its IP systems upon its colonies. In the aftermath of decolonization, the remaining states typically retained the legal structures of Europe while entering into debates over the relevance of IP to their particular situations.¹⁷ In the decades of ensuing postcolonial efforts, these states generally did not reject earlier laws but instead adopted them as a starting point for cultural protection.¹⁸ Settler states can thus retain laws that are at odds with the indigenous peoples and practices found within their national borders.

Furthermore, the colonial practices of Western nation-states are mirrored by the colonizing practices of academics who have seen the cultures produced by indigenous groups as raw material for the further production of knowledge, a process that leads to the “erasure of non-metropolitan experience,” including the experience of colonization.¹⁹ Academics are engaged in building knowledge within the liberal tradition—an ideological framework based on the assumption that knowledge of the past must be improved so that we can achieve “progress” in the future. Thus, to contribute something “new” means to produce knowledge that will enhance our understanding of the human condition or other lofty goals that academics impose on their work. However, the process of research within a global context is implicated in the power of colonial forces to appropriate the world into a Western paradigm.²⁰

Copyright is essential to the liberal tradition that protects “progress,” by establishing a proprietary right to the intellectual fruits of one’s labor. While academics may not be as attuned to economic benefits of producing intellectual work, the concept of the public domain is essential to the process of academic progress. The underlying assumption of a liberal academic system is that progress requires the circulation of ideas as freely as possible, an ideological position that was accentuated by Cold War debates discussed in Chapter 3. The ideology of intellectual progress is so ingrained that many academics cannot conceive of people wanting to preserve knowledge as private, local, or not available for general consumption.

While commercial interests have the goal of transforming everything into property and capturing the economic value of cultural products, thus transforming public knowledge into private knowledge, academics embrace the opposite impulse—to turn private knowledge into public knowledge that can facilitate our march towards a better future. In the name of progress, for example, social historians use private letters, journals, and personal belongings to construct the history of a period. In most cases, these written documents were not intended for public consumption, and many whose private lives have become public knowledge may not have approved of their private materials serving such a purpose. The tension, however, exists between the

values of an academic community to produce knowledge that contributes to the better understanding of our past, and thus to a better future, and the interests of the individual or community in retaining control over their private writings or cultural artifacts.

Given the drive for progress enshrined in academic pursuits, indigenous people have often found themselves the raw material of academic work. Anthropology, for example, has historically approached indigenous communities as a resource for scholarship.²¹ They see past lives or contemporary cultures as the data upon which to build public knowledge about the world. While anthropology today is more reflexive in its approaches to indigenous groups, anthropological research exemplifies the ways in which the collection and preservation of knowledge over time has been a colonial problem that often results in the misuse and appropriation of indigenous culture and knowledge in the name of academic freedom and progress.

Copyright plays a controversial role here. Indigenous cultures have often preserved knowledge through an oral and not a written tradition. They have specific cultural rituals, many of which are not designed for general public viewing. Copyright law, however, protects things "fixed in a tangible form." Underlying traditions, which remain ephemeral, receive no protection under modern copyright law. As anthropologists have explored the world, documenting oral histories and artistic practices, as expressed through music, dance, cloth making, and sculpture, the results become tangibly fixed through video, writing, and publications. Such a fixing of culture places it within the world of copyright law. However, the owner of the copyright is *not* the indigenous storyteller. The copyright goes to the one who fixes the story—the researcher.

Copyright does not protect traditional knowledge located with the group, but extends protection to the author of the academic work that results from research using indigenous knowledge. Without specific legal agreements (only recently being written) locating the ownership of digital or analog recordings or publications of traditional stories, music, or art, within the community, indigenous people lose control over the authored or archived materials. Additionally, what was once private is now public and though it was never meant to enter either a "public" domain or a commercial domain, it may be in both.

Academic works are different from commercial works—they are not published for commercial reasons (usually), but instead to produce knowledge about "humankind." The proprietary rights associated with copyright, however, exert the same colonizing force—they wrest control over the preservation and production of culture from the hands of the local communities. Copyright can thus do harm to local communities, while ostensibly creating knowledge for a larger "public good," meaning knowledge under a modern ideal of progress.

The expansion of copyright globally demonstrates another colonizing impact of an ideological project—in this case an economic model to protect creativity. As Johanna Gibson notes, "the narration of traditional cultural expression within the western social model for recognizing and rewarding conventional forms of creativity—copyright—risks a similar colonizing effect upon contemporary indigenous and traditional cultural

expression."²² The ideology of intellectual property translates all creative work into the product of an individual, justifies the individual's ownership by assuming that their "original contribution" is the most important part of the work, and asserts a private property right around this creation. Once property lines have been drawn, the individual work is divided from the vast sea of cultural innovation and creativity from which each person draws their inspiration. What is difficult to say is how much that is "original" is left to protect when a work can (or should) otherwise be situated within a cultural and creative context indebted to all that has gone before.

As part of its ideological project, copyright imposes a capitalist framework on the creative process and reduces the incentive to create to the idea that people only do it for money. While copyright was developed to protect commercial works by extending a limited monopoly to the copyright owner so that they would have an incentive to circulate them in a market system, creating a property right in ideas also created the outside—the "public domain." Into that world fell all those things that had not yet been commercially exploited, including all historical forms of knowledge, culture, and art. Thus, copyright became a tool that could be used to pull things out of the "public domain," which it produces through establishing boundaries between what is owned and not owned. The works of traditional cultures and non-commodified expressions that either pre-date or transcend the traditional copyright paradigm are included by default in the public domain.²³

As the commercialization of American and European folk music illustrates, copyright was used to appropriate and privatize non-commercial traditional music.²⁴ Songs whose original authors were lost were performed, arranged, collected, and sold by those who sought to commercialize them. Folk music thus became copyrighted as those interested in commercial exploitation pulled songs from the public domain into the commercial world of copyright. While the underlying song could still be performed freely, the recorded "new" versions required permissions not associated with traditional music.

By constructing the commercial world of copyright and the "free" world of the public domain, those embracing a copyright framework search out the possibilities of maximizing profits from the cultural richness of the public domain. Western powers are implicated in this process, but so too are nations of the global South and indigenous peoples themselves when the commercialization of culture is seen as a way to support a national or local economy.²⁵ Efforts to capitalize on the uniqueness of a traditional culture as a commodity are evident in attempts to turn local culture into tourist attractions.²⁶

Finally, copyright colonizes the future by closing off all other ways of talking about culture, creativity, and possibility.²⁷ By colonizing the future I mean that the powerful ideologies of the present marginalize alternatives and render the multiple possibilities that could be the future void. In the place of many alternative futures, there is instead a single future that is merely the status quo extrapolated forward. The field of futures studies takes seriously the idea that we should decolonize these futures by thinking about the possible alternatives and providing these visions to others.²⁸

I am beginning with the concept of copyright as colonization because claims made regarding intellectual property and copyright in the context of traditional knowledge come with a baggage of ideology and associated practices. Traditional communities at the local and international levels have now debated the role of copyright for indigenous peoples for several decades. The key is to struggle against the ideological colonization of a specific property rights regime while at the same time seeking to develop some mechanism for preserving and protecting indigenous rights. This is a difficult balance that many have struggled to achieve. What seems clear from the current literature is that multiple claims made by indigenous peoples, legal scholars, policymakers, and activists about the role that intellectual property can or should play exist, and these different claims can lead to very different types of protective regimes and ways of thinking about indigenous knowledge and expressions. Thus, the multiple tactics in the language game as it relates to indigenous knowledge must be evaluated.

As part of the process of establishing independence, in 1995, the Inuit released the results of the Nunavut Implementation Commission's report on the future governance of the newly defined territory of Nunavut.²⁹ The report outlined how the future government ought to be designed, including decentralized rule over the Arctic territory. The report titled "Footprints in New Snow," included the words of Amittuq MLA Titus Allooooloo, who spoke at the first Nunavut leaders' summit in Iqaluit in January 1992.³⁰ As Mr. Allooooloo put it:

Our future lying before us is like freshly fallen snow, and we had better be careful about how we walk on it. It will leave footprints for others to follow.³¹

While the metaphor may change depending upon local geography and climate, the sentiment is worth considering, especially when issues of law and policy are to be discussed. The relevant academic literature is path dependency—that decisions made in the past influence our economic, policy, and innovation options in the present and establish specific future trajectories.³² While we cannot undo the path that has led us to this point, we can think intentionally and politically about the future paths we choose to follow and, if possible, we can seek to disrupt the assumptions that the most traveled path is the one that should dominate discussions. This chapter looks at a range of claims made by indigenous groups today in order to understand the paths that such claims establish for the future of culture and the protection of traditional knowledge.

In developing the following pathways, I am trying to pick up on several threads interwoven into contemporary debates about the public domain, traditional knowledge, and intellectual property and connect them to their likely policy outcomes. I want to ask many questions: who should have control over indigenous knowledge? How should that knowledge be preserved and protected? What is the relationship of this knowledge to the larger world? As Michael F. Brown argues, it isn't so much about who owns native cultures, but rather "how can we promote respectful treatment of native cultures and indigenous forms of self-expression within mass societies?"³³ These are conversations that people throughout the world will need to have

as they face the colonization of national systems and the legal processes that would appropriate knowledge as a commodity. While it is possible to follow several paths simultaneously, each of these paths charts a different set of footprints for the future.

Pathway one: preserving the past—neotraditionalism

In a recent article in *Taiwan Today*, author Cheryl Robbins notes that:

Taiwan's indigenous peoples are facing a cultural crisis. There has been an exodus of young people from the villages to urban areas in search of work and study opportunities, which has made it difficult to pass on languages, traditions and history. Those that remain in their villages are often restricted from carrying out traditional activities such as hunting and fishing, due to their locations within national parks or protected areas, leading to further deterioration of their culture. Autonomy can serve to relieve or reduce the enormity of this crisis.³⁴

This assessment of the cultural crisis faced by Taiwan's indigenous people helps to frame the concern that many indigenous peoples feel about the loss of tradition. As a result, many indigenous people seek to shore up traditional cultures by asserting autonomy and resurrecting the essential aspects of their culture. Of course, for some groups, there is no "neo" attached to the traditionalist approach, if it has been possible to retain cultural practices without too much outside interference. However, for many a concerted effort to reclaim languages, cultural practices, and ways of knowing that have been destroyed by colonial projects is fully underway.

Taiwan has recognized the need to preserve traditional ways of life of its many indigenous communities through the creation of the Taiwan Indigenous Culture Park, which is designed to give visitors insight into the lives of the different indigenous groups living within the national borders.³⁵ Within the culture park, different Taiwanese indigenous groups are able to practice their way of life as it has traditionally been done. These groups are given a space outside the world of modern Taiwan in which to follow their cultural practices. As modernity assimilates indigenous groups and other cultures, a response in the form of organizations such as Survival International has emerged, whose goal is to preserve autonomous spaces where indigenous peoples can pursue their lives without being touched by the modern world.

The neotraditionalist firmly embraces past traditions and seeks to use them to construct a way of life and a unique indigenous identity outside modernity. Many indigenous communities blame the inability to fully practice their traditional culture as the source of the problems they face, including losing young people to the colonizing or settler culture. In the absence of a traditional cultural fabric, many feel isolated and alienated from their heritage, but not at home in modernity either. At issue is cultural survivability through tradition, language and a link to land. To follow the neotraditional pathway, indigenous communities reinvigorate their language, art, music, and stories and seek to protect their culture by controlling how knowledge about the community and its cultural practices are accessed. Furthermore, they seek

to clarify that there are different indigenous epistemologies that structure thought, action and life.³⁶

Claims to authenticity and traditional culture can be politically problematic. First, given the colonial paradigm within which they are made, it is worth considering Linda Tuhiwai Smith's comments regarding authenticity. She warns:

Questions of who is a 'real indigenous' person, what counts as a 'real indigenous leader,' which person displays 'real cultural values' and the criteria used to assess the characteristics of authenticity are frequently the topic of conversation and political debate. These debates are designed to fragment and marginalize those who speak for, or in support of, indigenous issues. They frequently have the effect also of silencing and making invisible the presence of other groups within the indigenous society like women, the urban non-status tribal person and those whose ancestry or 'blood quantum' is 'too white.'³⁷

Given that a traditionalist path is fraught with political tactics and challenges, it is important to recognize how the concept of the authentic can be used within the colonized world, both to empower, but also to disempower indigenous actors. It is also important to recognize that claims to authenticity can be the position from which an oppositional discourse can be produced.³⁸ However, in either case, these are political choices to consider.

For those seeking to follow the path of neotraditionalism, emphasis is placed on ways of life that continue much like they did prior to contact with the relevant colonizing forces or, for those communities who were forced to assimilate, a concerted effort is made to retrieve lost traditions. Such a project may be criticized for being "inauthentic," but it can be an important foundation for the revitalization of cultural practices and ways of life.

A traditional paradigm for indigenous knowledge frames life in specific ways. First, it sees indigenous peoples as deeply connected to the land and experiencing the world in a way that is holistic, not fragmented; spiritual, not commercial; and bound by the community, not the individual.³⁹ The land for many indigenous peoples "is part of the social order," and culture and art emerge from this important connection.⁴⁰ The neotraditionalist argues that culture must be protected and preserved as is without alteration. The links to the past are stronger than to the present. The neotraditionalist does not want the future to deviate substantially from the past. For the neotraditionalist, creative expressions are linked to the community, they are not commodities, and they are not a source of income because they maintain the sacred connections of a community to each other and to the land.

Second, for the neotraditionalist, authenticity of a community is found through isolation. When the state is involved, one sees the creation of cultural parks and reservations as one way of establishing an authentic traditional culture where traditional lifestyles can be practiced in relative peace. There is an assumption at the heart of the neotraditionalist approach, as it is produced through the state, that indigenous cultures are authentic if they can preserve a distinction between inside and outside,

self and other. Protecting and preserving culture as unique is central to the neotraditionalist way of thought. Resisting integration into modernity allows the community to remain distinct from the assimilating functions of the nation-state and a global political economy.

The more remote from modern cities and technologies, the more possible it becomes for neotraditionalists to structure a life based upon traditional culture and practices. As a renaissance in the practice of traditional lifestyles commences, many groups reclaim languages, artistic traditions, and practices to create a culturally sound and holistic way of life. They do so intentionally—taking their cue from other cultures that have successfully retained a sense of identity and community in the face of modernity. While the state may help support this internalizing turn, because the direction of the neotraditionalist tends to be inward, they are also substantially less threatening to the larger national project—within their cultural preserve the community may be able to express itself authentically, but the state itself is not challenged.

One issue for the neotraditionalist is the method of storing knowledge in the form of the archive. Given that traditional cultures are engaged in a life or death struggle with modern ones, archives for cultures seeking to reclaim the past can and do play a significant role in understanding heritage. An archive can also serve as a resource for future generations who can reconstruct the past through archival materials. Current archival materials, often collected about traditional groups not for them, have come to serve local communities by allowing them to reconnect with a past that was destroyed by colonizing forces. The neotraditionalist in an effort to shore up the boundaries between modernity and traditional culture can use archival work to do so.

However, a second issue for those seeking a neotraditional path is that the concepts themselves should be unpacked. As Monika Dommann points out, "the concept of tradition is a child of modernity."⁴¹ That it is constructed as a social and legal category that became relevant as its opposite—the modern world—became understood as a category of identity.⁴² Citing Hobsbawm and Anderson, Dommann notes that tradition is invented as part of the process of nation-building during the nineteenth century and results in a dichotomy constructed between the 'folk' and a state.⁴³ As Coleman notes about categories in relation to traditional knowledge, since they do political work there is always room to re-evaluate our categories of understanding.⁴⁴

That what we call traditional cultures continue to exist within the boundaries of nation-states across the globe is evidence of a long battle to preserve cultural autonomy in the face of the assimilatory tactics of the state, as well as an effort to remain linked to cultural traditions, even as modernity and its pervasive framework alters and severs connections with the past. However, the act of preserving "the traditional" must also be understood critically. As Jane Anderson notes about using the words "traditional knowledge":

Firstly, I want to suggest that the ways by which indigenous knowledge is equated to "traditional knowledge" is representative of the way that indigenous knowledge structures and thus indigenous people subsume a position of exteriority to contemporary cultural practice. The pervading emphasis on the

"traditional" component of indigenous knowledge facilitates a perception of incompatible differences between indigenous and western knowledge—upholding the unworkable dichotomy alluded to above by Agrawal. Secondly, the emphasis on traditional knowledge significantly affects how indigenous knowledge is understood and made intelligible before the law. This therefore underpins how realistic outcomes in intellectual property law are envisaged. Reliance upon the term "traditional" precludes an appreciation of the dynamism of indigenous ways of knowing: fixing in time, and therefore in the past, forms of knowledge that are, through practical utility, constantly evolving.⁴⁵

In other words, one must recognize the problems with the concept of "the traditional" and ensure that these claims are not used in a manner that would be harmful to indigenous peoples. Anderson suggests using the term indigenous knowledge instead of traditional knowledge to avoid unnecessarily connecting indigenous peoples to a traditional past. As with many claims, it is important to keep in mind the position of who is making the claim and the types of politics that can result.

Given that all cultures, even "traditional" ones, change over time, the preservation of culture in a tangible and fixed form can make change difficult by freezing traditions into a specific mode that is then permanently articulated as "the way things are done." As the oral tradition is passed along to new generations, it is often adapted and given the space to evolve with the community; thus traditional cultures are not static, but adaptive. Preserving an oral culture as fixed may change this process of adaptation. If neotraditionalists see their culture as a living experience, not something that should be frozen in time, archival work, especially done by outsiders, may be suspect.

A third issue for the neotraditionalist line of thought is the problem that emerges when the commercialization of culture arises. It is often argued that culture is sacred and selling cultural artifacts is anathema to the integrity of a fundamentally different way of understanding the world. The struggle to preserve the integrity of culture is often fought over its commodification and sale within a local and global "arts" community. Traditional cultures have spent considerable time resisting the forces of capitalism and arguing that their ways of life are not capitalist, but instead holistic. However, to follow this path makes it much more difficult to allow individuals within a specific culture to make and sell art expressing the cultural themes of the community. Traditional groups assert ownership over cultural expressions and traditions to keep others from appropriating and using them.

When turning to the issue of copyright law, the neotraditional paradigm finds that contemporary practices are not sufficient to protect indigenous knowledge from commercial exploitation. The scope of the problem involves the ways in which modern copyright law divides work into protected (for commercial exploitation) and that which falls into the public domain because the period of protection has expired. The public domain is an intrinsically problematic category for indigenous expressions because it opens up these types of knowledges to exploitation.⁴⁶ Thus, for neotraditionalists intent upon preserving the integrity of their culture as a non-commodified space, a new legal regime is required—one that would allow perpetual

protection because, and this is important, the works protected were not meant to be for sale, nor were they meant to enter the general public.

Sherman and Wiseman provide some excellent examples of a diverse set of codes and regulations that have been developed in conjunction with indigenous communities to help structure the use, sharing, and exploitation of indigenous knowledge. However, they conclude by recognizing that there is no perfect solution when configuring an indigenous approach to protection of intellectual property. Instead, most contemporary models fall short or impose too large a regulatory burden on communities that do not have the resources.⁴⁷ One possible solution that they consider is the use of a regime like the one designed to protect geographical indicators, which has the benefit of understanding the property to be protected as collective in nature as well as fairly permanent.⁴⁸

Following from Sherman and Wiseman's recommendations, the neotraditionalist approach tends to suggest that a unique legal regime providing perpetual protection to indigenous works that specifically prohibits the sale, appropriation, or commercial exploitation of culture without some sort of community permission would be one possible outcome. This legal system takes as its starting point the claim that indigenous cultures function outside the commercial world and that their art and cultural expressions represent a fundamentally different type of community and cultural relationship. However, once contemporary creative work produced by indigenous communities is subject to commercial exploitation, traditional copyright becomes a more reasonable mechanism for managing cultural rights.

The neotraditionalist future must struggle with the pull of modernity, technology, mass entertainment and communications. Primary among the problems for the neotraditionalist is that, as Manfred Steger has argued in the context of globalization, "even those voices that oppose modernity cannot extricate themselves from the very process of globalization they decry."⁴⁹ To create an oasis for cultural preservation, the law must be configured to be anti-commercial and protective. The neotraditionalist looks to the past for guidance and seeks to preserve a world that is relatively separate from modern culture. This approach has also been criticized for the paternalistic relationship it creates between the modern and the indigenous as it assumes an essentialized ontology for indigenous peoples. As Nair argues:

The notion of indigenous peoples as a community formed through primordial associations, having a particular relationship with nature and ecology pervade the thinking of the post-industrial Western mind. The logical outcome of such thinking is the paternalistic affirmation of the indigenous space as a pure space not to be trampled upon.⁵⁰

Nair argues that separating out the indigenous but globally recognizing the commonalities between indigenous groups constructs a paradox between the traditional and the modern, and creates an ahistorical understanding of what it means to be indigenous.⁵¹ Smith concurs with Nair's concerns and warns that she is "cautious about the mystical, misty-eyed discourse that is sometimes employed by indigenous people to describe our relationship with the land and the universe."⁵²

Despite debate over how one might define the essence of indigenous cultures, essentializing claims regarding the unique status of indigenous peoples continue to be made and must be taken seriously. They are moves in the language game that can secure specific outcomes for the players. While the possible threat is that indigenous cultures will be frozen in time, unable to grow and evolve, the neotraditionalist claims, that there is something authentic within a local culture that distinguishes it from other cultures, that this culture must be preserved as an integral whole, and that, within this whole, the commodification of culture is seen as its destruction, need to be considered. Traditional copyright law will not suffice. Legal regimes that protect a non-commercial way of life must be developed.

The legal mechanisms that must be developed will respond to key claims made by indigenous peoples:

1. Ownership is located in the group, not the individual.
2. Culture is protected as a whole instead of as discrete consumable parts.
3. There is a system of perpetual protective rights located in the group (not the individual) because culture is *not* property and is in most cases private.
4. Indigenous cultures are not part of a generalizable public domain free to be appropriated for academic or commercial purposes without permission from the groups involved.
5. Expressions of a culture in the form of art or music or literature can only be done by a member of the group and only within the context of collective agreement and permission.
6. To protect rights and culture appropriately, there is a need to create boards to approve cultural activity beyond the boundaries of the group, to reclaim cultural artifacts that have been placed in museums, and to oversee digitalization of cultural artifacts as a form of cultural preservation.
7. To protect indigenous culture one must extensively map the full scope of culture as it was historically practiced instead of relying upon Westernized accounts of traditional practices.

If one follows the path of a neotraditionalist paradigm, there are several considerations to keep in mind. First, if culture is produced collaboratively and evolves over time, then preservation in a "fixed" form, meaning digitally or otherwise, could freeze culture and dampen future growth. Here I am not talking about material cultural artifacts but instead enshrining cultural tradition as "the way things are done." Second, understanding culture as collective without any input from individuals means that individuals within a specific culture may be less free to develop their own artistic forms that draw from the cultural foundation of the group—thus, how will new songs or new designs be created and protected? Third, it is difficult, if not impossible to halt new ideas at the border of a culture. While indigenous parks like those established in Taiwan or other mechanisms might exist to establish boundaries between groups, ideas will still flow through. What will be the mechanism for dealing with new ideas?

The neotraditional argument is not the only argument produced to preserve and protect indigenous knowledge and cultural expressions. In fact, given that many indigenous peoples must live in close contact with settler states and can no longer pursue traditional ways of life, examining the relationship of indigenous peoples to the neo-liberal economic order is also important. The second pathway begins from claims regarding the role of indigenous peoples within the global flows of capitalism.

Pathway two: neo-liberal indigenity

If indigenous peoples choose to embrace the market as one of the predominant forces shaping their lives, then culture can be a commercial product and the lives of indigenous peoples become another way of doing business. The Taiwan Aboriginal website shows a Coca-cola advertisement for the Formosan Aboriginal Cultural Village, where a group of smiling indigenous people in traditional dress promote the tourist attraction alongside Coke.⁵³ The Polynesian Cultural Center is another example of culture as a commodity where tourists can learn about the many different Polynesian island cultures, be entertained, and, in this case, drink Pepsi. Such a visual image helps to identify the relationship between indigenous groups and state-sponsored tourist efforts. It sets indigenous people on a very different pathway than the first one.

In *Ethnicity, Inc.*, anthropologists John and Jean Comaroff argue that the increasingly branded nature of ethno-nationality that manifests itself in cultural theme parks and tourist attractions based upon exposure to culture can be an empowering way for marginalized groups to regain or retain cultural integrity.⁵⁴ Instead of seeing the commodification of culture as destroying indigenous cultures, they seek to, at the very least, open the possibility that the commercialization and branding of indigenous cultural practices can be positive for indigenous groups. They argued for a more nuanced understanding of the link between culture and commodity.

Even if the transaction of cultural products and practices were entirely reducible to cash, it does not necessarily mean that they would be denuded of all auratic, affective, or social worth: the very fungibility of money lends itself to transformations of value that may reinforce difference—and add substance to identity.⁵⁵

The concept of neo-liberal indigenity begins from the idea that indigenous peoples find themselves embroiled in the market economy, for better or for worse, and thus theorizing about possible futures will include the commodification of culture.

Despite the construction of a narrative and identity of tradition, the choices available to traditional cultures are made within the conditions of modernity framed by the globalizing forces of economic liberalism, the reach of mass communication systems, and the possibility of heightened exchange of ideas that can affect the traditional practices of any group. Furthermore, as we think about the future, it is important to keep in mind the ways in which the information age and modernity more generally impact us all.

First, modernity has changed our vision of the past, present, and future at an ideological level. Modernity as discussed here is characterized by human alienation from the land, from society, and with the growth of the individual at the expense of the community. Modernity places an emphasis on progress towards the future, not the links that might exist with the past. Ideologically, modernity represents a break with traditional pasts and offers humans a disrupted present that is only marginally governed by stable traditions. Modernity breaks the authority structures of traditional societies and replaces them with a heightened sense of the individual. These characteristics are all present in the process of knowledge production and dissemination from the Enlightenment forward.

Modernity, especially as it is manifested in the production of technology and innovation, offers the promise of a future that is unlike the present. As futurist Jim Dator has said regarding the futures of cultures, the vast majority of human history remained primarily stable, with the future looking much like the near and distant past. He notes:

The future is now permanently discontinuous from the past. It is no longer predictable. It is hardly forecastable. The future is no longer singular (THE future). It is multiple (futureS). There is uncertainty. And hence there is choice. What cannot be predicted can now—must now—be invented. The cultures of the future which can not be foreseen must be, and are being, created.⁵⁶

Humans within a traditional paradigm looked to the past for information regarding how to deal with the present and did not think the future would be much different. Tradition stabilized society and the pace of change was slow.

Change, not stability, has now become the default setting for understanding the present and future. Furthermore, easy access to technology and the growing ability of cultures and peoples from around the world to interact has meant we now tend to value the new over the old and things become "old" at an ever faster rate. The fast pace of change is in turn wrapped within the commodified world of the culture industry where mass consumption of cultural products to make a profit drives an ever more fast-paced mode of consumption and production.⁵⁷

For many, a transition to the postmodern simply exacerbates the trends of modernity and detaches us even further from the past.⁵⁸ Our (post)modern cultural consumption patterns demand more and more, faster and faster. Information is an example: given access to almost real time news collection, not only have the news media failed to find sufficient stories to fill a 24-hour news cycle (hence the endless drama of insignificance), but news is almost old before it is printed. To be current, one must be citing the most recent information, with the change in only a couple days, months, let alone years, making things outdated and thus irrelevant.

Given the frame of modernity, the neo-liberal approach begins from the assumption that indigenous groups have already been integrated into the globalized neo-liberal model either willingly or as they struggle to create lives within the constraints of modern nation-states. Modern technology replaces traditional processes and

traditional cultures have had to determine how best to integrate modernity into their everyday lives. Therefore, those belonging to specific cultural heritages form a hybrid of the old and the new. While some traditions are preserved, most within indigenous communities also embrace much about modernity.

As part of the economic paradigm of liberalism and the global political economy, indigenous cultures have become symbols of modern authenticity that can offer something unique in the face of the homogenizing forces of capitalism. As such, they have gained economic currency internationally, and traditional expressions through art and music are now globally popular. Artistic work from traditional communities has been flowing internationally in art markets, the global music scene, and through museums and private collections.

One consequence of a neo-liberal indigeneity is that, despite claims about group ownership and identity, the indigenous person as an individual may seek to create art and music inspired by their cultural heritage. For example, Inuit artists sculpting within the themes of their traditional culture are able to sell their work commercially within the context of modern copyright law and with the names of the authors affixed to the works, an example I will return to later.⁵⁹ Furthermore, museums now host significant art collections created by indigenous peoples expressing their culture through art. Such a project allows the artists to work within their culture while making a living as artists. While much of what goes as indigenous arts can be seen as exploitative and not connected to a specific community, it is also the case that many indigenous artists have made successful careers within the art and music markets.

One such example is Tanzanian artist George Lilanga (1934–2005). Lilanga is considered the Picasso of Africa.⁶⁰ There is, however, controversy over the role of Lilanga within the artistic tradition associated with his name, how much his heirs can control the "Lilanga style," and the relationship between his art and the work of other African artists. Given the controversy and the methods under which art is produced, the problems associated with neo-liberal approaches to traditional cultural expressions as they relate to copyright and commercialism becomes clear.

According to Daniel Agusta, who has worked as a manager for the Tingatinga Arts Cooperative Society, Lilanga worked cooperatively with other artists and often the work of others would be signed with Lilanga's name, because that name had international recognition and would make it more likely that the painting would be sold on the international arts market.⁶¹ Understanding the importance of original authorship associated with the Western copyright tradition, Lilanga and others used the idea of the original authorial name strategically to promote the paintings of an entire art collective. In other words, paintings associated with the name Lilanga could have been created by any number of different artists.

One specific artist who worked closely with Lilanga in his early years was Augustino Malaba, Lilanga's uncle. Malaba's carvings were signed with Lilanga's name once that name became internationally famous. While as many as 16 different artists signed and sold work under the name George Lilanga, upon his death his children have tightly restricted the practice. Lilanga's children claim an exclusive right to his "style

of art,"⁶² which means they use copyright law to keep others from painting in a manner similar to Lilanga. They claim they have the sole right to the style associated with their father's name and have used the Tanzanian court system to put a halt to the production of art that is produced in this style despite evidence that Lilanga did not embrace or care about the idea of authorship himself.⁶³

Thus, efforts to tightly control the style of painting are at odds with the long history from which Lilanga drew his own artistic work as well as with a far more collaborative process utilized by Lilanga while he was alive. Furthermore, while the disclosure that a work signed by Lilanga may not be "authentic," the practice engaged in by artists working with Lilanga while he was alive helps to highlight a fundamentally different way of looking at a style of art and its production that only uses the name of an artist to play the game associated with the international purchase and exchange of art.⁶⁴

The current state of the law has no method for dealing with a situation such as this except to assign a single "owner" and protect the "rights" of this owner from others. Where copyright has taken us today is into a world where those following in the tradition of prominent artists such as Lilanga can keep other artists from making art in their "style," especially given that they themselves are only a small actor in a much larger production process. In Lilanga's case, his art was itself inspired by the already existing style of the Makonde tribe, of which he was a member.⁶⁵ Such was not the case for Picasso, as discussed in the previous chapter.

The important distinction here is that traditional artists working within a modern conception of the arts utilize their cultural heritage as inspiration for modern configurations of traditional designs. The modern art, fixed in a tangible form, are copyrightable, despite their location within a traditional culture. However, such an artistic project is at odds with claims made by many indigenous communities about the sacred nature of cultural expressions and efforts to preserve culture without commodifying it.

While making use of international copyright laws to protect their *individual rights* as authors and creators, the approach to copyright found here undermines the claims made by those who seek a more holistic and comprehensive form of protection. By treating cultural heritage as the inspiration for modern works of art, new artistic work is produced in the "style" of traditional work. However, the indigenous group as a whole loses some control over traditional works once this pathway is adopted. As the legal clashes over Lilanga's art demonstrates, to follow the path of neo-liberalism shatters the community relations that may have cemented the work in the first place and replaces them with claims to private property, original authorship, and barriers to the participation of others.

Within this paradigm, the location of creativity becomes the individual who works within a specific culture, and the traditional production of the arts is transformed by that individual's encounter with modern commercial approaches. However, indigenous culture becomes what many indigenous people reject—part of a public domain that would be free to everyone to appropriate, not simply to members of a specific group. Sorting through the impulse to protect culture as a non-commodified and sacred space while at the same time preserving the possibility of artistic expression

of the individual who can sell his or her work is one of the key tensions emerging from the debates over traditional cultural expressions.

If we understand indigenous products as commodities that can be bought and sold, then the pathway to the future for indigenous groups is modernization. Lilanga demonstrates this process—the legal regimes of the commercial world are adopted, the individual emerges as the dominant unit of analysis, and cultural preservation becomes an act of historical memory, not an act of producing a traditional present or future. While it may be subtle, the shift from valuing the community creation of culture to the expression of the individual takes place. Lilanga, while alive, allowed his name to serve as the vehicle for a community to thrive. Now that he is dead, his heirs are much more interested in preserving the rights of a sole author over his creative works.

To follow this pathway, individuals located within specific indigenous cultures can sell locally branded art, music, and creative items to tourists and others interested in collecting artifacts of native life. Culture becomes the commodity upon which a larger national project can attract visitors and prop up a cash economy. It also helps to shore up ideas of local authenticity, and members of a local tribe or culture can be brought forward to perform their culture for visitors and for the purposes of tourist consumption. However, it can also be difficult to know who is an appropriate member of the group, having the right to use these cultural expressions.

When thinking about the likely legal regime that reflects the types of indigenous claims emerging from this line of argumentation, simply appropriating conventional copyright is the most likely approach. However, given the claims that indigenous communities make regarding authenticity, one possible legal regime might more thoroughly protect the style of a specific culture and require those producing work within this style to certify membership in the community. To do this, it may be necessary to create a regulatory structure like that developed by Australian aborigines.

Such practices impose limits not currently enshrined in copyright law. How one might construct boundaries as to who creates within a certain style will inevitably cause controversies and preclude some forms of artistic expression. For indigenous peoples, the legal system could be constructed to allow for the protection of what is called the "look and feel" of an artistic genre. However, indigenous communities lose some control over the outcome. So, for example, the mass production of a kind of cloth or a type of painting, to be sold for the purposes of tourism, can be regulated by the local community, but the boundaries between a "style" of work and a larger commercial process are very difficult to define.

For the most part, once a traditional community opts for a modern method of producing art, selling cultural artifacts, and performing cultural practices as part of a commercial endeavor, then traditional copyright law is the best vehicle for protection, but one risks the limits of the law, including the transmission of commodified cultural objects into the public domain. This pathway also opens a community up to commercial exploitation where modes of dress and cultural difference become a commodity to be sold as authentic. The danger of a neo-liberal program is that control over the uses of culture as a commodity privileges the individual. Furthermore, the

past becomes part of the public domain and thus easily exploitable for present and future commercial gain.

Pathway three: global indigeneity—hybridity and the (re)birth of authenticity

It bears repeating that the underlying arguments governing the first two pathways are often made simultaneously by the same groups, so that a group may seek to protect its traditional ways of life as is, but also provide room for commercial exploitation of cultural expressions within a modern economy. The goal is to clarify that these different pathways also align with very different ways of protecting what has come to be understood as intellectual property. It is of course possible to develop a multi-faceted approach to cultural protection that preserves the past while also trying to seek out a very different future. In both the first two pathways, the role of the state remains centered as a legal actor preserving rights or as the geographical boundaries within which a particular indigenous community might find themselves located. This final pathway transcends the state to follow the path of indigeneity and its promise for a different future.

The last pathway builds from the literature on indigeneity as offering a fundamentally different paradigm through which to view the world. While there are multiple local expressions of these underlying ideas, an indigenous epistemological paradigm that transcends any single culture is emerging out of a global conversation between previously separated indigenous communities. Given that all indigenous communities share a history of colonization, the process of reclaiming an indigenous voice and the potential of reclaiming indigenous sovereignty is essential to all. The connections between the local and the global within the field of indigeneity are deep.

As communities are linked together through communications technologies as well as the growing conversation amongst indigenous scholars who are seeking to both recover the past from colonial interpretations and chart a new future, the conversation about indigenous epistemologies transcends the geographical boundaries and limitations of the nation-state system to forge a local/global connection between indigenous communities worldwide. As a result, a broader alternative way of knowing the world is being articulated.⁶⁶ The goal of this approach is to dehegemonize not only colonial structures but also the ways of knowing the world that assert a single Western approach.⁶⁷

The last 30 years have seen a surge in indigenous sovereignty movements, and the creation of a transnational network focused on indigenous rights, culminating with the UN Declaration on the Rights of Indigenous Peoples.⁶⁸ Indigenous communities have sought to establish unique cultural identities when confronted with the homogenizing forces of a nation-state project and globalization. They have done so by mobilizing globally while keeping the importance of place centrally located in their discourse. Dirlik notes that:

While nation-states have had much reason to be unhappy about indigenous self-assertion, United Nations activity has spurred action at the national level

for the protection of indigenous peoples and cultures. The estimated 300,000 indigenous people around the world have indeed become quite visible, and serve as the source of a new kind of social mobilization in the name of economic, political, and cultural survival and justice.⁶⁹

At the global level and for the purposes of establishing a global presence, these diverse communities highlight the similarities between their cultures as a justification for cultural preservation that is distinct from the nation-state project.

Globalizing the idea of the indigenous and its *essential* characteristics while at the same time trying to leave room for the local and unique expressions of these diverse cultures has led to vibrant new conversations between indigenous communities as well as a growing sense of indigeneity as an alternative to the status quo. As Dirlik puts it, this is an indigenized modernity.⁷⁰

Implicated in this debate is a tension between the traditional and the modern, and the future of both. At the global level, indigenous peoples align against modern expressions of the nation and capitalism to articulate a way of knowing the world that is distinctly indigenous. The underlying argument is that many communities share the characteristics of indigenous life, though they may be expressed differently. These characteristics include a deep and spiritual connection to the land, a privileging of the group over the individual, a respect for knowledge that is held by elders and passed to others through specific forms or rituals, shared traditions, dances, art, and music, a rejection of the market as a primary way of organizing life, and often a self-sustaining mode of existence that allows people to remain connected to their homes.⁷¹ While specific groups may embrace some or all of these values, once generalized globally, efforts to articulate something uniquely indigenous constructs a global indigeneity. Scholars Harris and Wasilewski argue for a concept of indigeneity that is locally based but global in scope and recognizes four common values that can help us transform the world—relationship, responsibility, reciprocity, and redistribution.⁷²

The broader notion of a global indigeneity also allows for a rearticulation of issues of place and space, as many indigenous peoples find themselves part of a larger diaspora or living outside their original territorial boundaries. Indigeneity conceptually links space and place differently, so that any particular indigenous groups might be able to claim their authenticity as a member of the group while living outside it. David Welchman Gegeo remarks on the complexity of the space/place issue for indigenous peoples. He argues that, if an indigenous person is culturally situated within the group, they "can live anywhere in the world for long periods or perhaps permanently on a day-to-day basis, and still be seen as indigenous . . . Place is portable."⁷³ It is the underlying epistemology that links one to an indigenous community, not the tangible space where they reside.

Gegeo's remarks highlight another tension that runs through these different pathways and that is the meaning of "authentic" culture. The search for the authentic can be seen as a reaction to the homogenization of culture through capitalist appropriation, which flattens out cultural difference by replacing it with consumable products. Additionally, many experience modernity as alienating and disrupting, and thus a

search for meaning and place in a dispossessed political space, is often times understood as a search for something authentic. For traditional communities, the concept of authentic remains important because determining the relationship between tradition and modernity, and the appropriate response from a cultural perspective, is difficult terrain to negotiate. Ty Tengan seeks to negotiate these complex issues as he speaks of his own work as an anthropologist in the context of his status as a Native Hawaiian. On the one hand, Tengan argues that avoiding essential claims about indigenous ways of life supports the agenda of nation-states and corporations:

Other anthropologists have recently called into question the ability of anyone to claim a position that is truly 'indigenous' or 'native' without promoting essentialisms that lead to unjust social and intellectual strife. Wittingly or not, such criticisms often support the agendas of nation-states and transnational corporations that continue to violate the human rights of indigenous peoples. This, in turn, marks a disturbing unwillingness on the part of some anthropologists to engage critically with the social and political contexts from which their work emerges and into which it circulates back, a situation that calls into question the very nature of the anthropological enterprise and the responsibilities of anthropologists working in indigenous communities.⁷⁴

However, on the other hand, Tengan recognizes that, as a member of an indigenous community with a multi-ethnic background, it is important to acknowledge the already situated hybridity of any particular identity. As he says about his own position:

I trace my own genealogical lineages to Hawaiian, Okinawan, Portuguese and German ancestors, and my dwellings in place have occurred in Germany, Colorado, Georgia, O'ahu, New Hampshire and Maui. Differences of class and gender further complicate those of race and place, yet Punia, Kauanui and I still stake autochthonous claims to being Hawaiian. The indigenous is thus as inherently situational, hybrid, syncretic and articulated as it is grounded in genealogy and land. This very diversity of experience and positionality is a strength when it is understood as broadening and enlarging the space of indigeneity, rather than completely erasing it.⁷⁵

Such a complex understanding of the politics of indigenous ways of life makes it all the more difficult to chart this particular path. However, while the problematic of authenticity remains a significant dimension to any discussion about the future of culture and what a global indigeneity would look like, what emerges from this path is an effort to articulate an alternative epistemology—one that stakes out a substantially different worldview and one that reclaims authenticity not within the past but through an ongoing conversation about diversity and knowledge claims that have been historically ignored.

This path, followed by many in order to gain international visibility against nation-states that either seek to stamp out and destroy cultural difference or to appropriate

difference as a commodity to sell, is also a path that has consequences for how we understand the future of tradition and indigenous knowledge. In this approach, it is understood that the best way to preserve a culture is to disseminate it as widely as possible and to communicate it with as many people as possible.⁷⁶ A global indigeneity seeks to create and disseminate an alternative world, building upon indigenous values. These values transcend any single group but unite a very diverse set of people under a rubric that seeks to pose an alternative to the colonizing historical trajectory of Western thought. Given modern communications technologies and international forums, people can create connections among a dispersed people and work to rebuild First Nation identity.⁷⁷

By connecting people globally, by using modern communication to share knowledge, philosophies, ideas, and creativity, and by creating the possibility of a global indigeneity that envisions an entirely different world, the final path that might be followed is the path that highlights the best of indigenous traditions, but locates these within a new and global paradigm of indigenous-based values. Such a future escapes the limitations of an authenticity frozen in the past, it rejects the appropriation of indigenous values and knowledge by the market that changes everything into a commodity, and instead offers a new basis for a shared cultural evolution at the global level. This future path must recognize that, while we may be able to categorize ways of being in the world as "traditional" or "modern," and that there are consequences associated with these choices, the best way for cultures to grow, evolve, and meet the needs of their people is to share across borders.

In other words, the final possibility discussed here is that the future of indigenous peoples will look nothing like the past because there is no such thing as an authentic culture to begin with, but there are foundational values upon which to create future culture. Drawing upon notions of hybridity and cultural evolution, concepts discussed in the previous chapter, one can claim that no cultural community stands in a vacuum but instead is in constant communication with other peoples. Hybridity can be a political tool. It "unsettles the introverted concept of culture that underlies romantic nationalism, racism, ethnicism, religious revivalism, civilizational chauvinism, and cultural essentialism."⁷⁸ As such, it helps to reorganize social spaces around different groupings besides the nation-state.⁷⁹ Culture travels and flows, but also becomes indigenized in the process.⁸⁰ As Brown notes:

hybridity moves in every possible direction ... the ubiquity of these processes of cultural recombination must not be seen as compromising the authenticity of indigenous individuals or groups, but it does underscore the folly of cordoning off heritage as a discrete domain that can be defined and defended by law.⁸¹

The information society allows for members of diverse cultures to interact freely, and the ease of global travel means people and their cultures flow much more fluidly than they did even 60 years ago. The possibilities of sharing cultural difference globally with members of traditional communities that moved away, but also with entirely different and new peoples, is the way that cultures will evolve if this pathway

is chosen. Thus, the hybridity of the future *could be* the possibilities of transforming neo-liberal modernity into something entirely different that is rooted in the values expressed by indigenous people and lived daily around the globe. To do so, however, is to let go of control over an authenticity grounded in the past and to forge a new authenticity that can escape the controlling mechanisms of the markets. Thus, this path, too, comes with specific consequences to be considered.

In many ways this pathway is the reverse of the first one—instead of enclosing knowledge behind barriers that would preserve it as separate, this path assures that traditional cultural expressions are not commercialized but can be shared. In other words, developing the possibility of remaining outside the market but open to sharing is the goal sought by following this path. Limiting copyright control to allow for the free flow of ideas is one part of the solution. Perhaps the best available model is the open source model—where there is an understanding that rights of authorship and attribution remain important, but so too are efforts to exchange ideas, creativity, and knowledge outside market-based models.

Traditional knowledge and the modern state

In this final section, I would like to focus in more detail upon one indigenous community where the tensions between modernity and tradition play out. In April of 2010, I traveled to the high Arctic through the Canadian territory of Nunavut, a site that despite its extreme weather and remote location is subject to international scrutiny and political maneuvering because of its gas and oil reserves, and the possibility of realizing the long-time colonial dream of a navigable northwest passage. Travel in the high Arctic is primarily by plane, snowmobile, foot, or skis. There is no connecting road system between towns, leaving the small human habitations relatively isolated during the summer months when the ice thaws and during the winter months when it is too cold to travel. To get into the high Arctic, it is necessary to jump by plane from one small city to the next on your way to the final destination. The first in a series of stops along the way to the high Arctic is the capital city of the Nunavut territory, Iqaluit.

Iqaluit became the capital in 1999 when Canada created the territory of Nunavut to give the high Arctic region its own sovereign territorial government. The creation of the territory is the culmination of a 40-year process that began in the mid-'70s when the Inuit Tapirisat of Canada (ITC) study group demonstrated the extent of the Inuit land title and recommended the creation of the territory to reflect the land claims of the Inuit.⁸² The governance structure for the territory was developed in the 1990s, which includes decentralized control within the communities spread apart geographically.

Since then, Nunavut and the capital city, Iqaluit, have constructed a narrative that blends the traditional culture of the Inuit with the modern idea of a state that makes policy, provides services, and is concerned about issues such as unemployment and economic development. The website is written in the two official languages of Canada (English and French), but also in Inuktitut, the local traditional language. According to the Nunavut official website:

Nunavut—"our land" in the Inuktitut language—has been home to Inuit for millennia and part of Canada for more than a century. Embracing both traditional knowledge and values and the new opportunities presented by technologies like the Internet, the Government of Nunavut now provides a wide range of services tailored to the unique needs of approximately 29,500 residents.⁸³

The Nunavut government describes its role as facilitating the blend between tradition and modernity, especially with the use of technology to connect this remote region to the rest of the world. The Nunavut official website tells an optimistic story of a new capital city in a new territory that will modernize along the lines paved for it by all other national projects over the last several centuries.

This uneasy relationship attempts to do two things at once. First the government tries to establish a modern narrative of jobs and economic growth, coming primarily from resource extraction. The territory hosts a department of statistics, which lists unemployment at about 18 percent, a standard measure of economic development.⁸⁴ Second, the government wants to preserve the traditional way of life of the Inuit and their traditional knowledge. However, preservation of this way of life is at odds with modern efforts to bring jobs and money to the region. For example, the territory would like to see people visit for the unique culture and the natural beauty, but commodifying culture as a tourist attraction is yet another way to privilege the modern, capitalist economy while marginalizing traditional cultures. Furthermore, traditional practices such as seal and polar bear hunting are tightly regulated by the Canadian government, and the more modern expressions of these traditional practices such as selling the seal pelts or polar bear skins for money are internationally controversial because of the endangered status of the animals involved. Thus, despite rhetorical nods to traditional culture, its expression is often circumscribed by modern concerns or directed towards its contribution to a cash-based economy.

Despite the importance of traditional culture, the story is one of conventional modernization. The city of Iqaluit website, for example, offers a glowing description that places the new territory firmly within the language of neo-liberal globalization and economic development:

It's hard to imagine anywhere in Canada with greater prospects. The city's alive with the anything's-possible attitude of a young community. Bursting with new growth, exciting economic and social opportunities, this bustling Arctic capital is home to a diverse mix of people enjoying the leading edge of development and phenomenal potential. Young and old are working to create a future that will preserve the strengths of traditional culture, while embracing the surging changes of the 21st century.⁸⁵

While the city is small and covered in snow and ice for the vast majority of the year, and the territory hosts an unemployment rate of 18 percent, the language used to describe life there makes it sound like any other city in North America.

In fact, Iqaluit is politically significant. Given the importance of resource extraction to the region, the 13th annual Nunavut Mining Symposium was hosted in Iqaluit April 13–15, 2010 as we were traveling through. The event brought together academics, mining professionals, professionals from Inuit organizations, and government representatives to “celebrate the mining and exploration industry in Nunavut.”⁸⁶ The theme of the symposium that year was “From the Ground Up,” which, as the organizers described it, “highlights the paths of achievement that the mining and exploration industry represent in the development of regional economies, as well as in the development of education and training initiatives.”⁸⁷

Scattered throughout the high Arctic are scores of oil and gas exploration efforts, and scientific expeditions developing knowledge of the geography of the region and the impact of global warming on the sea ice and animal life, as well as temporary and permanent installations that exist in order for claims of territorial sovereignty to be made by governments with a national interest in the region. Between these small encampments of people lies a vast assortment of small islands and a frozen ocean, much of which doesn’t melt. Canada has long sought to establish its sovereignty over the region by using the local population as a justification for its claims to ownership. In fact, indigenous peoples from Northern Quebec were forcibly moved to Resolute in order for the Canadian government to claim the region as its sovereign territory.

Aside from the Mining Symposium, Iqaluit also demonstrated its global significance by hosting the G-7 meetings in February of 2010. Given that the capital city can only be reached by air, snowmobile, dogsled, or, in the summer, boats, the choice of location virtually eliminated the possibility of public protest or significant attention to the meetings. Hosting the G7 in Iqaluit also served the publicly stated purpose to “demonstrate Canada’s sovereignty in the Arctic,” according to Canadian Finance Minister Jim Flaherty.⁸⁸

The issue of sovereignty over the Arctic is increasingly significant and contentious. The region is rich with oil and gas reserves, and developing methods to extract these reserves is of significant interest to all the member countries of the Arctic council. In a recent controversy over sovereignty claims, Canada’s Foreign Affairs Minister Lawrence Cannon was criticized for not inviting the Nunavut leaders to meetings regarding Arctic issues related to sovereignty disputes. Even though he had traveled to Resolute, he did not meet with the Nunavut leaders and instead issued claims about Canadian sovereignty as if the territory had no specific leadership of its own. From the local perspective, the existence of Inuit throughout the region in towns like Resolute and Pond Inlet (both created by the Canadian government to establish sovereignty in the region) are “living proof of sovereignty.”⁸⁹ Canada’s exclusion of the Inuit from the Ilulissat Summit of Arctic foreign policy chiefs met with criticism by Hillary Clinton who became a surprise advocate for the Inuit and inspired the Inuit to issue the Circumpolar Inuit Declaration of Arctic Sovereignty.⁹⁰

International maneuvering regarding sovereignty is extremely significant to the future of the Arctic region, and all states have their eyes on how the issue will play out. As Canada gets ready to submit its report to the United Nations Commission on the Limits of the Continental Shelf in December of 2013, it is spending more time

focused on the high Arctic region and its connection to Canada.⁹¹ Under the United Nations Convention on the Law of the Sea (UNCLOS), Canada’s sovereign territory extends 200 nautical miles from shore. However, sovereign territory can be extended to 350 nautical miles if Canada can demonstrate that the continental shelf extends from its territory that far.⁹² Efforts to extend Canadian sovereignty as far north as possible are, according to Foreign Affairs minister Cannon, “a priority for our government as we protect and defend Canada’s interests in the North.”⁹³ Thus, despite the positive support on websites locating some amount of territorial sovereignty in the territory of Nunavut, Canada clearly has its own agenda when it comes to the northernmost territory.

Despite the cultural heritage and ways of life of the Inuit who have lived on the land for “a millennia,” modern development for Nunavut and the high Arctic more generally is conceived as providing jobs within a cash economy and industry-based model (primarily resource extraction), as well as establishing Canadian national sovereignty over the region. The contribution of the Inuit to territorial government, at least if one were to take their exclusion from international talks on the region as evidence that their interests are discounted, seems to be to provide a cultural branding to the northernmost territory in Canada and give it a unique cultural flavor, while undermining any real sense of territorial sovereignty that might exist.

Of course, the cultural practices of the Inuit have long been linked to the larger global economy. As Zellen points out, there exists a tension between the traditional practices of the Inuit and much of Europe which:

[H]as resulted in a very odd diplomatic tension between a sub-state tribe and the very European states whose own fur empires led to the colonization of the Far North in centuries past, and which introduced the Inuit to the globalizing economics of the fur trade. Once proudly independent and with a subsistence economy perfectly aligned with the unique Arctic landscape, the Inuit became part of a new, European-centered, global economy that actively solicited their fur wealth, whether the muskrat, sea otter or even the seal.⁹⁴

The transformation of cultural practices into commodities is one example of how modern economic models interact and fundamentally change local cultures. Thus, today’s Inuit seek to retain and revive cultural practices that are already implicated in a global economy. What is true for the practices of everyday life that make up a unique cultural milieu is also true for the creative expression of culture.

While in Iqaluit I visited a local art gallery where local artists were promoted. Along with intricate carvings of polar bears and seals and human figures on animal bones, the art gallery hosted numerous carved images of a stone figure central to the traditional culture of the Inuit called the Inukshuk. I would like to use this symbol to tell the story of cultural appropriation and copyright as it relates to indigenous knowledge and to further highlight the various claims made in the three pathways above.

The Inukshuk figure has a long history as a tool for navigation and to track animals for hunting. In a terrain that is stark, treeless, filled with ice and snow, and extremely

cold, and dark throughout the entire winter, the Inukshuk helped hunters herd caribou, it helped to point the direction in which someone might go, and it also helped to mark channels for boats.⁹⁵ It has become one of the most visible symbols of the region, and of first nation peoples in Canada more generally, gracing information pamphlets as well as a number of gift items for sale in Iqaluit. In fact, the 2010 Olympics, hosted in British Columbia, appropriated the symbol as part of Olympic branding.⁹⁶

With the publication of the 2010 Olympic logo, the more localized meanings of the Inukshuk became appropriated into a much larger narrative of cultural connections between the traditional and the modern. While the marketing of the Olympics based upon the traditional symbol further catapults local culture into the global flow of cultural capital, Iqaluit had already used the symbol to "brand" the traditional cultures of Canada and sell this brand to tourists such as myself as a token of "authentic" local culture. If I want to buy something authentic from Iqaluit as a souvenir of my trip, which I did, I could purchase jewelry or carvings with the Inukshuk symbol, a symbol that at least until I saw it on the 2010 Olympic billboards in Western Canada, spoke to a unique local culture and a traditional way of life.

The art gallery was not the only place where one could purchase tokens from the region. I could also go to the airport gift shop and purchase the same symbol placed on items manufactured in China. The Chinese-made gifts were far less expensive and were found on potholders, towels, shirts, shot glasses, and other trinkets. For many, who never left the airport in Iqaluit to cross the street to the art gallery, the gift shop was their only link to the local culture.

The art gallery also had some beautiful jewelry made by local artists that did not evoke the place or local culture. It looked like jewelry that could be bought anywhere. I was not interested in purchasing these items, nor were any of the other members of my group, who also bought carvings of seals, polar bears, or the Inukshuk symbol to take home. I did, however, purchase two small watercolor paintings by local artists. One is a landscape and, to be honest, I was disappointed that it showed the region without snow, given that this was the high Arctic. While the artist was local, his work did not evoke the Arctic scenes I had become accustomed to seeing over the past month.

In a world of globalized economies where culture is used by the state to promote tourism and regional economic growth, what is the correct consumer choice when faced with the representations of traditional Inuit culture found for sale in these gift shops? Recognizing my own status as an elite tourist with the opportunity to travel to the high Arctic, and my desire to possess a symbol by which to remember the trip, what are the political choices involved in what I should purchase? My choice was to purchase the items made by local artists, which more directly supported local culture and an artistic tradition. This choice was less likely to embrace the globalized marketing of that culture and its associated monopolization of cultural products that use trinkets made in China to siphon off some of the resulting profit to remote locations of capital.

Given the complexity of traditional knowledge claims, sovereignty issues, cultural autonomy, and authenticity, it seems difficult to reduce the questions to those of

copyright. However, as traditional cultural symbols enter the world of artistic creation and international commodity flows, questions of copyright, inspiration, innovation, and creativity become central to understanding the implications of culture in a modern world. First, the traditional symbol cannot be owned, given that it was created prior to any known copyright laws, was freely used throughout the culture before it became an artistic cultural symbol, and falls within the category of a "traditional cultural expression" that is the "heritage of mankind." As such, it can be appropriated by anyone and its resulting use has made it a ubiquitous marker of the region.

This issue becomes a complex problem for those critical of copyright. While all might acknowledge that the Inukshuk symbol can and has been freely appropriated from the local culture, suggesting that some form of copyright protection would be advisable, critical copyright positions reject the idea of copyright as useful or positive, especially for indigenous peoples, because the regime of intellectual property rights transforms culture into a commodity and assures that the global flow of culture will follow colonial patterns where the West appropriates local culture as a raw material and requires the South to purchase culture as a commodity in return.

Thus, the appropriation of unprotected culture has heightened awareness of why communities might need some form of intellectual property protection—either extending copyright to somehow protect traditional knowledge or developing new legal frameworks. However, calling traditional knowledge "intellectual property" is suspect because it creates the conditions of privatized ownership—and makes culture into private property. Refusing to protect traditional knowledge through some sort of legal regime leaves it vulnerable to unauthorized and unattributed appropriation. Such a position creates a double bind for those seeking to protect traditional cultures.

Perhaps more controversial, however, is that the debate over copyright as it relates to traditional knowledge and the protection of traditional cultures raises questions of what "authentic" culture is to begin with, who can create such "authentic" culture, and how might that culture be shared or preserved. When I purchased my gifts, I wanted something authentic—but what is the meaning of authenticity in a globalized world? Seeking out the different, the unique, and the culturally diverse seems important but is the very act of understanding specific cultural formations as "traditional" more likely to do harm?

For example, the watercolor I purchased by a local Iqaluit artist used painting techniques not developed locally. The artist was trained in a method of doing art that would not have been available to the "traditional" culture. Does this make the painting less authentic? What kinds of claims can we make about the flow of methods of expression? These are questions that are simply not easily answered within an economic model of cultural development based upon copyright.

For artistic innovation to occur within our modern conceptualization of art, ideas and their expressions filter through the lens of an individual personality. However, for most traditional communities, the individual is not the privileged position or the location of cultural knowledge, but the community. As individuals working within a traditional culture but having adapted to a modern economy begin to express their art using traditional styles, what type of ownership claims can be made? The line

between artistic training, which is often built upon learning techniques and methods that are designed to give a work of art a specific look or feel, is very blurry and difficult to distinguish. Inspiration, often found when seeing the work of another, is another name for piracy.

Finally, these claims get bound up within the context of cultural and often national identity—which can freeze culture into “traditional” avenues that do not allow it to change or evolve. This raises questions about how cultures evolve, innovate, and/or remain static. How might one facilitate cultural diversity, or do we only pay lip service to this idea? And, what are the ways in which cultures interact that are helped or hindered by a system of copyright? A commercial and tightly controlled copyright law and policy seeks to halt the type of cultural flows that inspire new innovation and work.

What if I had not bought the Inukshuk symbol in Iqaluit, but got it in the Ottawa airport, or, what if an artist traveling through Iqaluit saw these small sculptures, went home and began integrating them into their own art? What becomes of the authenticity of the symbol then? Who would you ask for permission to use it? Should anyone be able to integrate these symbols into their art? Or, let's say I am an artist who has been inspired by a local design or pattern. I return home and integrate these into my own work, thus creating an individualized expression that is a blend of my own artistic talent with the ideas I was exposed to while traveling. Is this appropriation acceptable? Or is it piracy?

These questions problematize all dimensions of creativity, from the inspiration the artist may find in viewing something new, to the ways in which the state appropriates cultural traditions to symbolize their own governance practices and integrates local cultures into the global economic structure. The state's interest in providing jobs means that they facilitate the commodification of culture through a legal regime, but they also encourage the consumption of culture through the purchase of tourist trinkets. Virtually all facets of culture today are integrated within a nation-state system and the globalized economy that this system helps to reproduce.

Within the context of a complex and controversial interplay of concepts such as “the traditional,” claims to authenticity, and the relationship of the traditional to the modern, it is important to investigate how institutional structures of law and policy that can be created to preserve and protect traditional cultural expressions have consequences for the types of expressions and the possible futures of expressions. One can and should think strategically about the law, how it opens up some possibilities while closing off others, and develop the frameworks that can best create the future. The Inuit experience helps problematize the present, and one question that emerges is—what are the pathways to the future?

Conclusion

When we think about the position of indigenous cultures within modernity and the relationship of modernity to copyright, as they have evolved through these three pathways, there are several concurrently existing trends shaping cultural creation that seem relevant:

- faster turnover of information and culture as a commodity—supported by the network of law known as copyright;
- an effort to protect the cultural integrity of traditional cultural expression and practices from commodification and appropriation;
- a recognition that culture flows across geographic and cultural boundaries;
- ever more cultural exchange made possible by globalized networks of communication that create the conditions under which cultures adapt, grow, and evolve;
- A search for authenticity in the face of an alienating modernity and the expression of unique culture that can be exploited economically.

Trying to construct a future that is sensitive to these multiple trends and the various directions they lead is virtually impossible. There are clear consequences to each option and of course it is the case that all options may be pursued simultaneously.

This chapter perhaps also demonstrates that the fate of indigenous peoples is multifaceted and issues of intellectual property are only part of a much larger struggle. That larger struggle is the effort to retain traditional ways of life, adapt to modernity, articulate a unique identity within the larger sphere of the nation state, and figure out how traditional cultures might survive without closing off the possibility of evolution and change. These struggles face indigenous peoples throughout the globe and, while culturally these geographically situated peoples are quite different, the struggle for autonomy in the face of modern politics, culture, and law remains similar. Cultural preservation is a much larger issue than copyright law, but unfortunately as culture has been narrated as property (either of a group or individual), the scope of intellectual property law or some version of it to protect culture has become a more pervasive conversation.

Solving problems associated with intellectual property will not solve the problems facing traditional cultures. This is true because, despite the best efforts to preserve cultural traditions, the battles that must be fought transcend issues of intellectual property. While these laws have become visible as vehicles for exploitation of traditional communities and knowledge by the larger capitalist world, cultural survival will hinge not on better formulated intellectual property laws, but on a community-based agreement on how to negotiate the preservation of traditional culture within the cultural flows of a modern and globalized society. That being said, a focus on the relationship of indigenous cultural expressions and developing intellectual property regimes can serve as a way of understanding the possibilities for future cultural expressions and the ways in which the law and the politics of intellectual property rights frame these possibilities. In the process, we can hope that the claims of indigenous peoples will help to transform the ways in which intellectual property interacts with culture for us all.

Notes

- 1 Much of this chapter was originally prepared for the Digital Tradition Archive Knowledge: International Conference on the Protection and Application of Indigenous

Traditional Cultural Expression in the Digital Era, held in Taiwan, December 2010. Additional portions can be found as part of the Rio Papers written for the CopySouth Working Group meeting in Brazil and available at: http://copysouth.org/portal/therio_papers.

- 2 "South American Indians to Receive Royalties from Potato Sales," *Survival International*, April 1, 2011, www.survivalinternational.org/news/7144.
- 3 Ibid.
- 4 Isabella Löhr, "Intellectual Property Rights Between Nationalization and Globalization. Introduction," in *Intellectual Property Rights and Globalization*, ed. Isabella Löhr and Hannes Siegrist (Leipzig: Leipziger Universitätsverlag, 2011), 27–45.
- 5 Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (London: Zed Books, 1999), 59.
- 6 Christoph Graber, "Using Human Rights to Tackle Fragmentation in the Field of Traditional Cultural Expressions: An Institutional Approach," in *Intellectual Property and Traditional Cultural Expressions in Digital Environment*, ed. Christoph Graber and Mira Burri-Nenova (Cheltenham and Northampton, MA: Edward Elgar, 2008), 96–120.
- 7 Hopper, *Understanding Cultural Globalization*, op. cit., 25.
- 8 Smith, *Decolonizing Methodologies*, op. cit., 61.
- 9 Ibid., 42–94.
- 10 Hopper, *Understanding Cultural Globalization*, op. cit., 27.
- 11 Lorenzo Veracini, "Settler Colonialism and Decolonisation," *Borderlands E-Journal* 6, no. 2 (2007), www.borderlands.net.au/vol6no2_2007/veracini_settler.htm.
- 12 Ibid., para 26.
- 13 Ibid., para 26–27.
- 14 Connell discusses how the origins of modernity and capitalism are "not a by-product; [but] they are constitutive of modern capitalism as a system." Raewyn Connell, *Southern Theory: The Global Dynamics of Knowledge in Social Science* (Cambridge, MA and Malden, MA: Polity, 2007), 38.
- 15 Alain Kiyindou, "Cultural Diversity," in *Word Matters: Multicultural Perspectives on Information Societies*, ed. Alain Ambrosi, Valerie Peugeot, and Daniel Pimienta, 2006, <http://vecam.org/article597.html>.
- 16 Arif Dirlik, "Globalization, Indigenism, and the Politics of Place," *The Free Library* (January 1, 2003), www.thefreelibrary.com/Globalization,indigenism,andthe+politics+of+place.
- 17 Monika Dommann, "Lost in Tradition? Reconsidering the History of Folklore and Its Legal Protection Since 1800," in *Intellectual Property and Traditional Cultural Expressions in a Digital Environment*, ed. Christoph Beat Graber and Mira Burri-Nenova (Cheltenham and Northampton, MA: Edward Elgar, 2008), 9.
- 18 Ibid. (Arguing that decolonial nations saw cultural heritage as an economic good.)
- 19 Connell, *Southern Theory*, op. cit., 64–65.
- 20 Smith, *Decolonizing Methodologies*, op. cit.
- 21 Connell is especially critical of the roles played by sociologists and anthropologists in colonial projects, failing to see the ways in which they reproduce colonial power relations through their disciplinary actions. Connell, *Southern Theory*, op. cit., 67.
- 22 Johanna Gibson, "The Lay of the Land: The Geography of Traditional Cultural Expression," in *Intellectual Property and Traditional Cultural Expressions in Digital Environment*, ed. Christoph Beat Graber and Mira Burri-Nenova (Cheltenham and Northampton, MA: Edward Elgar, 2008), 183.
- 23 While James Boyle is perhaps best identified as writing about the Public Domain and was instrumental in the creation of the Center for the Public Domain, theorizing the public domain has been taken up by numerous scholars. See: Boyle, "The Second Enclosure Movement and the Construction of the Public Domain"; Jessica Litman, *Digital Copyright* (Amherst, MA: Prometheus Books, 2006); Debora Halbert, *Resisting Intellectual Property* (London and New York: Routledge, 2005); Anupam Chander and

Sunder Madhavi, "The Romance of the Public Domain," *California Law Review* 92 (October 2004): 1331–73.

- 24 For an account of the privatization of American folk music see: Callahan, *The Trouble with Music*.
- 25 For an excellent case study of the tensions between traditional knowledge and commercial practices within the layers of indigenous communities and nation-state practices see: Boatema Boateng, *The Copyright Thing Doesn't Work Here: Adinkra and Kente Cloth and Intellectual Property in Ghana* (Minneapolis: University of Minnesota Press, 2011); John Comaroff and Jean Comaroff, *Ethnicity, Inc.* (Chicago, IL: University of Chicago Press, 2009).
- 26 Comaroff and Comaroff, *Ethnicity, Inc.*, op. cit.
- 27 Ziauddin Sardar, "Colonizing the Future: The 'other' Dimension of Futures Studies," *Futures* 25, no. 2 (March 1993): 179–87. Sardar talks specifically about how non-Western views of the future are marginalized.
- 28 Jim Dator, "De-Colonizing the Future," *Journal of Futures Studies* 9, no. 3 (February 2005): 93–104.
- 29 Jim Bell and Todd Phillips, "Footprints in New Snow: The NIC's First Report," *Nunatsiag News*, May 12, 1995, www.nunatsiagonline.ca/archives/april0199/nvt90401_34.html.
- 30 Ibid.
- 31 Ibid.
- 32 Lars Magnusson and Jan Ottosson, *The Evolution of Path Dependence* (Cheltenham and Northampton, MA: Edward Elgar Publishing, 2009); Gerhard Fuchs and Philip Shapira, *Rethinking Regional Innovation and Change: Path Dependency or Regional Breakthrough* (New York: Springer, 2005).
- 33 Michael F. Brown, *Who Owns Native Culture?* (Cambridge, MA: Harvard University Press, 2003), 10.
- 34 Cheryl Robbins, "Autonomy Is Key to Preserving Taiwan's Indigenous Cultures," *Taiwan Today*, April 23, 2010, <http://taiwantoday.tw/ct.asp?xItem=100364&ctNode=423>.
- 35 "Taiwan Indigenous Culture Park," accessed December 4, 2010, [www.tadp.gov.tw/tadpeng/home02_2.aspx?ID=\\$2001&idk=2&exec=L](http://tadp.gov.tw/tadpeng/home02_2.aspx?ID=$2001&idk=2&exec=L).
- 36 Smith, *Decolonizing Methodologies*, op. cit., 187–88.
- 37 Ibid., 72.
- 38 Ibid., 73.
- 39 Connell, *Southern Theory*, op. cit., 198. (Connell highlights the importance of the relationship of indigenous communities to the land).
- 40 Ibid., 200.
- 41 Dommann, "Lost in Tradition? Reconsidering the History of Folklore and Its Legal Protection Since 1800," 4.
- 42 Ibid., 4–6.
- 43 Ibid., 6.
- 44 Elizabeth Burns Coleman, "The Disneyland of Cultural Rights to Intellectual Property: Anthropological and Philosophical Perspectives," in *Intellectual Property and Traditional Cultural Expressions in a Digital Environment*, ed. Christoph Graber and Mira Burri-Nenova (Cheltenham and Northampton, MA: Edward Elgar, 2008), 67.
- 45 Jane Anderson, "Access and Control of Indigenous Knowledge in Libraries and Archives: Ownership and Future Use" (presented at the Correcting Course: Rebalancing Copyright for Libraries in the National and International Arena, Columbia University, New York: American Library Association and The MacArthur Foundation, 2005), 6, correctingcourse.columbia.edu/paper_anderson.pdf.
- 46 Brad Sherman and Leanne Wiseman, "Towards an Indigenous Public Domain," in *The Future of the Public Domain: Identifying the Commons in Information Law*, ed. Lucie M. C. R. Guibault (Frederick, MD: Alphen aan den Rijn: Kluwer Law International, 2006), 259–77.

- 47 Ibid., 273–76.
- 48 Ibid., 275–77.
- 49 Steger, *Globalization*, 2013, op. cit., 5.
- 50 Manjusha S. Nair, "Defining Indigeneity: Situating Transnational Knowledge," *World Society Focus Paper Series*, World Society Foundation, Zurich (January 31, 2006): 6, www.uzh.ch/wsf/WSFocus_Nair.pdf.
- 51 Ibid., 1–7.
- 52 Smith, *Decolonizing Methodologies*, op. cit., 12.
- 53 "Taiwan Aboriginal Page," accessed September 17, 2010, www.taiwanfirstnations.org/index.html.
- 54 Comaroff and Comaroff, *Ethnicity, Inc.*, op. cit., 6–19.
- 55 Ibid., 27.
- 56 Jim Dator, "Some Futures for Cultures," *Hawaii Research Center for Futures Studies*, November 1986, www.futures.hawaii.edu/dator/culture/somefuts.html.
- 57 Ironically, the extension of property rights over culture increases in time and scope even as we demand faster and newer items. For example, while copyrights protect a work for the life of the author plus 70 years, software is innovated, redesigned, and updated yearly, if not monthly. The fate of a movie—with millions of dollars in production, thousands of hours of labor, and often hundreds of people working to create a Hollywood blockbuster—is determined often in a single night, and even the best movies are out of the theaters in weeks and rented only rarely after a few years. While some movies may end up becoming classics, most will be relegated to the dust bin, some almost as soon as they are released. Even the worst movie, however, remains unavailable for any uses other than those claimed by the copyright owner for over a century.
- 58 Baudrillard and Virilio are two theorists speaking to the hypermodern and the ways in which the world becomes detached from reality and/or accelerates in ways not imagined in the past. Jean Baudrillard, *Simulacra and Simulation* (Ann Arbor: University of Michigan Press, 1994); John Armitage, *Paul Virilio: From Modernism to Hypermodernism and Beyond* (London and Thousand Oaks, CA: SAGE, 2000).
- 59 "Inuit Art," *Winnipeg Art Gallery*, accessed September 17, 2010, wag.ca/art/inuit; "Inuit Gallery of Vancouver—Specializing in Inuit Art, Northwest Coast Art, Native Indian Art, Canadian Aboriginal Art, Jewelry, Sculptures, Prints, Drawings, Masks," accessed October 21, 2010, www.inuit.com/?p2=/modules/xgalleries/showgallery.jsp&curAlbId=7.
- 60 Fernandes Andrea, "The Picasso of Africa: George Lilanga," *Mental Floss Blog*, June 5, 2009, www.mentalfloss.com/blogs/archives/26206.
- 61 Daniel Agusta, "Fake George Lilanga," accessed June 2, 2010, www.lilanga.org.
- 62 Andrea, "The Picasso of Africa: George Lilanga," op. cit.
- 63 Agusta, "Fake George Lilanga," op. cit.
- 64 The collective production of art associated with Lilanga is similar to the process through which glass blower Dale Chihuly produces his art. These artists oversee a production process where numerous others work under them to produce the actual work. Dale Chihuly, for example, sued a former employee for producing works that looked similar to his own. The lawsuit was settled without either party being able to discuss the particulars. Chihuly's contributions to his own glasswork are sketches, which he does not typically color himself. These sketches are passed along to his glass studio where other glass blowers bring them to fruition. The glass, however, is sold under the name of Chihuly, not under the name of the glass blower. Such an industrial process neglects the work of the for more than one author. See: Regina Hackett, "Chihuly Settles Copyright Lawsuit," *Seattle PI*, August 4, 2006, www.seattlepi.com/visualart/280101_chihuly04.html.
- 65 "simcoe/ART," July 6, 2009, <http://simcoeart.com/page/6>.
- 66 M. Quanchi, "Indigenous Epistemology, Wisdom and Tradition; Changing and Challenging Dominant Paradigms in Oceania," in *Social Change in the 21st Century* (presented at the Social Change in the 21st Century Conference, Queensland University of Technology, 2004), 2–3, <http://eprints.qut.edu.au/630/>; Manulani A. Meyer, "Our Own Liberation: Reflections on Hawaiian Epistemology," *The Contemporary Pacific* 13, no. 1 (2001): 124–48; N.K. Denzin, Y.S. Lincoln, and L.T. Smith, *Handbook of Critical and Indigenous Methodologies* (Thousand Oaks, CA: Sage Publications, Inc, 2008).
- 67 Gegeo uses "dehegemonize" to discuss the need to do more than replace colonizing faces with "brown" faces but to instead offer the possibilities of structural transformation. D.W. Gegeo, "Cultural Rupture and Indigeneity: The Challenge of (Re)Visioning 'Place' in the Pacific," *The Contemporary Pacific* 13, no. 2 (2001): 493.
- 68 Nair, "Defining Indigeneity: Situating Transnational Knowledge," op. cit., 3.
- 69 Dirlik, "Globalization, Indigenism, and the Politics of Place," op. cit.
- 70 Ibid.
- 71 The UN Declaration on the Rights of Indigenous Peoples is an excellent example of how the language of indigeneity is globalized while at the same time seeking to provide the space for local articulations of the rights and values described in the document. "United Nations Declaration on the Rights of Indigenous Peoples," *United Nations*, September 2007, www.un.org/esa/socdev/unpfii/en/drip.html.
- 72 La Harris and Jacqueline Wasilewski, "Indigeneity, an Alternative Worldview: Four R's (Relationship, Responsibility, Reciprocity, Redistribution) vs. Two P's (Power and Profit). Sharing the Journey Towards Conscious Evolution," *Systems Research and Behavioral Science* 21, no. 5 (2004): 489; "Indigeneity in the Contemporary World," accessed November 6, 2010, www.indigeneity.net.
- 73 Gegeo, "Cultural Rupture and Indigeneity," op. cit., 494–95.
- 74 Ty P. Kāwika Tengan, "Unsettling Ethnography: Tales of an 'Ōiwi in the Anthropological Slot," *Anthropological Forum* 15 (November 2005): 253.
- 75 Ibid., 252–53.
- 76 Marcia Nickerson and Jay Kaufman, "Aboriginal Culture in the Digital Age" (Aboriginal Voice Culture Working Group, n.d.), 9, www.kta.on.ca/documents/AboriginalCultureinADigitalAge.pdf.
- 77 Ibid., 6; Quanchi, "Indigenous Epistemology, Wisdom and Tradition; Changing and Challenging Dominant Paradigms in Oceania," op. cit., 4–5.
- 78 Nederveen Pieterse, *Globalization and Culture*, op. cit., 88.
- 79 Ibid., 89.
- 80 Hopper, *Understanding Cultural Globalization*, op. cit., 49.
- 81 Brown, *Who Owns Native Culture?* op. cit., 222.
- 82 "Facts About Nunavut," *Chronological History*, accessed September 1, 2010, www.gov.nu.ca/English/about.
- 83 "English," *Tunngavutit—Welcome to the Government of Nunavut*, accessed August 29, 2010, www.gov.nu.ca/english.
- 84 "Nunavut Bureau of Statistics," *Nunavut*, accessed September 1, 2010, www.gov.nu.ca/cia/stats.
- 85 "Welcome to the City of Iqaluit," accessed September 1, 2010, www.city.iqaluit.nu.ca/apps/fusebox/index.php?fa=c.displayHome.
- 86 "Nunavut Mining Symposium," *2010 Nunavut Mining Symposium*, April 13, 2010, www.nunavutminingsymposium.ca.
- 87 Ibid.
- 88 "G7 Leaders Enjoy Arctic Outing before Talks," *CBC News*, February 5, 2010, www.cbc.ca/canada/story/2010/02/05/g7-north.html.
- 89 "Nunavut Irked by Arctic Sovereignty Talk," *CBC News*, April 9, 2010, www.cbc.ca/canada/north/story/2010/04/09/north-arctic-sovereignty-nunavut-premier.html.
- 90 Barry Zellen, "Cold Front: Hillary, Ottawa, and the Inuit: A Year After the Inuit Re-Assert Their Sovereignty, Washington Takes Their Side," *Journal of Military and Strategic Studies* 12, no. 3 (Spring 2010): 5–11; "Circumpolar Inuit Declaration on Arctic Sovereignty," *Inuit Tapiriit Kanatami*, April 2009, www.itk.ca/circumpolar-inuit-declaration-arctic-sovereignty.

91 Cindy Chan, "Underwater Robot to Stake Canada's Arctic Claim," *Epoch Times*, April 8, 2010, www.theepochtimes.com/n2/content/view/32982.

92 Ibid.

93 Ibid.

94 Zellen, "Cold Front: Hillary, Ottawa, and the Inuit: A Year After the Inuit Re-Assert Their Sovereignty, Washington Takes Their Side," 10.

95 www.freepirategallery.ca/inukshuk.htm.

96 Graphic Designer Elena Rivera MacGregor won the design competition for the 2010 logo.

7

MASS CULTURE AND THE CULTURE OF THE MASSES

A manifesto for user-generated rights¹

The social condition of global interconnection that we call the Internet makes it possible for all of us to be creative in new and previously undreamed-of ways; Unless we allow "ownership" to interfere.²

A specter is haunting the world—the specter of massive copyright infringement. All the old powers have aligned together to eliminate this specter—the RIAA, the MPAA, the BSA, ASCAP, BMI, and, most importantly, the United States.³ Where is the local start-up, the DJ, the mashup artist, or the 12-year-old fan that has not been labeled a pirate, deemed a criminal, and ordered to "cease and desist"? Where is the new service provider, be it YouTube, Napster, Grokster, MegaUpload, or The Pirate Bay that has not been issued a takedown notice under the DMCA or destroyed altogether?

Two things result from these facts:

- 1 User-generated creative works are already acknowledged to be a power—a culture of the masses taking control of technology and making culture instead of consuming it.
- 2 It is high time that users and the copyright critics supporting this movement openly and in the face of the whole world publish their views, their aims, their tendencies, and meet this nursery tale of the specter of copyright infringement with a manifesto for the rights of user-generated content.

To this end, we (I) sketch a manifesto.⁴

It is time to strike a new balance within copyright law, and the term "user-generated content" itself helps us understand why this new balance is necessary. While the culture industry⁵ ignores the basis for its own appropriation, it uses copyright as a club

to ensure that creative permutations of commercial works remain under commercial control. The trajectory for consumer culture is toward more concentrated ownership, despite the fact that most products produced by the culture industry pull freely from the non-commodified world;⁶ however, these origins are often forgotten when profit motives take over.

In the previous chapters, the relationships between culture, the state, and copyright have been examined. The concepts of culture as property and the relationship between culture and the state have been problematized. In this chapter, and in the final section of the book, my attention turns to not simply how the problems of copyright infringement are narrated, but what possible solutions might exist in the form of policy proposals and beyond. This chapter will focus on policy repairs, but offer a different "balance" between users and creators. The final chapter will look beyond the law and to the transformational possibilities of alternatives to copyright.

This chapter is not an argument against copyright, but instead it is an argument for broader protection of all creative work, including creative work built upon that of others. I am trying to shift the focus to recognize that authors exist outside the commercial sphere of the culture industry and that works of authorship, broadly conceived, are built upon the works of others. It is time to demand change to our copyright policy, change that facilitates a type of self-expression currently mislabeled "user-generated content." User-generated content is in reality authorship and creative work, but also work that generally disrupts the commercial paradigm.

The second section in this chapter sketches the evolution of the term, "user-generated content" in order to identify the politics inherent in the definition and how technology has changed our relationship to entertainment and information. The third section deconstructs the assumptions behind the term, user-generated content in order to clarify its political economy. The fourth part maps the "problem" of user-generated content within the specific world of YouTube videos in order to highlight the flow of ideas inherent in culture, and argues that the problem is, rather than the user, the over-commodification of culture. Finally, I offer several recommendations for policy changes and conclude by arguing that it is time to strike a new balance between commercial interests and the public at large.

The origins of user-generated content

Instead of taking the concept of user-generated content as a given, it seems appropriate to think about the evolution of the term and what it means. As will become clear, the term is used to describe activities engaged in by those typically seen not as cultural producers but cultural consumers. This section will describe the origins and evolution of the term, and the next section will take up the political implications.

The scope of user-generated content includes many problematic connections to copyright law.⁷ User-generated content can be found on wikis, blogs, twitter feeds, YouTube, Facebook, in virtual worlds, in reactions to news stories, in reactions to others' reproductions of news stories, on pirate websites, as ratings for products or ratings for seller reputations, as well as many more places yet to be described or envisioned.⁸

These are part of the emerging social networks of self-expression that are the foundation of our online political and social culture. All these sites raise issues of creativity, ownership, collective authorship, and illegal appropriation of previously copyrighted works.⁹

The history of the term, "user-generated content" is not a long one, with the earliest articles appearing in 1995.¹⁰ Deborah Bogle's 1999 essay is one of the first to suggest that user-generated content could replace professional content and make the once "all-powerful editor/producer type ... just another content provider."¹¹ Bogle tells the story of a colleague, saying, "Well, they can just f.k off, all these users. We need that money!"¹² As a result of technological changes, Bogle acknowledges that experts will have to work harder and the focus will shift to filtering, not producing content. Professionals will have to become more "flexible" as the line blurs between them and passive "users."¹³

The term, "user-generated content" began to gain momentum in 2005 and 2006 when the Web 2.0 phenomenon became a news subject.¹⁴ The vast majority of articles on user-generated content were published in the middle of the first decade of the twenty-first century.¹⁵ By 2007, the online business environment and attitudes toward user-generated content had evolved considerably, as have the impacts of user-generated content on product information,¹⁶ but also for news production,¹⁷ policing,¹⁸ and business models.¹⁹ Users had also changed. Modern users want more connectivity, more user control, and more new technologies.²⁰ In other words, much has changed in the past 15 years as the internet has evolved. User-generated content has become both an opportunity and a concern.

Deconstruction of user-generated content

Mass society is commercialized and driven from the top down by profit-oriented models of cultural consumption. In other words, U.S. mass culture is commercial culture where culture is a commodity like shoes or luxury cars.²¹ The paradigm of consumer culture requires that one take as "truth" a series of starting assumptions. First, the most widely discussed assertion regarding creative use is the assumption that within commodity culture no one creates for free; all artists, no matter their genre, create to make money. According to this logic, nobody gives away their creative work, or their intellectual property as it has come to be called, because to do so would go against the very principles of an ideology based on private property.

The second "truth" is that culture is produced by professionals, defined as those who make a living from their creative work.²² The professionalization and commercialization of consumer culture has traditionally privileged those who monopolize the means of creative production—movie studios, music studios, publishing houses, and other venues associated with the production of mass culture and control.²³ Control over the means of creative production and the avenues of distribution allows for top-down creative control.

Third, articulating the cultural arena as one dominated by professionals is premised upon the myth of the romantic and original artist.²⁴ Within the culture industry, the

profit motive drives production while concealing an industrial model behind the "author effect."²⁵ Important to the industrial model is that in almost all cases the work itself becomes the "property" of the company and not the original author.²⁶ A different way to look at the argument about original authors and production is to see the culture industry structurally—no movie, album, book, fashion design, painting, or other creative work exists because of a single author, as the flows of culture described in previous chapters demonstrate. It is possible to subvert the ideology of the original author by endorsing values of attribution, inspiration, appropriation, and exchange instead. Furthermore, these differences do not break down along the lines of professional and amateur as the user-generated content debates would suggest.²⁷

Only by understanding these assumptions does the phrase "user-generated content" make sense—though the concept of "content" helps disassociate what is produced from culture and instead emphasizes its commodity form. These assumptions generate a landscape where culture is produced in an assembly-line fashion by the "original" few and sold to the uncreative masses, who spend their days consuming culture (or in the digital age, pirating it).

In the context of the consuming masses, user-generated content disrupts a distribution monopoly. Computer technology in the hands of the masses has made available software programs that can create music, documents, and art almost as well as expensive studios did in the past. This democratization of technology disrupts the monopoly over the creative means of production. The world of "amateur" production also demonstrates that many are motivated by non-commercial reasons.²⁸ By using the term, user-generated content, the structure of the narrative implicitly undermines the value that can be placed on the original work of "users" and implies that professional contributions are somehow superior.²⁹

In the past, it was far more difficult to see the creativity of thousands, if not millions, of people. The social networking platforms at the heart of the Web 2.0 revolution have changed this. Web 2.0 technologies brought broader visibility to the creative self-expression of the average person, and in doing so reproduced already existing forms of everyday cultural creation. In the non-commodified world, user-generated content is not a new concept, and in some cases the communities built around it had already developed their own sets of norms.³⁰ Ironically, the web itself is the product of user-generated content.³¹ Furthermore, important aspects of our culture, from quilts to recipes, to style, to scrapbooks, to music, and poetry, are all generated by "users," given that the term "user" is simply another way to describe non-professionals who allow their creative energies to be part of a gift, or uncommodified, culture.

The user-generated world can and does play with the commodified products of the culture industry, appropriating common cultural symbols and remaking them as personally meaningful connections. In a world of commodities where our common cultural symbols are commercially produced, there are few other options. This remix behavior goes well beyond the technology platforms that allow for its distribution.³² I will argue that remixing is a form of de-commodification—it takes a product of the culture industry and creates social meaning that is out of the control of the "content owners." For example, in the non-networked world, anyone who has sat around

quoting the lines from a Monty Python skit can understand how a product of the culture industry cements relationships and allows for cultural meaning to develop beyond the actual "product," in effect de-commodifying the object and giving it shared cultural meaning. We have always interacted with our cultural products; we just didn't do it virtually before. So, what is the problem created by user-generated content?

The "problem" of user-generated content

Corporate concern surrounding user-generated content highlights the sea change we are witnessing today. As cultural critic and editor, Matt Mason, argues, "When pirates start to appear in a market it's usually an indication that it isn't working properly."³³ Where once there existed the relatively stable world of the culture industry in which concentrated control over film, music, literature, and art was easy, the technology of modernity has shifted control into the hands of consumers of culture. Stable control over the culture industry was possible because commodity culture deskills people as creators, in the same way that industrialization deskilled the artisan and craftsman while turning them into fodder for the industrial machine.³⁴

This means that, as the tools for re-skilling creativity emerge, the industrial model of creativity will filter. Consumers with access to technology become creators in a more democratically accessible world. From the perspective of the culture industry, consumers become thieves, but instead of luddites destroying the machinery of their oppression, these actors are taking over the technologies of production and turning them toward their own personal uses.

Technology makes it much easier to produce your own music or films, as well as download the works of others.³⁵ The existence of mass culture, dominated by command and control organizations, is threatened by the shift to the reskilled creative agent. In response to the breakdown of control, the culture industry polices the use of derivatives more closely because it is easier to share more readily.³⁶ Most of the focus is on derivative works, though, hypocritically, the culture industry does not acknowledge its own works as derivative from the surrounding culture.³⁷ Derivative works created by users are problematic because they threaten control over the owned content. In a world where everything is branded, this control is essential.

While, in the United States, the Digital Millennium Copyright Act established rules ostensibly to balance content-owner concerns with service-provider concerns, private initiatives are under way to shore up content ownership in the digital age.³⁸ Media companies including CBS, Walt Disney, Sony Pictures, and Viacom met with internet service providers (ISPs) to formulate a set of principles for user-generated content in October of 2007.³⁹ Key players, including Google, were absent, but also missing were actual users and public interest groups. These absences highlight the political nature of the debate in which users are irrelevant because corporate players will set standards and users will be required to play by the resulting rules.

The primary concern articulated in the principles is the need for a system through which commercial interests can halt the uploading and distribution of content that

instead, they are opening up a platform for cultural sharing around our most common cultural products—commercial culture. In the process, users decommo-dify these cultural moments and give them authentic meaning, meaning that cannot exist without the shared value contributed by the people who are linked through a common cultural experience. These video clips generate a dialogue amongst people and produce a cultural flow that in many cases even crosses international boundaries. As Rosemary Coombe notes, "Everywhere individuals and groups improvise local performances from (re)collected pasts, drawing on foreign media, symbols, and languages. Forces of global capitalism have created a situation of late modernity that is "decentered, fragmented, compressed, flexible, refractive, and meanings are fashioned with materials from diverse cultural lifeworlds."⁶⁴ Not only do people make meaning from "diverse cultural lifeworlds," but I would argue that only when a commodity achieves a cultural flow does it gain value at all. In fact, culture industry products only become successful in the first place when people find social meaning in a work that transcends market value. If *Thriller* had not been so popular, we certainly would not be celebrating its twenty-fifth anniversary, but instead it would be resigned to the dustbins with so much other 1980s' music that did not catch the public attention.

Direct clips of movies or entire music videos, while having social value, are the most obvious forms of copyright infringement. YouTube is also filled with transformative works that fall into much more difficult-to-define categories. For example, it is unlikely that the 1,500 inmates at the Cebu Provincial Detention and Rehabilitation Center in the Philippines who have reproduced the choreography for *Thriller* did so with authorization.⁶⁵ However, this video is wildly popular and has been viewed over 52 million times.⁶⁶ Other versions of the *Thriller* choreography are available, including one created in the virtual world, *Second Life*, all using the song and choreography from the original music video, at least this version existed until removed for copyright violations.⁶⁷

Despite the possibility of copyright infringement, the social and political value of providing a forum in which to discuss these copyrighted works should not be underemphasized. For example, when Steven Colbert was invited to roast President Bush at the White House Press Corps dinner, his speech was considered a disaster in the mainstream media.⁶⁸ However, it became required watching on YouTube. The speech was almost immediately taken off of the site as a copyright violation, but has since made its way back, with one version generating almost 3 million views and almost 9,000 comments.⁶⁹ As one viewer pointed out:

This whole thing is interesting, because he's not playing to the crowd who was in that dinner hall that night. He was playing to the people at home and those (like us) who would watch it on the internet later. WE were the ones who found it hilarious. Not just because of what he said, but because the crowd there TOTALLY DIDN'T.⁷⁰

Posting an entire segment of a news clip, humorous program, or music video creates a way of viewing media never experienced before. Prior to YouTube (and other

services like it), if you missed the show, didn't know to videotape it, or didn't know someone with a copy, you simply had to rely upon the filtered versions provided by the major news outlets or versions mediated by your friend's interpretations. The only media items making it to the video store used to be feature-length movies and now include television series. For all other interesting stories there was simply no secondary market after it was first shown on television.

YouTube has changed this, as has webstreaming and other internet technologies that allow for instant replay and multiple viewings. They place previously tethered entertainment and news into the wild and in the process transform the conversations we can have about our political figures, socially relevant events, and culture industry artifacts. It is likely that Colbert understood his remarks would reach an entirely different audience than the one controlled by the Press Corps and the President's office.⁷¹ The new media environment would allow for many to see the event in its entirety; it would allow for multiple replays and discussion. Old-format media failed to see the significance of the event as a viral political tool, now viewed by millions via YouTube, and instead sought to keep it off of the internet using copyright.⁷² However, YouTube allows for a disintermediated, and thus more authentic, political experience. You can see it for yourself and, instead of being forced to listen to blathering political pundits, you can become your own.

Direct copying, then, has a legitimate social and political function that puts it at odds with copyright law. Aside from direct copying, there is also a vast array of multiple and diverse transformative works available on YouTube. These include fan videos, the reappropriation of characters to be used in different and often deviant contexts,⁷³ machinima, and home videos set to music. Legal commentators have begun to map out the importance and complexity of transformative works.⁷⁴

When fans take culture industry products and make them into something that has social value for them, where commercial compensation is neither sought nor demanded, they are engaged in what could be considered an important political act in a market-dominated world. As I am arguing here, they are decommo-difying culture by taking it out of its profit-oriented platform and transforming it not only into a derivative work under copyright law, but into something that has cultural meaning that goes beyond monetary value. However, box office numbers and advertising dollars are the only way that commercial culture has to measure success.

When copyright stands in the way, it helps to destroy the possibility of human connection through culture. Who could have ever guessed, for example, that an obscure B movie would produce entire communities of re-enactments and forge important relationships between people who might otherwise be far more isolated and alienated as *Rocky Horror Picture Show* has done for over 30 years? When fans of *Buffy the Vampire Slayer* sought to do something similar with the musical episode, "Once More with Feeling," Fox sent cease and desist letters to those who were trying to pay homage to the series and used their control of the copyright to shut down any such performances.⁷⁵

Despite the creative energy associated with commodities being "decommo-dified" and placed within the cultural flow of human life, copyright renders illegal an

enormously varied range of creative products by making all works related to the initial copyrighted work the "property" of the original author and criminals out of those who create these works.⁷⁶ These derivatives include the remake of *Raiders of the Lost Ark* lovingly put together over years of hard work by Chris Stronopoulos, Eric Zala, and Jayson Lamb when they were kids,⁷⁷ the home videos depicted in the recent movie starring Jack Black, *Be Kind ReWind*,⁷⁸ and footage in many documentary films.⁷⁹

Commercial culture causes problems for those inspired by the predominant cultural form we have today—we are trapped in a commodity culture but not allowed to use these properties to imagine our own worlds and scenarios. From a corporate perspective, the problem is that, as Rebecca Tushnet points out, "imagination trumps ownership," and transformative work is difficult to stop because it is the manifestation of the cultural conversation we all engage in as social beings.⁸⁰ From a fan perspective, "imagination trumps ownership," and this is a positive outlet for our self-expression. The conversation about our cultural artifacts facilitates connections but is also contingent upon the transformative aspect of art and thus rendered highly problematic under current copyright law.

One other popular YouTube genre that moves beyond fan appropriation is the home video appropriating copyrighted music as a soundtrack. These home productions often copy an entire song or significant parts of one to develop their narrative. Climbing videos, for example, use music to accentuate the action of the video such as the May 5, 2008 upload by "Lolobrenda."⁸¹ This YouTube video is an 8-minute-and-4-seconds-long creation encapsulating a climbing trip, complete with scene and music changes.⁸² Such unauthorized use of music, even music purchased by the video creators legally, violates the law.

A more complex example is "Zac Sands Climbing No Redemption 5.13 Red River Gorge."⁸³ This 2-minute-and-57-second-long video, viewed over 40,000 times, was produced and uploaded by "Victorypro," a 24-year-old named Spenser Victory, who lists his occupation as video production and his company as Victory Productions.⁸⁴ The footage of Sands climbing is set to Weird Al Yankovic's "White and Nerdy."⁸⁵

A literary interpretation of the video might suggest that "Victorypro" is making a commentary on a white guy doing something that seems far from nerdy.⁸⁶ However, it is much more likely that he just liked the song or it was the correct amount of time for the video.⁸⁷ The Zac Sands video highlights yet again the complexity of cultural exchange. The Yankovic song is a parody of Chamillionaire's "Ridin',"⁸⁸ and it took Weird Al into the Billboard Top 10.⁸⁹ Yankovic released the music video of "White and Nerdy" on the internet, making it one of the most popular YouTube hits available, having now been viewed over 77 million times.⁹⁰ Despite parody being an acceptable fair use, Yankovic splits profits with, and gets permission from, the original artist.⁹¹ However, his work is in itself an incredibly labor-intensive form of creation, one might argue even more difficult than the original, because it requires comic timing and the clever remixing of a song's lyrics.⁹² Weird Al's songs do not only accompany climbing videos; it is possible to find living room performances of them on YouTube, thus turning parody into parody.⁹³

One such appropriation of the parody is "White and Nerdy in Lego," in which "jrdmovimkr" has painstakingly choreographed the song with Lego action figures.⁹⁴ He asks that viewers read his info blurb about the video first, which states:

Some people have questions about my video, and a lot of them are answered here:

Special thanks to lasered97 for the neat weird al trippy with my lego version! Go see all of his videos!!!! I made a video off of Weird Al's music video to "White and Nerdy" ... but it's in LEGO!!! Hope you like it!!! It took me a LOOOOOOONG time to make it, but it was a lot of fun!! (Ok, it took me a week to make it) This is my very first film that I have made in 16 frames per second. I also used Windows Movie Maker to put the pictures together. The "effects" like the (ping pong ball) were all done in Microsoft Paint. Please comment!! :) Don't take this video and post it as your own!!!!⁹⁵

The commentary is illustrative of the culture of sharing and innovation that exists on YouTube. The author understands his own position in the cultural flow of objects, but also wants to highlight the labor he has invested in the Lego version, as well as suggest that norms of plagiarism still apply. This creator is not attempting to pass off the song as his own, but instead to build upon it to create something different and hopefully entertaining.

These examples, all of which take songs and use them in home-produced (or potentially commercial) videos, are more egregious violations of copyright than Lenz's dancing baby. Thus, they are targets for removal. However, it is not at all clear how these videos harm the music's copyright owner. The copyright owners cannot maximize all possible uses of their products, and balanced public policy should not allow cultural products to be so rigidly owned in the first place. Instead, the cultural flows identified here suggest the ways in which creative talent is inspired and remade by interaction with the work of others. These examples enrich our cultural lives with humor, innovation, and the ability to see the proud self-expression of our fellow human beings.

One final example of music and cultural transformations takes us into the world of parkour, a "user-generated" urban movement. Parkour (according to yet another user-generated platform, Wikipedia) involves kids living primarily in urban environments executing physically demanding and acrobatic movements.⁹⁶ The word comes from the French term for an obstacle course—*parcours du combattant*.⁹⁷ For those who practice parkour, the urban environment is the obstacle course.⁹⁸ The founders considered it to be a physical art and it is similar in skill and practice to free running.⁹⁹

YouTube is host to many parkour videos, including one set to a soundtrack appropriating music from, among others, *The Matrix*, and *The Chrysal Method*.¹⁰⁰ This video is 8 minutes and 24 seconds of an amazing demonstration of physical agility and grace performed by an unnamed Russian youth that has been viewed almost 1 million times.¹⁰¹ This video poses copyright problems on a national and international scale, given that the original producer is in Russia.

The copyright violation in the YouTube video should be understood in the context of the cultural appropriation of parkour itself. The introductory scene to the James Bond movie *Casino Royale* involves a chase through a Madagascar construction site.¹⁰² Conveniently, this video is also available on YouTube in high definition.¹⁰³ In the movie, Sébastien Foucan, an actor and co-founder of free running, uses parkour to try to escape from James Bond.¹⁰⁴ Foucan and David Belle, while credited with creating parkour, are not the originators either.¹⁰⁵ Instead, the roots of this youth movement come from pre-World War I visits by Europeans to Africa, thus adding yet another layer of cultural appropriation onto this complex phenomenon.¹⁰⁶

Where cultural appropriation begins and ends is difficult to say, but copyright provides a brighter line. The Russian video is an unauthorized use of the music and can be taken down as a result. The culture industry, however, can take parkour created as a form of individual self-expression and use it for its own purposes, an act that constitutes a cultural appropriation with no legal consequences.

Commercial culture almost destroyed parkour before it could develop as part of urban youth culture. As Matt Mason notes, "it was a real movement, but it was turned into a corporate circus almost instantly."¹⁰⁷ Once something becomes a commercial entity where even Madonna and James Bond are doing it, "it is difficult for a movement to gain grassroots appeal."¹⁰⁸ For Mason, who traces virtually all cultural innovation from the grassroots to commercial culture, youth culture is forced to go even further to the edge in search of something authentic.¹⁰⁹ As he puts it, "New youth cultures can't be as safe as those of days gone by, because if they stay within socially acceptable limits, marketers pounce, and before long they are just another branded spectacle."¹¹⁰ The *Casino Royale* scene highlights that those responsible for the film can pull from cultural phenomena to produce a commercial product, but once commodified in the form of a film, it is a one-way street as far as the culture industry is concerned.

Another way in which people use YouTube is to post videos that take place in cultural worlds created by the culture industry. Because characters and fictional worlds belong to their creators, any unauthorized transformations can be stifled to protect intellectual property rights of the author.¹¹¹ One *Harry Potter* fan included a bold-lettered claim, "Fan-made video, not for profit no infringement intended,"¹¹² to her adaptation of the scenes from *Harry Potter* dubbed to the trailer for the movie *Pride and Prejudice*. While this particular fan has produced a number of different fan videos, her declaration of intent will not be sufficient to save her from a legal dispute if one were to be forthcoming. The *Harry Potter* universe has not been friendly to its fans, with cease and desist letters being a popular method of controlling the brand.¹¹³ As mentioned in the introduction to this book, J.K. Rowling recently won a copyright suit against the man who tried to publish a commercial version of his fan-based *Harry Potter* lexicon, the online version of which Rowling had admittedly used herself while writing the final books in the series.¹¹⁴

Star Wars has also created a fictional universe populated by fans and derivative works. Many are familiar with the Chad Vader videos, the first of which has been viewed over 7 million times.¹¹⁵ Another *Star Wars* derivative parodies *Cops* using

Imperial Stormtroopers.¹¹⁶ This clip has been viewed over 1.5 million times and includes scenes taken from the *Star Wars* movies interspersed with acting and action scenes by amateur actors.¹¹⁷ Yet another video combines *Star Wars* Lego figures with a voiceover of comic Eddie Izzard doing a standup routine about Darth Vader going to the Canteen on the Death Star, viewed over 20 million times.¹¹⁸

Star Wars works hard to maintain the purity of its brand and employs Leland Chee full time to maintain the integrity of the *Star Wars* universe.¹¹⁹ All products associated with the *Star Wars* brand have been licensed since the late 1970s, when George Lucas recognized the possibilities of a branded universe.¹²⁰ However, in a press release following the successful lawsuit of a British man accused of producing unauthorized Imperial Stormtrooper outfits, Lucasfilm sought to assure fans that, while the company will protect their brand against unauthorized commercial actions, they seek to retain a space that allows for imagination and flexibility by fans:

[M]any *Star Wars* fans around the world produce replicas of *Star Wars* costumes for their own personal use and enjoyment, an activity to which Lucasfilm Ltd. has no objection. One such group, the "501st Legion" of stormtroopers, is a global organization that has often worked with Lucasfilm and its partners. "We appreciate that *Star Wars* has sparked the imaginations of fans around the world," he said. "We would never want to discourage fans from showcasing their enthusiasm for the movies. However, anyone who tries to profit from using our copyrights and trademarks without authorization crosses the line; they become an infringer and we will go after them."¹²¹

Other fan bases and transformative works have not been so lucky.¹²²

Such a declaration by Lucasfilm, while helpful, is not sufficient.¹²³ First, the line between commercial uses and non-commercial uses is not clear-cut. Second, Lucasfilm can change their minds at any time and, given the expansive ownership over film characters in the *Star Wars* universe, could decide that mashups using *Star Wars* characters that don't fit within the acknowledged lexicon will be banned. Even if characters that don't fit within the acknowledged lexicon will be banned. Even if Lucasfilm is generally supportive of their fan-made works, fan uses in general raise fair use claims, but are dealt with on a case-by-case basis, making the territory for creativity very unclear.¹²⁴ However, now notoriously copyright-maximalist Disney has purchased Lucasfilm, the state of the fan world is even more seriously in question.¹²⁵

The Lego skit offers further complexities. Not only is it based upon the *Star Wars* universe, but also reproduces a televised standup routine by Eddie Izzard, which means copyrights exist in the televised version of the comedy routine and, if written down, in the text of the stand-up routine itself.¹²⁶ This transformative work might be in danger of being taken down not only because it plays with the *Star Wars* universe in a way that the *Star Wars* franchise might disapprove of, but also because it appropriates the televised broadcast of the routine of a well-known comic. While a fair use argument could be made, and the Lego version could be read as a parody of the comedy and of *Star Wars*, the work exists in an unprotected zone and remains in danger of being eliminated.

Yet another *Star Wars* example illustrates how media corporations attempt to assert total control, even when that property is appropriated from others. Christopher Knight produced a series of campaign ads in 2006 when he ran for the North Carolina Rockingham County Board of Education.¹²⁷ His ads showed him using a light saber and also depicted the Death Star blowing up a school as the voiceover critiqued the "No Child Left Behind" legislation.¹²⁸ Knight put his commercials on YouTube to share with family and friends.¹²⁹ While his homemade commercials were not sufficient to get him elected, they did bring him to the attention of the VH1 program *Web Junk 20*, where Knight's video was lampooned by host Aries Spears.¹³⁰

The business model for *Web Junk 20* included using YouTube videos without permission (according to Knight) and adding humorous commentary.¹³¹ It is the new generation of *America's Funniest Home Videos*, but viewers don't have to submit their videos because they are already available online. When the *Web Junk 20* video was brought to Knight's attention, he liked it so much that he put it on YouTube to share with his family and friends.¹³² However, Viacom saw Knight's video as their intellectual property because they had included a few seconds of additional commentary. Under the notice and takedown procedures of the DMCA, YouTube was ordered to remove the video, which it proceeded to do. Viacom argued that the inclusion of commentary and the image of Aries Spears transformed the original commercial by Knight into their copyrighted material, despite never gaining permission from Knight to use his video.¹³³ Knight argued that his commercial was also copyrighted and VH1 had created a derivative work. After Knight filed a Digital Millennium Copyright Act counter-notification claim and blogged about the case, Viacom chose not to proceed.¹³⁴

While engaged in this dispute with Knight, Viacom published a statement to the Electronic Frontier Foundation (EFF) claiming that it did not challenge "users of Viacom copyrighted material where the use or copy is occasional and is a creative, newsworthy, or transformative use of a limited excerpt for non-commercial purposes."¹³⁵ However, the Knight case and the ongoing litigation against YouTube demonstrate the hypocrisy, if not complete dishonesty of this statement.

Despite Viacom's assurances to EFF that the corporation will allow creative and transformative uses, their litigation against YouTube suggests otherwise. In its ongoing lawsuit against YouTube, Viacom claims, "YouTube's brazen disregard of the intellectual property laws fundamentally threatens not just Plaintiffs, but the economic underpinnings of one of the most important sectors of the United States economy," and that they have done nothing to halt "massive infringement."¹³⁶ Viacom's complaint further argues that YouTube is directly liable because it is YouTube, and not users, that "commits the infringing duplication, public performance, and public display of Plaintiff's copyrighted works, and that infringement occurs on YouTube's own website, which is operated and controlled by Defendants, not users."¹³⁷ In other words, the platform itself is the infringer, not the people making the content. Furthermore, we are to assume that the alleged 150,000 violations do not include possible fair uses.¹³⁸

In its response, dated April 30, 2007, YouTube argues that the DMCA was designed to balance owner rights with protecting the new form of communication

made available by the internet.¹³⁹ Viacom, according to YouTube and Google, "threatens the way hundreds of millions of people legitimately exchange information, news, entertainment, and political and artistic expression."¹⁴⁰ YouTube claims they are protected under the safe harbor provision of the DMCA.¹⁴¹ YouTube outlines a series of defenses that go well beyond fair use and opens the space to have a conversation over cultural appropriation and exchange.¹⁴²

Viacom lost in April of 2013 but has indicated that it will appeal, costing millions more in attorney fees on both sides.¹⁴³ If they ultimately succeed, the creative world that YouTube provides will be destroyed in part because there will be an even stronger burden to take down potentially infringing works. As the case is structured now, it seems unlikely that a sophisticated and detailed articulation of fair use or derivative and transformative works will be made. Instead, following the evolving legal analysis in the courts, which tends to favor old media companies against new ones,¹⁴⁴ some accommodation that ignores the cultural generativity of the people using YouTube will be created. Thus, substantive issues that may shape the possibilities of new cultural forms in the future will be held hostage to commercial expectations and bottom lines. Viacom's strategy is to control all uses of its property without engaging in a discussion of fair use if possible.¹⁴⁵ However, as the examples above demonstrate, there are gray areas where Viacom may claim a copyright violation when legitimate fair use might be at play.

Furthermore, social networking sites have transformed the space for cultural communication, and copyright law now hinders communicative exchange. For example, what should happen to the post by "LiberalViewer" that takes clips from *The Daily Show* and offers commentary on how Fox News recuts news to favor McCain over Obama?¹⁴⁶ Is this mini-documentary a fair use or a copyright infringement because it takes the full segment of a Jon Stewart joke to make its political point? While the video is a commentary, the case-by-case analysis required of fair use may at the very least mean that the video is taken down at Viacom's request and must go through the arduous process of counter-notification to be reposted.

How should one consider the commentary that users attach to each YouTube video? For example, the October 13, 2008 clip from *The Daily Show* has been viewed over 1 million times and has over 6,000 comments and several video responses, many of which engage in a debate over financial markets.¹⁴⁷ The clip itself is not in any way transformed, but the dialogue it generates seems important to consider. As the Steven Colbert example above suggests, the viral viewing habits of these videos constitute a new form of public discourse that copyright now hinders. The world of blogs is a clearer example of how writing has been transformed by the interaction and substantive commentary made possible between the blogger and the audience.¹⁴⁸

There is a socially valuable justification for being able to review the clip and engage in an online discussion.¹⁴⁹ As Rebecca Tushnet notes, "democracy requires more than democratically elected rulers; it requires democratic culture."¹⁵⁰ Copyright draws the lines tightly when an argument for allowing even complete clips of media content in order to foster public debate can be made. Withdrawing relevant social and political commentary for copyright reasons is a form of censorship, an issue of

some concern to those who study first amendment and copyright issues.¹⁵¹ When copyright trumps free speech, as both candidates during this presidential election cycle found out, the balance struck between property rights and the public good is too distorted to support.¹⁵²

Ultimately, the problem is not the advent of massive copyright infringement spawned by user-generated content, but instead the balance struck in the law regarding access to creative work. Furthermore, the distinct lack of clarity regarding what is and is not a fair use and the commercial bias of the fair use criteria subordinates the public interest to private ones.¹⁵³ When courts do make decisions on where to strike the fair use balance, they are required to be sympathetic to commercial interests by the standards themselves, which are skewed toward protection of the commercial function of a work.¹⁵⁴ Of the four fair use criteria, both the first standard, investigating the purpose of the work for commercial uses, and the fourth standard, dealing with the effect on the market of the original work, demonstrate the priority placed on protecting the market.¹⁵⁵ Furthermore, outside of "nonprofit educational purposes," the political and social interests of the public are not considered in the calculation.¹⁵⁶ Finally, fair use is applied in a case-by-case manner so that no bright lines exist and continued confusion is the result.¹⁵⁷

The problems of copyright infringement will continue to grow. The principles advocated by content owners and the trend toward more "tethered" technologies suggest that a new balance needs to be struck.¹⁵⁸ To that end, it is not user-generated content that is the problem, but the fact that copyright law itself strikes a balance that favors commercial interests too much. The law has always been written to protect the interests of the entrenched against the interests of future technologies, as Jessica Litman argued in 2001.¹⁵⁹ As Litman notes, current copyright leaves the public interest unprotected,¹⁶⁰ something that needs to change.

As with any good manifesto, this one ends with a series of demands. These demands take the form of proposals for a new copyright law that strikes a balance not between commercial entities, but between a public that has been given the tools of cultural production and the culture industry that has secured a monopoly over these tools for too long. The YouTube examples demonstrate that originality, authorship, and creative work are more complex than our legal system allows for and that people desire to be creative and socially connected outside an economic paradigm.¹⁶¹

The absolutist position of the copyright industries has sparked resistance, even to what most would consider appropriate ownership, as the work of the anti-copyright group The League of Noble Peers and their website, The Pirate Bay, demonstrate.¹⁶² It is time the law is changed to reflect the reality emerging from the social sciences and the habits and actions of everyday people. There are fine lines drawn between inspiration, appropriation, creativity, and theft from the cultural commons, much of what seems to exist on a continuum instead of as clear bright line choices.¹⁶³ We need to produce a law that facilitates cultural flow and isn't focused so exclusively on commercial interests. The following are proposals that should be incorporated into existing law.

Toward a better copyright balance and a cultural bill of rights

It must be recognized that most people who create do not know or care about copyright in their work or the work of others. They don't care until the law makes them—thus the law does not reflect a social consensus over the use or production of creative work. Instead, what needs to be written into the law is a space for non-commodified goods to be created, circulated, and enjoyed without the threat of sanction that goes beyond the fair use guidelines currently enshrined in the Copyright Act. As Quiggen and Hunter put it, "If public policy is to help rather than hinder, it must be designed to take into account the particular nature of the amateur modality."¹⁶⁴

The most important demand that this manifesto makes is that the law must be changed to allow for the maximum creation of derivative works. Derivatives are cultural contributions that demonstrate labors of love and the fun of creativity. To film an entire music video using action figures just for the fun of it, while appropriating the cultural references of the original, is still a creative act. Derivative works should be respected in their own right. Once a creative work becomes part of the cultural conversation, thus creating value for the owner, derivatives should be a legally acceptable option.

This legal change will not disrupt ownership in the original work. Furthermore, commercial derivatives will remain under the protection of the copyright owner. For example, if someone authors a book, they will retain control over movie adaptations. However, art inspired by the book and produced by fans should be an acceptable fair use so long as distribution remains non-commercial in purpose. Other permutations on the theme of the book, multiple story lines, and character developments would all be considered acceptable transformations so long as the commercial/non-commercial distinction exists.

The new balance between ownership and inspiration would create a public space for derivative works for non-commercial purposes. All items not produced commercially would be legal—amateur remakes of films, home videos with soundtracks, even when publically available via YouTube, and even if they become popular. Ultimately, commercial culture should not exert so much control over cultural products. Cultural and literary theory recognize the extent to which texts are disassociated from authors once they become part of the public sphere;¹⁶⁵ it is time that the law recognizes this fact as well.

A second key area of law is the function of the platform for exchange of creative work. For this manifesto it must be argued that, if commercial sites benefit from the work, for this manifesto it must be argued that, if commercial sites benefit from the work, for this manifesto it must be argued that, if commercial sites benefit from the work, it should be seen as exchange of non-commodified cultural flow over their channels, it should be seen as irrelevant to the creation of that cultural flow.¹⁶⁶ In the internet age, the platforms upon which non-commercial derivative works are published should be exempted from liability. Platforms are just that—platforms. It is difficult to conceive of the analog version of this rule where the platform is liable for contributory infringement. Take, for example, a paper company that makes paper used to reprint copies of a *Harry Potter* book or an art supply company whose supplies are used to plaster public spaces with graffiti—the platform is not held liable and the same should hold true in the digital age. Peer-to-peer platforms have had a transformative affect on culture

itself and, to the degree that the culture industry feels the need to initiate legal action, it should leave the platform out of the conversation.

Third, if corporations insist upon notice and takedown procedures that target works, there should be consequences for overly asserting property rights against free speech rights. Aggressive notice and takedown procedures that harm free speech should be met with punishment equal to that of a copyright violation. For example, when Viacom initiates blanket notice and takedown procedures that sweep the good with the bad, then there should be an equal punishment for their actions against free speech.¹⁶⁷ The law should strike a balance that allows for more commentary—including the type that is attached to clips uploaded to a format such as YouTube.

Even with a radically reduced protective mechanism for transformative works, there are many important acts of direct copying that still need to be considered. As Tushnet notes:

A cutback in the derivative works right wouldn't help decide whether the Free Republic website infringed by copying whole newspaper articles and then letting people annotate them to reveal the mainstream media's liberal biases or whether full-scale sculptures made from a postcard in order to highlight the banality of popular art infringed the photographer's copyright ... Many of the ways in which people use copyright works creatively involve both copying and reworking.¹⁶⁸

Thus, a fourth point in the manifesto will recognize the social value of the copy as a copy. While it is important to create the possibility of transformative works, the function of a copy as a copy is also important socially and politically.¹⁶⁹

A fifth point would focus on the value of creative works as part of a cultural heritage that should be preserved and protected. At the moment, cultural preservation is left to the companies who own the copyrights and, to the degree that there is a preservation strategy, it is based upon current market value.¹⁷⁰ As Ivey notes, we "have a right to our diverse artistic heritage even if access must be achieved by setting new public policy goals that push back against the ownership rights of market-driven cultural industries."¹⁷¹

A new copyright law that reinvigorates fair use, balances public and commercial interests, and reduces the regulation of intellectual property needs to be written. Lawrence Lessig offers several suggestions in his book *Remix*, including deregulating the amateur remix, simplifying the copyright code, returning to the original 14-year term, and decriminalizing Generation X.¹⁷² These are all important steps that can help strike the appropriate balance. I also endorse reducing the copyright term to the original 14-year position, where the copyright owner then must affirmatively renew the copyright in order to maintain control. The burden needs to be shifted onto the shoulders of those who seek a monopoly over publically relevant materials, not the other way around.

While changing the law to eliminate ownership of non-commercial derivatives might work, one could also address the issue through the fair use provisions. The fair

use protections could be expanded beyond the "purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research."¹⁷³ Professors of law, John Quiggen and Dan Hunter call for innovation policy that helps encourage cooperation as much as it does competition.¹⁷⁴ One way to enhance cooperative efforts is to expand the concept of fair use to include uses that go beyond comment and criticism to include remakes, mashups, and creative options that transform the work and become creative entities of their own. Political efforts to reinterpret fair use are underway, but policy changes to broaden fair use should also be recommended.¹⁷⁵

Ultimately, the key change is that transformative non-commercial use should not violate copyright law. In most ways, this simply changes the law to reflect a reality that has always existed. Changing the law to create a space for non-commercial flow will take the chilling effect off current internet-related speech and creativity and instead develop an underlying commons that is much more free. Furthermore, it will help avoid selective enforcement and eliminate the problems associated with the vast lack of knowledge on the part of most users regarding both their own creative work and the work they appropriate from others. The culture industry rifles freely through our culture and appropriates what it wants without attribution; it is time that limits are placed upon what it can do with the products it generates so that the one-way street toward cultural commodification becomes a two-way street that recognizes what people contribute to cultural flows.¹⁷⁶

Conclusion

The future requires a different balance between self-expression and commercial content—one that recognizes the vast flow of creative work that violates copyright but serves social and political purposes. Furthermore, it is not sufficient to simply hope for "tolerated content" as legal scholar Tim Wu suggests might be the unintended consequence of the DMCA.¹⁷⁷ Such a position allows corporate culture to retain all the power when in fact that power should be redistributed to recognize the importance of cultural flows in creative production. Tolerating content does nothing to solve the chilling effects associated with the current system. Furthermore, leaving the legal system to determine fair use on a case-by-case basis is an unworkable process because acceptable norms of use must be developed from the fragmented application of case law.

We need a cultural world where decommmodified culture prevails and people are able to build something creative on the foundation of what already exists. What becomes clear from studying the cultural phenomena made possible by YouTube is that users create despite copyright law and without an interest in how the law would potentially protect their work. Users appropriate from the only culture that we have—commercial culture—but do so in a way that decommodifies that culture. This is what the law should preserve.

Allowing for corporate actors to negotiate the scope, possibility, and framework within which user-generated content exists is simply not appropriate. Despite YouTube's general position in favor of user-generated content, allowing it to be a stand

in for the public interest means that the rules governing creative exchange will be negotiated between top-down corporate agents with their personal interests in mind. Such a landscape will limit creative possibilities to those that can turn a profit.

It could be argued that there is no need to make changes to the law because there remain spaces under the law where many can play without too much fear of retribution. Numerous fan cultures, for example, have developed their own norms of non-commercial exchange to stay under the radar of copyright enforcement and, despite engaging in copyright infringement, have created a sort of equilibrium that allows them to function.¹⁷⁸ Additionally, under the current structure, even when an infringing work is taken down it is almost immediately replaced by other fans; thus, online creative content remains available despite the law. However, such an ad hoc process has serious drawbacks when the potential exists for draconian punishment, including fines and possible jail time. Furthermore, platforms agreeing to implement technological solutions to find copyright infringement will further limit the possibilities of open systems prevailing.¹⁷⁹ Such a technological solution would pre-emptively destroy possible infringing works and even further skew internet ownership toward the corporate. Thus, revising the law to better reflect creativity is a superior option to doing nothing at all.

While the examples discussed in this article focus on the user-generated world of YouTube, the web is ripe with creative works by people who want to express themselves and connect with others. There are different layers of connectivity and different methods through which people connect, but ultimately the underlying urge is to produce socially meaningful communication. Clay Shirky in his recent book *Here Comes Everybody* touts the benefits of mass amateurization for both creativity and business.¹⁸⁰ From amateur news media to the ability to create new business models, the world made possible by millions of individual users generating is to be encouraged. Shirky notes that, if mass behavior acts against the law, as it did during prohibition and the 55-mile-per-hour speed limit, the costs of imposing regulation outweigh the benefits of deregulating.¹⁸¹ Copyright is similar—as an industrial model, it only functions to support already existing actors. Given that it has historically been negotiated as an industry-based law,¹⁸² it is inapplicable to the world created by everybody for everybody.

The problem of user-generated content isn't the users or their content, but the corporate model that has captured the regulatory process and needs to be dismantled. It is time to severely limit the monopoly grant associated with copyright and open up cultural terrain so that all can play. It is time to understand that what is good for a business monopoly is not the same as what is good for the public. The terrain of user-generated content demonstrates that most of what is created serves the purposes of social exchange. We need to resist the commodification of our world and instead see what happens when we "wrap the Internet around everyone and spin the planet."¹⁸³

Notes

- 1 I would like to thank Steven Hetcher, Raizel Liebler, and the participants at the User-Generated Content, Social Networking and Virtual Worlds symposium, as well as the

editors of the *Vanderbilt Journal of Entertainment and Technology Law*, most specifically, Casey Fiesler and her contributions to this piece, for their assistance on this article. An earlier version of this chapter appeared in the *Vanderbilt Journal of Entertainment and Technology Law*.

- 2 Eben Moglen, "Anarchism Triumphant: Free Software and the Death of Copyright," *First Monday* 4, no. 8 (August 2, 1999), <http://firstmonday.org/ojs/index.php/fm/article/view/684>.
- 3 The following acronyms stand for the Recording Industry Association of America (RIAA), the Motion Picture Association of America (MPAA), the Business Software Alliance (BSA), the American Society of Composers, Authors and Publishers (ASCAP), Business Music, Inc. (BMI), and the United States of America (USA). There are, of course, others that could be added to this list.
- 4 In case you didn't notice already, this introductory paragraph is basically plagiarized from the Communist Manifesto. Karl Marx and Friedrich Engels, *The Communist Manifesto* (New York: Appleton-Century-Crofts, 1955); Tom Bell uses the "specter of copyism" in his essay on user-generated content published in the *Vanderbilt Journal of Entertainment and Technology Law* in 2008. See: Tom Bell, "The Specter of Copyism V. Blockheaded Authors: How User-Generated Content Affects Copyright Policy," *Vanderbilt Journal of Entertainment and Technology Law* 10, no. 4 (2008): 848.
- 5 I am using the phrase "culture industry" to evoke the critical theory of Theodor Adorno and his critique of the commodification of culture. See: Theodor W. Adorno, *The Culture Industry: Selected Essays on Mass Culture*, ed. J. M. Bernstein, 2nd edn (New York and London: Routledge, 2001).
- 6 Matt Mason, *The Pirate's Dilemma: How Youth Culture Is Reinventing Capitalism*, Reprint (New York: Free Press, 2009).
- 7 Steven Hetcher, "User-Generated Content and the Future of Copyright: Part One—Investiture of Ownership," *Vanderbilt Journal of Entertainment and Technology Law* 10, no. 4 (2008): 863–92.
- 8 Ibid.; see also: "User-Generated Content & Social Media," *IAB Reports*, accessed June 3, 2013, www.iab.net/guidelines/508676/1488/ugcplatform; Quiggen and Hunter also provide an excellent description of user-generated content and include modding as well—modifying open source video games to create new games. See: Dan Hunter and John Quiggen, "Money Ruins Everything," *Hastings Communications and Entertainment Law Journal* 30 (2008): 203–55; universities will also have to become attuned to the transformations made possible in a user-generated world or be made irrelevant by open systems such as WikiUniversity. As Vice Chancellor of The Open University, Brenda Wourley notes, "why should a student forgive a pedestrian lecture and coverage of content when the student can get a much better service on the internet?" See: Brenda Goutley, "It's Time to Adapt—and Quickly—If We're to Survive in the User-generated Content World," *The Independent* (London), May 1, 2007, LexisNexis edition; see also: Keegan, who describes the user-generated content in Second Life and the blurring of boundaries between virtual and real economies in Victor Keegan, "Taking Stock of Virtual Economies," *The Guardian*, January 11, 2007, LexisNexis edition, 4.
- 9 Hetcher, "User-Generated Content and the Future of Copyright: Part One—Investiture of Ownership," op. cit.
- 10 Using the General Easy Search [trade] function in the "Major U.S. and World Publications" of LexisNexis and the key terms, "User-generated content," you retrieve 974 articles with these words in the context of the article. A more sophisticated search of the articles with these words in the context of the article, "user-generated content" just in the headline "News, All News" category for the term, "user-generated content" just in the headline for all dates returns 700 hits. Doing the same search in the Academic Search Premier database retrieves 222 hits. For both the News, All News search and the Academic Search Premier search, the oldest article is a 1995 *Interactive Age* piece by Dana Blankenhorn reporting on litigation holding the web service Prodigy liable for defamation by a user. See: Dana Blankenhorn, "Judge: Prodigy Is Liable for User-generated

- Content," *Interactive Age* 2, no. 16 (June 5, 1995): 35, <http://micro189.lib3.hawaii.edu:2048/login?url=http://search.ebscohost.com/login.aspx?direct=true&db=aphi&an=9506137524&site=ehost-live>.
- 11 Deborah Bogle, "Consumer Revolution—Online," *The Australian*, September 30, 1999, LexisNexis edition; this article appears in the General Easy Search. In 1999, the News, All News search includes an article on turning user-generated comments into company profits. See: "User-Generated Content: Monetizing the People," *Min's Media Report* 5, no. 13 (June 21, 1999); *The Sydney Morning Herald* reported on a controversy generated when Yahoo's copyright policy was changed to expand their ownership of copyright to the content generated by users. Sandy Plunkett, "Good Guys, or Just Another Mob of Yahoos?" *Sydney Morning Herald*, July 5, 1999, LexisNexis.
 - 12 Bogle, "Consumer Revolution—Online," op. cit.
 - 13 The Academic Search Premier database includes a 2001 editorial claiming that user-generated content cannot replace "manufactured content," or that produced by professional writers. See: Walt Crawford, "User-Generated 'Content': This is the Promised Land?" *EContent*, Vol. 24: 8, October 2001, p. 50, <http://micro189.lib3.hawaii.edu:2048/login?url=http://search.ebscohost.com/login.aspx?direct=true&db=aphi&an=5289595&site=ehost-live> Visited October 25, 2008.
 - 14 Web 2.0 is a term used to suggest that a second internet revolution has arrived, one driven by participatory culture. Kirsner describes this concept. See: Scott Kirsner, "Champions of Web 2.0 See a Shift to More Participation by the Public," *The Boston Globe*, October 10, 2005, LexisNexis edition; but creating user-generated content takes work to manage and create. See: Marie Griffin, "User Generated Content: Web 2.0 Tools Doesn't Mean Your Audience Will Automatically Participate," *Media Business*, November 1, 2007, LexisNexis edition.
 - 15 This is true for both the LexisNexis and Academic Search Premier searches.
 - 16 According to a survey by the Harrison Group, a significant generational divide has emerged in online purchasing habits with Millennials (those aged 13–24) receiving 51% of their product information from user-generated content and 49% from company-generated content. Mark Dominiak, "Defy the Old Models: Younger Online Consumers Learning More Towards User-Generated Content," *Television Week*, May 7, 2007, LexisNexis; the first article in the LexisNexis search to use Web 2.0 was in August of 2005. Charles Authur, "The Geek: Stuck on You: The Magic Trick That's Changing the Web," *The Independent*, August 17, 2005, LexisNexis.
 - 17 Naughton argues that individuals with cameras and phones on the scene can post their photos of news events to websites faster than professional journalists and photographers. These trends create a sharecropping system by appropriating user-content for free. See: John Naughton, "The Networker: Writers Who Work for Nothing: It's a License to Print Money," *The Observer* (UK), March 11, 2007, LexisNexis; see also Ingram, who argues that users create new business opportunities while disrupting traditional ones. Matthew Ingram, "Content Generators Transforming More Than Just the Web," *The Globe and Mail*, December 21, 2006, LexisNexis.
 - 18 The police shooting of Oscar Grant in Oakland California is an example. Video footage of the shooting was taken by at least two different people on their cell phones. Jerome Tuccille, "Oakland Police Shooting of Oscar Grant Made a Story by Citizen Journalists," *Examiner.com*, January 9, 2009, www.examiner.com/article/oakland-police-shooting-of-oscar-grant-made-a-story-by-citizen-journalists; Police attempted to confiscate the telephones used to record the incident. See: Tim Jue, "Criticism Mounts as Home Videos Show BART Cop Shooting, Killing Unarmed Rider," *California Beat*, January 5, 2008, www.californiabeat.org/2009/01/04/criticism-mounts-as-home-videos-show-bart-cop-shooting-killing-unarmed-rider.
 - 19 Ed Charles, "Crowd-Sourcing Really Rocks," *The Australian*, August 29, 2008, LexisNexis; Richard Morgan, "Beyond Massive Passives," *Daily Deal/The Deal*, March 5, 2007, LexisNexis; Matt Mason in *The Pirate's Dilemma: How Youth Culture is Reinventing*

- Capitalism*, op. cit. and Yochai Benkler in *The Wealth of Networks: How Social Production Transforms Markets and Freedom*, op. cit., both compellingly argue for the necessity of open systems facilitated by technology as the underlying engine of the market environment, despite efforts by corporations to control and close these systems. See: Mason, *The Pirate's Dilemma*, op. cit.; Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom*; However, others point out that substantive technological innovation remains reliant upon a top-down, elite model of creativity. G. Pascal Zachary, "In a High-tech World, Top-down Innovation," *The International Herald Tribune*, July 31, 2007, LexisNexis; of course, these arguments are not new; Peter Kropotkin, the famed late nineteenth-century anarchist identified early on that social cooperation and open systems were essential to innovation and progress. See: Peter Kropotkin, *Mutual Aid* (Cosimo Classics, 2009).
- 20 Dominiak, "Millennials Defy the Old Models: Younger Online Consumers Learning More Towards User-Generated Content," op. cit.
 - 21 A still relevant critique of the culture industry was made by Theodor Adorno beginning in the 1940s. See: Adorno, *The Culture Industry*; more a critique of the commodification of culture, see: Naomi Klein, *No Logo*, Tenth Anniversary Edition (New York: Picador, 2009).
 - 22 For example, the Interactive Advertising Bureau status report on User Generated Content defines it as, "User Generated Content (UGC), also known as consumer-generated media (CGM), refers to any material created and uploaded to the internet by non-media professionals, whether it's a comment left on Amazon.com, a professional-quality video uploaded to YouTube, or a student's profile on Facebook." "User-Generated Content & Social Media," op. cit., 1.
 - 23 Adorno's critique of the culture industry is uncompromising. The culture industry sets the stage for mass consumption which is unthinking and devoid of possible liberation. See "The Schema of Mass Culture at 61–97 and "The Culture Industry Reconsidered," at 98–106 in: Adorno, *The Culture Industry*, op. cit.; for a digital version of the monopolization of culture via the commodity form, see: Geoff Cox, Joshua Krysa, and Anya Lewin, eds., *Economising Culture* (Autonomedia, 2005).
 - 24 Halbert, *Intellectual Property in the Information Age*, op. cit., 122–26.
 - 25 Michele Foucault, "What Is an Author?" in *Language, Counter-memory, Practice: Selected Essays and Interviews*, ed. D.F. Bouchard, trans. S. Simon (Ithica, NY: Cornell University Press, 1977), 113–38; See also Shapiro who argues that authors serve a 'sovereignty function' by establishing the boundaries of ownership of a creative work Michael J. Shapiro, "Sovereignty and Exchange in the Orders of Modernity," *Alternatives: Global, Local, Political* 16, no. 4 (1991): 460.
 - 26 May provides analysis that five major entertainment companies own approximately 75 to 80 percent of the market. See: Christopher May, "Concentrated Industry, Fragmented Consumption: The Global Music Culture, and Politics," in *Rewinding International Relations: On Music, Culture, and Politics*, ed. Marianne Franklin (New York: Palgrave Macmillan, 2005), 31; Publishing has also seen increasing concentration. See: John B. Thompson, *Books in the Digital Age: The Transformation of Academic and Higher Education Publishing in Britain and the United States* (Cambridge and Malden, MA: Polity Press, 2005), 61.
 - 27 Quiggen and Hunter note in the context of open source software that "Any discussion of amateur content production should, therefore, not assume that amateur production of amateur content precludes commercial development around the production of the content. It necessarily precludes commercial development around the production of the content. See simply means that the content will be generated for non-commercial reasons." See Hunter and Quiggen, "Money Ruins Everything," op. cit., 219.
 - 28 Ibid., 230.
 - 29 Niva Elkin-Koren, "Making Room for Consumers Under the DMCA," *Berkley Technology Law Journal* 22, no. 3 (2007): 14.
 - 30 The example here would be fan fiction, which precedes the internet, but has gained a new and vibrant life because of the internet. See: Rebecca Tushnet, "Legal Fictions: Copyright,

- Fan Fiction, and A New Common Law," *Loyola of Los Angeles Entertainment Law Journal* 17, no. 3 (1997): 664; see also: Casey Fiesler, "Everything I Need to Know I Learned from Fandom: How Existing Social Norms Can Help Shape the Next Generation of User-Generated Content," *Vanderbilt Journal of Entertainment and Technology Law* 10 (2008): 729.
- 31 "Bob Greenberg On Web 2.0's Impact," *AdWeek*, January 1, 2007, www.adweek.com/news/advertising/bob-greenberg-web-20s-impact-87448.
- 32 Lawrence Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy* (New York: Penguin Press, 2008).
- 33 Mason, *The Pirate's Dilemma*, op. cit., 66.
- 34 Nicols Fox, *Against the Machine: The Hidden Luddite Tradition in Literature, Art, and Individual Lives* (Washington, DC: Island Press/Shearwater Books, 2002). Fox describes the impact of industrialization on artisans and craftspeople as they were integrated into the industrial labor pool.
- 35 Jenkins, *Convergence Culture*, op. cit., 23. Jenkins highlights a future concern about a "participation gap."
- 36 James Boyle, *The Public Domain: Enclosing the Commons of the Mind* (New Haven, CT and London: Yale University Press, 2008), 42-53.
- 37 *Ibid.*, 122-59. Boyle uses the example of a single song to demonstrate the flow of ideas and the often ironic assertion of copyright over creative expression.
- 38 Pub. L. No. 105-304, 112 Stat. 2860 (1998).
- 39 "Principles for User Generated Content Services: Foster Innovation. Encourage Creativity. Thwart Infringement," *User Generated Content Principles*, accessed June 4, 2013, www.ugcprinciples.com; For the press release regarding the creation of the principles, see: "Internet and Media Industry Leaders Unveil Principles to Foster Online Innovation While Protecting Copyrights," *User Generated Content Principles*, October 18, 2007, www.ugcprinciples.com/press_release.html.
- 40 "Principles for User Generated Content Services: Foster Innovation. Encourage Creativity. Thwart Infringement," op. cit.
- 41 *Ibid.*
- 42 *Ibid.*, para 5.
- 43 *Ibid.*
- 44 The Electronic Frontier Foundation responded by articulating their own principles of fair use regarding video content. "Fair Use Principles for User Generated Video Content," *Electronic Frontier Foundation*, accessed June 4, 2013, <https://www.eff.org/pages/fair-use-principles-user-generated-video-content>; the full report is available at: "Code of Best Practices in Fair Use for Online Video," *Center for Social Media*, June, 2008, www.centerforsocialmedia.org/fair-use/related-materials/codes/code-best-practices-fair-use-online-video.
- 45 "The Principles for User Generated Content Services: A Middle-Ground Approach to Cyber-Governance," *Harvard Law Review* 121, no. 5 (2008): 1407.
- 46 Lenz countered and argued her video was a fair use. Lawrence Lessig, "In Defense of Piracy," *The Wall Street Journal*, October 11, 2008, www.wsj.com; Timothy B. Lee, "Fair Use Gets a Fair Shake: YouTube Tot to Get Day in Court," *Arts Technica*, August 21, 2008, <http://arstechnica.com/uncategorized/2008/08/fair-use-gets-a-fair-shake-youtube-tot-to-get-day-in-court>.
- 47 Lee, "Fair Use Gets a Fair Shake," op. cit.
- 48 For general discussion of YouTube's success, see: B. Buckley, "SueTube: Web 2.0 and Copyright Infringement," *The Columbia Journal of Law & the Arts* 31, no. 2 (2008): 235-65; Furthermore, many of YouTube's initiatives have been politically oriented. They are developing channels to cover both houses of Congress. See: Miguel Helft, "YouTube Teams with Congress to Show Lawmakers at Work," *The New York Times*, January 12, 2009; YouTube is turning into a reference tool for the internet savvy. See: Miguel Helft, "At First, Funny Videos. Now, a Reference Tool," *New York Times*, January 18, 2009; YouTube is also helping shaping access to news, as the recent conflict in Gaza

- demonstrates. See: Yigal Schleifer, "Blogs, YouTube: The New Battleground of Gaza Conflict," *Christian Science Monitor* 101, no. 40 (January 23, 2009): 4.
- 49 Buckley, "SueTube," op. cit., 235.
- 50 *Ibid.*, 237-38.
- 51 Hunt Estimates a piracy range of 30-70 percent of content. See: Kurt Hunt, "Copyright and Youtube: Pirate's Playground or Fair Use Forum?" *Michigan Telecommunications Technology Law Review* (2007): 198.
- 52 *Ibid.*, 238-39.
- 53 *Ibid.*, 239.
- 54 The Electronic Frontier Foundation (EFF) is currently engaged in an initiative to broaden the scope of fair use in video remixes. See: "A 'Test Suite' of Fair Use Examples for Service Providers and Content Owners," *Electronic Frontier Foundation*, accessed June 4, 2013, <https://www.eff.org/pages/UGC-test-suite>; See also, the Center for Transformative Works and their efforts to build the "fair use muscle" by advocating for fan-based vids. Francesca Coppa, "Is YouTube Blocking Your Vids? Exercise Your Right To Fair Use!," *Organization for Transformative Works*, January 4, 2009, <http://transformativeworks.org/news/youtube-blocking-your-vids-exercise-your-right-fair-use>.
- 55 Michael Jackson—Thriller, 2009, www.youtube.com/watch?v=sOnqjkTMAA&feature=youtu.be. Visited June 4, 2013. The original source for this video was: "Michael Jackson—Thriller," www.youtube.com/watch?v=ArYjhlOZj58. Visited January 28, 2009. It has since been removed. That site had been visited 24 million times and generated over 60,000 comments.
- 56 This video has managed to survive takedown and remains available despite copyright implications. "Thriller on 13 Going On 30, 2007," www.youtube.com/watch?v=wO0810JIF4Q&feature=youtu.be. Visited June 4, 2013.
- 57 *Ibid.*
- 58 This particular clip was added by a 20-year old Brazilian, www.youtube.com/user/KerollBr.
- 59 A general search for "Thriller" turns up over 79,000 hits. The top hits include an "Indian Thriller," several videos teaching people the dance routine, a version of Thriller in Final Fantasy and one done in Lego. See: www.youtube.com/results?search_type=&search_query=thriller&q=f. Visited January 28, 2009.
- 60 See accompanying text to "Thriller on 13 Going on 30," op. cit.
- 61 As an interesting side note, YouTube has been attributed with saving the music video from extinction. Young music video producers are moving their music videos to YouTube, thus further conflating the professional/amateur divide as well as the commercial/non-commercial divide. Given that the outlet for videos going direct to music fans exists on YouTube, it is not the case that all music available on the site has been pirated. *Wired*, October 2008.
- 62 Eugene Kim, "Youtube: Testing the Safe Harbors of Digital Copyright Law," *Southern California Interdisciplinary Law Journal* 17 (Fall 2007): 145-46.
- 63 They could take (or be required to take) the YouTube Fair Use informational workshop. See: "Level 4—Fair Use—YouTube Help," accessed June 4, 2013, <http://support.google.com/youtube/bin/static.py?hl=en&page=guide.cs&guide=25903&topic=25908>. Visited June 4, 2013.
- 64 Coombe, "Contingent Articulations: A Critical Cultural Studies of Law," op. cit., 44.
- 65 "Thriller" (original Upload), 2007, www.youtube.com/watch?v=hMnk7lh9M3o&feature=youtu.be. Visited June 4, 2013.
- 66 *Ibid.*
- 67 Note, the original link no longer works because the video was taken down for copyright reasons. stampshady, "Thriller," www.youtube.com/watch?v=memW5gGvIs. Visited January 28, 2009. Revisited June 4, 2013.
- 68 Michael Scherer, "The Truthiness Hurts," *Salon.com*, May 1, 2006, www.salon.com/2006/05/01/collbert_10/. Visited June 4, 2013.

- 69 *Colbert Roasts Bush*, 2007, www.youtube.com/watch?v=BSE_saVX_2A&feature=youtu-tube_gdata_player.
- 70 Comment of JamesOhGoodle, *ibid*.
- 71 Ironically, Viacom, the owners of Comedy Central used the DMCA to require YouTube to take down a parody of the Colbert Report done by Moveon.com called "Stop the Falsiness." In their press release, the Electronic Frontier Foundation (EFF) identified how hypocritical it was for Viacom to take such action when in fact the type of "fair use" the Colbert Report relies on to show its media clips was the issue in the YouTube parody. See: Rebecca Jeschke, "INTERNET LAW Free Speech Battle Over Online Parody of 'Colbert Report,'" *Internet Business Law Services*, accessed June 4, 2013, www.ibll.com/internet_law_news_portal_view.aspx?n=latestnews&id=1728. Visited June 4, 2013. Viacom later acknowledged their mistake. "Lawsuit Dropped over 'Colbert Report' Parody," *Mimic.com*, April 23, 2007, www.nbcnews.com/id/18277460/m/business-us_business/t/lawsuit-dropped-over-colbert-report-parody/. Visited June 4, 2013.
- 72 CSPAN owned the copyright to the video and requested YouTube to take it down. Xeni Jardin, "Why Was Colbert Press Corps Video Removed from YouTube?" *Boing Boing*, May 4, 2008, <http://boingboing.net/2006/05/04/why-was-colbert-pres.html>. Visited June 4, 2013.
- 73 There are YouTube videos where the Sesame Street characters are engaging in all sorts of non-kid-like behavior. See: *Bert and Ernie Parody—Ernie I'm Homie*, 2009, www.youtube.com/watch?v=0IEIP09POBo&feature=youtu-tube_gdata_player. Visited June 4, 2013; *Bert and Ernie Are on the Drugs*, 2007, www.youtube.com/watch?v=hVhVdYdRgr0&feature=youtu-tube_gdata_player. Visited June 4, 2013.
- 74 Rebecca Tushnet has done so for fan fiction. Rebecca Tushnet, "Legal Fictions: Copyright, Fan Fiction, and a New Common Law," *Loyola of Los Angeles Entertainment Law Journal* 17, no. 3 (1997): 651–86; Greg Lastowka has done so for virtual worlds. See: Greg Lastowka, "User-Generated Content and Virtual Worlds 10 893," *Vanderbilt Journal of Entertainment & Technology Law* 10 (2008): 893–917; Some content owners, especially for video games, are recognizing the importance of user-generated content and the interactive experience that needs to be provided and are redesigning their products to integrate Web 2.0 interactivity into the video game environment. Sony's PlayStation Home is one example where users and producers are converging around the creation of content. As Peter Edward, the director of PlayStation Home says, "Giving people semi-ownership of the game itself is great for building up the bond between the games and the gamer, rather than it just being a commodity that you use and, once it's expired, you move onto the next thing. It's great, because it gives longevity to games, which was a very difficult thing to do before." See: Steve Boxer, "Power to the People: User-Generated Content Is Transforming Gaming into a Communal Experience," *The Daily Telegraph*, October 20, 2007, 19, LexisNexis.
- 75 "Fox Lawyers C& d Buffy Fandom Musical," *LawGeek*, October 19, 2005, http://lawgeek.typepad.com/lawgeek/2005/10/fox_lawyers_cd.html. Visited June 5, 2013.
- 76 17.U.S.C. § 103 (Subject Matter of Copyright: Compilations and Derivative Works); these rights are exclusive to the copyright owner as outlined in 17. U.S.C § 106.
- 77 J. D. Lasica, *Darknet: Hollywood's War Against the Digital Generation* (Hoboken, NJ: Wiley, 2005), 7–11.
- 78 Jack Black issued a 'competition' for 'sweded' movies like the ones found in *Be Kind ReWind* and as a result you can now find a plethora of reappropriations of feature films, remade by everyday people on YouTube. The copyright implications of these productions are interesting. In the movie, the main characters are shut down by the FBI for violating the copyright law.
- 79 The Center for Social Media has worked to address this problem by defining best practices for fair use and by advocating for legislation over orphan works. See: Jennifer Urban *et al.*, "Report on Orphan Works Challenges: For Libraries, Archives, and Other Memory Institutions," *Center for Social Media*, January 2013, <http://centerforsocialmedia.org/fair-use/related-materials/documents/report-orphan-works-challenges-libraries-archives-and-other-memory>.

- org/fair-use/related-materials/documents/report-orphan-works-challenges-libraries-archives-and-other-memory. Visited June 4, 2013; see also: Magnus MacQueen, "The Revolution Must Be Televised: Instead of Being a Threat, User-Generated Content Is an Exciting Opportunity that Can Revitalize the Art of Documentary Film-Making," *The Guardian*, October 30, 2006, 8, LexisNexis.
- 80 Rebecca Tushnet, "User-Generated Discontent: Transformation in Practice," *The Columbia Journal of Law & the Arts*, 31, no. 4 (2008): 505.
- 81 *Red River Gorge* 08, 2008, www.youtube.com/watch?v=JKGEazqY9g&feature=youtu-tube_gdata_player. Visited June 4, 2013.
- 82 It has been viewed 557 times (in June of 2013), up from 188 views in November, 2008, suggesting its purpose was to document the trip and to share the adventure with friends. *Ibid*.
- 83 *Zac Sands Climbing No Redemption 5.13 Red River Gorge*, 2007, www.youtube.com/watch?v=VldO6m9-3-0&feature=youtu-tube_gdata_player. Visited June 4, 2013.
- 84 "Spencer Victory," *YouTube*, accessed June 5, 2013, www.youtube.com/user/victorypro.
- 85 "Weird Al" Yankovic—White & Nerdy, 2009, www.youtube.com/watch?v=N9qYF9DZPdW&feature=youtu-tube_gdata_player. Visited June 4, 2013.
- 86 While climbing is not the subject of the paper, it is a non-computer version of a 'user-generated' sport where routes like the one climbed in this video are set by local climbers and gifted to the climbing community for all to do. No monetary reward exists for making a climbing route; instead, the route setter expends a fairly significant amount of money and time investing in a drill gun, bolts, glue, and climbing gear to establish the route, as well as enormous amounts of time cleaning and preparing the route for climbing. According to the norms of the climbing community, the person establishing the route is given the right to the first ascent and to name the climb. After that, anyone can climb the route. The community functions in an open source manner where 'secret' climbing areas do not stay secret for long and, as soon as routes are ready, climbers flock to them. The route shown in this video was set by Kenny Baker, a climber from Columbus Ohio, who has established a number of difficult climbs in the Red River Gorge. It should be noted that the grade is sufficiently difficult to keep all but an elite group of climbers from even getting off the ground.
- 87 I emailed him to inquire about the song choice, but he has not replied.
- 88 *Chamillionaire—Ridin'*, 2009, www.youtube.com/watch?v=Ctwjvg1P9xw&feature=youtu-tube_gdata_player.
- 89 Brian Raferty, "A Sidesplitting Work of Frivolous Genius," *Wired*, October 2008, 186.
- 90 "Weird Al" Yankovic—White & Nerdy, *op. cit*.
- 91 Raferty, "A Sidesplitting Work of Frivolous Genius," *op. cit*.
- 92 *Ibid.*, 199.
- 93 *Ibid.*, 214.
- 94 There is an entire YouTube genre of Lego versions of movies, songs, and much more.
- 95 *White & Nerdy in Lego*, 2007, www.youtube.com/watch?v=Nh9mVd3KwYs&feature=youtu-tube_gdata_player.
- 96 "Parkour," Wikipedia, <http://en.wikipedia.org/wiki/Parkour>. Visited January 26, 2009.
- 97 *Ibid*.
- 98 *Ibid*.
- 99 *Ibid*.
- 100 "Russian Climbing," www.youtube.com/watch?v=Rxv8SS1XU_8. Visited January 26, 2009.
- 101 *Ibid*.
- 102 *Casino Royale* (Sony Pictures, 2006).
- 103 The original link was blocked for copyright reasons see: www.youtube.com/watch?v=8w2oAWzHUfk. However, it can be found here: *Casino Royale Parkour Chase*, 2010, www.youtube.com/watch?v=jjubOZLpp4A&feature=youtu-tube_gdata_player. Visited June 4, 2013.
- 104 *Ibid*.

- 138 "Viacom International, Inc. et al. v. Youtube, Inc. et al. Document 1," accessed June 5, 2013, <http://docs.justia.com/cases/federal/district-courts/new-york/nysdce/1:2007cv02103/302164/1/>. Visited June 4, 2013. The complaint alleges that Viacom has found over 150,000 unauthorized clips viewed 1.5 billion times. Issues of fair use are not mentioned, as can be expected in the complaint. (Ibid. at 3).
- 139 Hunt, "Copyright and Youtube: Pirate's Playground or Fair Use Forum?" op. cit., 203-06.
- 140 "Viacom International, Inc. et al. v. Youtube, Inc. et al. Document 21," accessed June 5, 2013, http://docs.justia.com/cases/federal/district-courts/new-york/nysdce/1:2007cv_02103/302164/21/. Visited June 4, 2013.
- 141 Ibid., 10.
- 142 "The doctrine of substantial non-infringing use, estoppel, waiver, laches, copyright misuse, unclean hands, and express or implied licenses granted by Plaintiffs (e.g., plaintiffs putting their own works on YouTube or permitting others to do the same.) Viacom and YouTube Joint Proposed Rule 16(b) Scheduling Order, *Viacom International et al. v. YouTube, Inc. et al.*, United States District Court, District of New York, No. 1:07-cv-02103. Filing 56 at 3, available: "Viacom International, Inc. et al. v. YouTube, Inc. et al. Document 56," accessed June 5, 2013, <http://docs.justia.com/cases/federal/district-courts/new-york/nysdce/1:2007cv02103/302164/56/>.
- 143 Meg James, "YouTube Prevails in Huge Copyright Suit with Viacom," *Los Angeles Times*, April 18, 2013, <http://articles.latimes.com/2013/apr/18/entertainment/la-et-ct-youtube-prevails-copyright-suit-viacom-20130418>.
- 144 Boyle, *The Public Domain*, op. cit., 56.
- 145 Viacom Executive Chairman Sumner Redstone believes decisions about online distributions belong to copyright owners and "a fan has no special privileges." Dvorak argues, "Fair use should be the argument in the billion-dollar YouTube suit, but I'm not seeing it even being mentioned." See: John Dvorak, "Viacom Versus Fair Use," *PCMag*, May 13, 2008, www.pcmag.com/article2/0,2817,2304366,00.asp. Visited January 30, 2009.
- 146 www.youtube.com/watch?v=0gh6r5ALVMo.
- 147 *Fox News Edits Criticism of McCain Out of Daily Show Clip?* 2008, www.youtube.com/watch?v=0gh6r5ALVMo&feature=youtu_gdata_player.
- 148 Andrew Sullivan, "Why I Blog," *The Atlantic*, November 2008, 106-13, www.theatlantic.com/magazine/archive/2008/11/why-i-blog/307060/. Visited June 4, 2013.
- 149 Hunt, "Copyright and Youtube: Pirate's Playground or Fair Use Forum?" op. cit., 299.
- 150 Rebecca Tushnet, "Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It," *The Yale Law Journal* 114, no. 3 (2004): 539.
- 151 The author discusses the idea of "censorship misuse" and the tension between censorship, first amendment issue, and copyright law as found in *Suntrust Bank v. Houghton-Mifflin*. "NOTES—'Recoding' and the Derivative Works Entitlement: Addressing the First Amendment Challenge," *Harvard Law Review*, 119, no. 5 (2006): 1488.
- 152 Lawrence Lessig, "Copyright and Politics Don't Mix," *The New York Times*, October 21, 2008, sec. Opinion, www.nytimes.com/2008/10/21/opinion/21lessig.html. Visited June 4, 2013.
- 153 For an assessment of how the fair use criteria fit with YouTube see: Hunt, "Copyright and Youtube: Pirate's Playground or Fair Use Forum?" op. cit., 210-20.
- 154 17. U.S.C. Section 107. The four fair use criteria are: 1) The purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes; 2) the nature of the copyrighted work; 3) amount and substantiality of the portion used in relation to the copyrighted work as a whole; and 4) the effect of the use upon the potential market for or value of the copyrighted work.
- 155 Ibid.
- 156 Rebecca Tushnet reminds us that there are other mechanisms to support free speech and a freer public conversation in copyright law as well. See: Tushnet, "Copy This Essay," op. cit., 553.

- 157 One website hosts a conversation on what would constitute a fair use of music for the purposes of reviews and the general confusion over how much, if any, the person could post. See: Content, Writing and Copyright, www.webmasterworld.com/forum44/1066.htm; another site asks the same question regarding 30-second clips for podcasts. See: "Fair Use of 30-Second Music Clips," www.podcastalley.com/forum/archive/index.php/t-127395.html. Both EFF and the Center for Social Media are trying to establish 'best practices' for online video to offset some of the chilling effect that occurs when nobody knows what the rules might be. See: "Code of Best Practices in Fair Use for Online Video," op. cit. See also: "A 'Test-suite' of fair use examples for service providers and content owners," www.eff.org/pages/UGC-test-suite.
- 158 Jonathan Zittrain, *The Future of the Internet—And How to Stop It* (New Haven, CT and London: Yale University Press, 2009).
- 159 Litman, *Digital Copyright*, op. cit., 47.
- 160 Ibid., 70-74.
- 161 There is a growing literature suggesting that what is called piracy is actually a vital part of economic development, that "crowdsourcing" is the wave of the future, and that we live at the cusp of a new technological convergence. See: Mason, *The Pirate's Dilemma*, op. cit.; Cass R. Sunstein, *Infotopia: How Many Minds Produce Knowledge* (Oxford and New York: Oxford University Press, 2006); Jenkins, *Convergence Culture*, op. cit.; Shirky, *Here Comes Everybody*, op. cit.; Lessig, *Free Culture*, op. cit.
- 162 The Pirate Bay spawned the Pirate Party, now operating in countries around the world. The U.S. Pirate Party platform goes well beyond copyright issues. See: www.pirate-party.us/platform visited October 31, 2008. Their analysis on copyright and the term 'intellectual property' is as follows:

Separation of Intellect from Property

The term "intellectual property" implies that ideas can be owned and controlled. This is directly counter to the aims of a free and free-thinking society. Thoughts cannot be owned. Expression should never be controlled, even while those who innovate should be given credit where credit is due. We thus reject the term when applied to copyright, patent, and trademark as an all-inclusive idea; likewise, we will not support any legislation which uses this corruptive all-encompassing term.

Reform of Copyright

Copyright is flagrantly abused around the world, has an unreasonable term length, and is used to prevent, rather than promote, innovation. This is directly counter to its stated intent in the beginning, of protecting authors' works. Additionally, the right of use should never be in question; merely the right to be credited. The term should be reverted to the original length of 14 years at most.

See *ibid.*

- 163 Deniers, *Steal This Music*, op. cit., 29.
- 164 Hunter and Quiggin, "Money Ruins Everything," op. cit., 239-40.
- 165 Reception theory looks at the role of the reader in the process of authorship. See generally: Hans Robert Jauss and Timothy Bacht, *Toward an Aesthetics of Reception* (Minneapolis: University of Minnesota Press, 1982); other theorists argue that we all engage in "textual poaching," see: Michel de Certeau, *The Practice of Everyday Life* (Berkeley: University of California Press, 1984), 165-76; Rosemary Coombe argued many years ago that, "freezing the connotations of signs and symbols and fencing off fields of cultural meaning with 'no trespassing' signs" restricts the flow of texts. See: Rosemary J. Coombe, "Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue," *Texas Law Review* 69 (June 1991): 1800.
- 166 Tushnet, "Copy This Essay," op. cit., 513.

- 167 This idea comes from Joho the Blog, www.hyperorg.com/blogger/mtarchive/violate_copyright_150000_viola.html visited October 24, 2008.
- 168 Tushnet, "Copy This Essay," op. cit., 552.
- 169 Ibid., 561-65.
- 170 Ivey, *Arts, Inc.*, op. cit., 55.
- 171 Ibid., 56.
- 172 Lessig, *Remix*, op. cit.
- 173 Copyright Law of the United States of America, Circular 92, April 2000, at 14. §106A. Litman argues that fair use has not expanded or shrunk, but moved around and that fair use "remains a doctrine that permits a relatively narrow swath of exceptional, rather than everyday uses." Jessica Litman, "Billowing White Goo," *The Columbia Journal of Law & the Arts* 31, no. 4 (2008): 590-91.
- 174 Hunter and Quiggin, "Money Ruins Everything," op. cit., 243.
- 175 "Fair Use Principles for User Generated Video Content," op. cit.; "Code of Best Practices in Fair Use for Online Video," op. cit.
- 176 Of course, figuring out where to draw the lines will still be difficult. However, given that I am arguing that there are legitimate reasons to allow for verbatim copying, at this point, the bar should be kept fairly low. Rethinking control over derivative works does not in any way displace the fact that attribution to the original author is still required. Allowing for greater play with culture is not the same as advocating plagiarism.
- 177 Tim Wu quoted in Buckley, "SueTube," op. cit.
- 178 However, things might change as copyright becomes more relevant. See: Fiesler, "Everything I Need to Know I Learned from Fandom: How Existing Social Norms Can Help Shape the Next Generation of User-Generated Content," op. cit., 735.
- 179 Shirky, *Here Comes Everybody*, op. cit.
- 180 Ibid.
- 181 Ibid., 298.
- 182 Litman, "Billowing White Goo," op. cit., 53.
- 183 Moglen, "Anarchism Triumphant," op. cit.

8

SKIPPING THROUGH THE DESERT OF THE REAL

Copyright landscapes and the future of creativity¹

The nation-state of the future is the individual human being.²

The democratization of technological power has made the shape of the future hard to know, even for the best informed. The individual holds more power than at any time in the past century, and literally in the palm of his hand. Whether or not he can hold on to it is another matter.

Tim Wu, *The Master Switch*, 298

The commodity economy has always been a globalizing force, but under the rule of capital, the global served the interests of the powerful ruling states, whereas under the rule of the vectoral, states come to serve the interests of an emerging global power. The vectoralist class detaches power from its spatial fixity. It dreams of a world in which place gives way to space, where any and every locus the vector touches becomes a node in a matrix of values, yielding objects that can be freely appropriated in their productivity, freely combined with any and every other object, regardless of distance, or the particular happenstance of origin.

McKenzie Wark, *A Hacker Manifesto*, 360

To refresh the argument made in the earlier chapters of this book, we have seen a massive reconfiguration of the legal and policy structures around the world to deal with the emerging information age, where intangible property has taken on a level of significance previously only linked to real property. During the 1980s, while most people in the world had yet to pay much attention to the legal regimes of copyright and patent law, those interested in securing strong property rights in intangible products were shaping the legal environment of the future by fashioning national and international laws to support their particular paradigm of ownership and control. By

the end of the 1990s, much of the legal system that would govern intellectual property was in place—from domestic laws detailing the relations of industries associated with the exchange of intellectual property to international laws establishing a minimum amount of protection that everyone needed to provide.

Resistance has always been part of the process of expanding intellectual property rights and was documented during the debates over TRIPS as well as most proceedings surrounding IP at the WTO since then. Resistance has come not only from a growing number of voices in the West, but also from the global South, where the consequences of a new method for extracting wealth has been understood as reconfiguring the old colonial landscape under the same management but different terms.³ It was the culmination of several watershed events occurring during the 2000s that helped draw public attention to the intellectual property expansion going on globally as these controversies took the idea of patents, copyrights, and trademarks out of the realm of the abstract and relocated them in the everyday lives of people struggling for survival, seeking to share music, and innovate without litigation.⁴ Each of these resistances is an indicator of one possible future that could be built upon a different set of assumptions regarding access to knowledge, the production of culture outside the culture industry mandate, and the importance of democracy at a global level.

First, the public health crisis of access to medication in South Africa as it related to an unjust international patent regime became part of the counter-globalization debate. Second, beginning with the file-sharing service Napster, peer-to-peer programs opened up the content of the culture industry to widespread sharing, thus undermining the dominant mode of industrial cultural production. Third, the free and open source software (FOSS) movement in conjunction with the creation and evolution of the Creative Commons and other open access movements reached a critical mass and produced a viable alternative to monopoly rights enshrined in copyright and patent protection. These events, combined with the more recent decision by major content industries in the United States to sue their fans, and countries as far-ranging as France and South Korea to enact “three strikes and you are out” laws, thus demonstrate that intellectual property law had gone personal and helped to generate world-wide public interest in the issues of IP. Numerous other controversies from biopiracy and the ongoing debate over traditional knowledge, as well as the increasingly global flow of culture discussed in earlier chapters, have all helped create a sea change in how property rights in intangibles are being conceptualized by the global public.

As a result, many around the world began fighting back against what James Boyle called “the new enclosure” movement.⁵ Today, because copyright and patent issues have also become social justice issues, the policy framework that will affect our future is developed within a culture of resistance to intellectual property, or at the very least, much more public consideration of the issues involved. That resistance has made some headway by inserting issues of open access onto the international agenda. The recent public outcry and internet blackouts associated with the proposed Stop Online Piracy Act is an indication of how significant the change in terms of resistance has been. Where previous laws impacting intellectual property have met with little to no public

concern, SOPA elicited enormous public outcry and technology company protests.⁶ ACTA received similar attention and reaction at the international level.

As this book has sought to demonstrate, the structure of copyright and patent law is not neutral, but instead produces a new political economy where individuals are subjected to surveillance and control in an effort to manage intangibles and to enhance the profits of what McKenzie Wark has called the “vectoralist class.”⁷ What is less clear is how the public benefits from the contemporary configuration of intellectual property policy at the domestic or international levels. Certainly, they have been given access to the entertainment products that allowed the United States to “win” the Cold War and they have been subjected to the increasing branding of everything, and, as discussed in the previous chapter, a top-down formation of cultural creativity that undermines the possibility of the “user-generated” has been produced. The concentration of information, entertainment, and knowledge as property is made possible through the system of intellectual property rules that have been created. The question is how to put people back in the intellectual property policy process. While most IP policy is designed to protect the status quo, it is possible to remain hopeful about alternative trajectories.

In the previous chapter, I tried to propose some moderate revisions that remain within the frame of the law. These revisions, while certainly not original, could better balance the legal system with the types of creativity that abound. While labeled a manifesto, the types of changes we could deploy are not actually all that radical, but instead reframe the legal code within the scope of actual creativity and protection. However, in this chapter I want to talk about creativity unhinged from the nation-state and from the legal system, at least as much as possible.

To frame the idea of this world, I will talk about copyright landscapes that can be evoked from a different set of starting assumptions than the traditional economic view. As with each of the last three chapters, following different assumptions leads to different futures for intellectual property. The mainstream world of intellectual property, as established in the second and third chapters, focuses on the economic rationale for creativity and then leads to specific assumptions about how to protect the fruits of creative labor. However, if one were to switch out the starting assumptions, it is possible to develop different futures.

Thinking about possible futures is a tactic used by futurists to critically assess starting assumptions, trends, and emerging issues. Investigating trends and emerging issues allows us to develop alternative future landscapes. As noted futurist Wendell Bell argues:

Among other things, futurists work to expand the alternative possibilities that people consider before they decide to act one way or another. Present possibilities for the future are real, but many are often ignored as people go through their daily lives blindly following past routines of behavior. Futurists encourage people to look beyond the familiar and to search for opportunities for themselves and their organizations; to add medium- and long-term visions to their decision making; to use their imaginations to consider things, including social

arrangements, that do not now exist; and to plan deliberate actions—solely or cooperatively with others—to achieve more desirable futures.⁸

Taking the approach of a futurist to copyright landscapes allows one to follow a variety of different pathways towards different possible future outcomes. It allows one to assess the policy choices that have been made, the possibilities for different choices, and to envision futures that fall outside the mainstream. In this chapter I am concentrating my focus on an alternative to the conventional way in which we see intellectual property.

The next section offers the status quo assumptions and the consequences for art, a description that summarizes the prevailing narrative articulated in the prior chapters. This section builds upon the critique of the culture industry developed in the previous chapter and seeks to demonstrate from the position of creativity how property rights claims become problematic. I then examine the trends that could lead us towards a more desirable creative future. The final section offers a brief conclusion. Ultimately, each of the trends discussed here will interact in ways too complex to fully address. However, by more consciously choosing our future path, we can perhaps more actively chart the creative possibilities opening up in the land of the desert of the real.

TRIPING through the desert of the real

I have chosen the term "copyright landscape" because I want to broadly evoke what might be in terms of creativity as well as what is in terms of the laws that form the backdrop for creativity. A landscape has stable features but is always open to both radical as well as subtle changes. As I developed in the introduction, the landscape forged by copyright law is both a frame for cultural work as well as a prison hindering the use of this work by others. To reiterate, as a frame and a prison, it can be used to protect work that was generated from the bottom up, but is primarily used as a mechanism to ensure that cultural exchange only happens within the prison of property rights. As a frame, copyright law defines the types of culture that can be created—focused upon commercial culture targeted for consumption. One might also call this type of targeting the prison of copyright as well.

Many of the complexities of the copyright landscape have been developed throughout the previous chapters. To elaborate on these complexities further, it seems appropriate to begin with a popular film reference. This film exists because of, or perhaps despite, the complex legal world of copyright. It exists as an example of creativity within the culture industry, possible copyright violations, and of course intellectual appropriations that allow it to be both original and a replica at the same time. As an aside, to use popular culture as a reference in itself demonstrates the power of creative work to influence our lives and shape our understanding of the world—it is our collective strategy for communication, and the fact that we communicate with each other using commercial references is another aspect of the frame/prison of the copyright landscape. It also demonstrates the limits to understanding culture as

property—appropriation and reuse are the anathema of copyright, but essential to the active construction of meaning in everyday life.

In *The Matrix*, there is a scene where Morpheus shows Neo the construct for the first time and describes the elaborate simulation that constitutes the lives of all trapped within. As he demonstrates the power of the computer to imprison the human mind and body, he states, "Welcome to the desert of the real."⁹ This layer to the plot means that the movie can be seen either as just another action flick, or it can be read at a more complex level regarding our understandings of reality.

I am of course not the first to notice or comment on the fact that the phrase "desert of the real" is not original to the Wachowski brothers, but is borrowed from the first page of Jean Baudrillard's *Simulacra and Simulation*¹⁰—which is cited, in a way, in the movie as the book in which Neo hides his pirate computer work before he discovers the reality of the matrix. Baudrillard uses the phrase "desert of the real" to refer to the experience of living our lives in a simulation—the media-saturated, image-focused world is not an authentic experience, but a simulation of one. For all intents and purposes, reality and simulation are the same, termed by Baudrillard as the hyperreal.

To Baudrillard, "culture is little more than a 'hallucination of the real,' a 'simulational' world characterized by an endless series of copies of previous forms ... 'TV is the world.'"¹¹ Of course, it is not to Baudrillard that the Wachowski brothers owe their greatest debt since the underlying story of *The Matrix* is as old as Plato's *Republic*. Replace the shadows on the wall with a computer simulation and one soul breaking his chains to see the sun with Neo's taking of the red pill and you have virtually the same story, ripped and remixed for centuries. Fortunately, *The Republic* is out of copyright (and of course was produced before such a law was ever conceived). However, the story of *The Matrix* does not end with obscure philosophical references used to demonstrate that it is not a particularly original plot.

To bring the story full circle, from appropriation, to remixing, and life within the simulation, the Wachowski brothers and the film's producers were sued for copyright infringement by Sophia Stewart who claimed to have written the script years before the movie was ever made.¹² Stewart said that she had responded to a contest and submitted a short story remarkably similar to *The Matrix*, but had never heard back about her story or the contest. After making these allegations, Stewart failed to show up for the preliminary hearing, and her legal claims were dropped. However, the controversy itself helps raise what is at stake when creativity meets the law and the myriad issues that can emanate from cultural co-optation within the culture industry.

If Stewart's claims are true and she had sent a short story remarkably similar to *The Matrix* to a story contest, and if the Wachowski brothers then took the idea and transformed it into *The Matrix* years later, it demonstrates how the underlying appropriation of ideas is commonplace and foundational to the evolution of art. Obviously, the original short story may be similar at many levels, but the ultimate production of the movie, which included thousands of hours of production including acting, special effects, music, not to mention the screenplay itself, is clearly something different from the original story. What debt would they owe Stewart? It is likely they

would owe her no debt simply because of the types of contracts related to intellectual property that would have been signed when she submitted her original story. Has something been stolen from Stewart, if indeed her claims are true?

It is copyright law that provides the landscape for making claims about authorship, ownership, and control. One possible scenario (and I am using this as an example, not as fact) would suggest that it is very likely Stewart did not read the fine print on the story contest, which would have required her to waive any proprietary rights to her ideas upon the submission of her story. This type of language is fairly standard in contracts and end-user license agreements associated with both solicited and unsolicited stories that are provided to entertainment conglomerates.¹³ In other words, entertainment companies, including video game producers and Hollywood, have built an architecture of legal control that allows them to appropriate others' ideas simply through the act of having those ideas submitted to them. Because copyright is alienable and assignable, unknowing creators, hoping to perhaps sell their story, can instead have it stripped from them through the legal system, which only professional players might understand.

Furthermore, given the legal architecture of the idea/expression dichotomy, it is likely that, if indeed a general idea has been shared, it would not be sufficiently similar to the end product of *The Matrix*, to count. To heighten the hypocrisy surrounding claims of piracy and theft, it should also be noted that, if someone were to download or stream the movie without authorization, the copyright owners would cry loudly about their victimization at the hands of thieves and pirates who are out to destroy the incentive to create that strong and absolute copyright laws can ensure. They would then deploy the criminal and civil procedures now in place to crush the pirate.

So, if indeed Stewart's claims were true, she only helps to highlight how the legal system functions to protect and secure the rights of some copyright interests against others. One might also remark on the huge cost of mounting a legal campaign against the entertainment industry and the likelihood that, even if Stewart were to have pursued her case in the courts, she could not have afforded the lawyers to fight Warner Brothers. The same holds true in reverse when the recording industry or movie industry pursues litigation against college students and single moms. They have no way of resisting the power of the team of corporate attorneys paid to work on such cases. The legal system will not work equally because first, the laws have been constructed to protect the interests of one side over the other and second, to even try to resist would be too big a financial burden for most people to bear.

Getting back to Stewart's claim, it could also be the case that her claims are false. Perhaps she has manufactured the claim that she submitted a story, or she did submit the story, but the similarity to *The Matrix* was only in passing. After all, at a certain level of abstraction, there are only a few plot lines out there and *The Matrix* falls well within the genre of cyberpunk (or *The Republic*) that had been making the rounds of fiction for at least a couple decades.

Even if Stewart's claims are manufactured, they still highlight one of the problems associated with the current copyright landscape—that litigation over the ownership of an idea (and this is true for both copyright and patent law) has become so central to

the creative process and the rules so convoluted and unclear that we have created a system where creativity must be determined by a court. What constitutes too much appropriation for a song, what might be considered a parody, what is a similar plot line, all become subject to the legal system, where assessments about creativity, originality, and the scope of authorized appropriation are made by judges (and sometimes juries). Such a system encourages copyright and patent trolls who use the system to profit from claims that they own a more general manifestation of what has been created. While I am not saying Stewart is a copyright troll, if she is using the system to extract profits for something that is marginally similar, while having produced nothing substantial herself, her actions also highlight that copyright is not about innovation, creativity, or originality but about extortion, getting rich, and using the legal system to make unwarranted claims.¹⁴

In either case, the landscape of copyright is revealed—it is one of profit maximization, framed by the law as both a club and an opportunity. Ivey notes that:

The absence of public-interest priorities in intellectual property law, trade in cultural goods, creative education, and access to heritage has allowed an unrestrained marketplace to cobble together an arts scene that serves narrow commercial interests. And to be blunt, over the decades things have gotten worse, not better.¹⁵

Without any balancing public policy, those who control the market are able to decide the law.

At one level, it is clear that all creative work is appropriation and remixing. At another level is the issue of who exploits whom, and which party might be able to maximize their profits by using the law to reap benefits that they may or may not deserve. As we ultimately deal with the legal tools created to structure the desert of the real, it is important to remember that copyright is not the sum of our creative lives and is far more often used as a reactive weapon than a tool for creativity. While copyright can be used by creative people to protect their work, it is at least as often used, if not more often used, by those who have not created anything, but use copyright to commodify the creativity of others.

The landscape defined here is one where corporations rule the world.¹⁶ In the landscape of corporate control, we are all consumers, and creative work is a product to be bought, sold, and commodified. This is the landscape of the status quo mapped onto our most likely future. I am using the concept of tripping here to imply a lack of attention. When one lets the landscape control behavior instead of consciously understanding one's relationship to the world, it is likely that tripping will result. Paying insufficient attention to where you are going or the surrounding environment allows for others to set the agenda and create the framework within which our lives are lived. It is living a life within the simulation and not even recognizing the simulation as such. Most of us have simply tripped along, paying little attention to the trajectory of the law and where it might lead. A significant trend is that those with an interest in strong copyright protection are continuing to attempt to strengthen

copyright law, concentrate ownership of intellectual property products, and allow for more corporate dominance over intellectual property. This trend has implications for our future, a future as seen from the perspective of corporate control.¹⁷

Information monopolies dominate the world economic scene and are at the center of neo-liberal globalization. As noted by Okediji, "Globalization thrives on the ascendancy of information as the subject of, and the agency for, socioeconomic activity worldwide. In sum, information and information technology constitute the centripetal forces of globalization."¹⁸ These information monopolies are not under the control of any specific nation-state. These info-monopolies control access not only to the primary media forms of the twentieth century, but also access to the internet, a medium that is rapidly becoming privatized at the beginning of the twenty-first century as the open standards upon which it was built are being transformed into closed and private standards.¹⁹ As Garon notes:

Although once idealized as the perfect democratic medium, the Internet and the "portal" metaphor return once again to a format of content-controlled safe zones that are predetermined by demographic trends and dictated by millions of dollars in advertising designed to lure viewers. The portals provide the primary access to the Internet and control the content that is most readily available to consumers. Only with concerted effort can a viewer find material that has not been designed by one of these companies. The flow of information leads to economic power that leads to the control of the flow of information.²⁰

Neo-liberal corporate globalization has reframed the world conceptually into an information and economic elite dispersed throughout the world, but not necessarily tied to any particular state. The remainder of the world's citizens constitute a vast disenfranchised majority. As Chrystia Freeman notes:

Perhaps most noteworthy, they are becoming a transglobal community of peers who have more in common with one another than with their countrymen back home. Whether they maintain primary residences in New York or Hong Kong, Moscow or Mumbai, today's super-rich are increasingly a nation unto themselves.²¹

Elites within the global South may have more in common with U.S. elites than U.S. elites do with the poor in the United States.

Aside from the implications for political economy extending from a critique of the globalization of information and the transnational, and deterritorializing of the economic elite, in this tripping scenario, I want to also think about the *future of creativity* as it relates to copyright, the state, and culture. While many might see the Frankfurt school as offering an antiquated critique in the age of new analysis, their assessment of the culture industry remains quite relevant. Thus, to fully understand how the corporate model shapes the future of creativity, this section is informed by the intellectual work of critical theorists Max Horkheimer, Theodor Adorno, and Herbert Marcuse.²²

The seminal work of Horkheimer and Adorno on the critique of the culture industry sets the stage for understanding what it means to trip through cultural creativity. Most importantly, Adorno offers up a critique of the quality of culture under the culture industry, the lack of revolutionary potential available through art, and the ways in which entertainment products serve authoritarian principles by co-opting critical thinking and replacing it with docile consumption. Marcuse calls this state of mind one-dimensionality.

Copyright scholars leave *qualitative* judgments of content alone for the most part: so long as the creative work meets a minimum bar of creativity, the focus is on the illegal copy, the unauthorized appropriation, and the use of too many words. Copyright attorneys are not cultural critics—they do not say a work of art, novel, or musical score, or movie, is a culturally inferior product, but instead measure what, if anything, was "taken" from this product and used in a derivative one. The focus on copyright as a frame for all creative work assumes a minimal amount of creativity, but does not assess the quality of that creative act. Thus, a child's drawing is protected at the same level as a masterpiece (though sometimes these might be about the same quality). One is not justified in appropriating something from a bad work of art any more than from a good one.

There are important reasons for this. First, art as an aesthetic demands personal choices and, as any debate on art suggests, what constitutes art is constantly in tension and should not be imposed legally. Ostensibly frameworks should be neutral and protect all creative work, despite the fact some work is abysmally bad. Of course, when cultural commentary requires art to produce exact copies of something else, the law becomes relevant. Second, if one were to make qualitative decisions, what criteria would be used? The clash between copyright and free speech can and should be invoked when an effort is made to use copyright as a tool for censorship that might regulate content.

Thus, copyright scholars discuss the rules governing the protection of content as property, no matter what that content might be, how poorly conceived it is, how sexist, how racist, or how superficial and trite. The contribution of the critical theorists to this debate suggests that, given a corporate model of content ownership, we are treated to a highly censored, centrally managed information and entertainment product. This is culture from the top down and it is a condition of authoritarian existence devoid of any critical edge, playing to the lowest common denominator. If you can sell it or, conversely, if people will buy it, then it meets the appropriate criteria of "success." What is lacking is any possibility of imagining culture outside the culture industry standard. The measure of "art" is what people will buy, and legitimate artists are those who can be paid.

Part of discussing the future of creativity is making the argument that there are superior models for creativity than those found within the world of the culture industry. In other words, when discussing the future of creativity it is necessary to move beyond the legal framework of copyright and delve into how this regulatory structure affects the *type* of content produced and the reasons for its production. To live an authentic life, if such a thing is even possible, means to think critically about cultural creativity, who produces it, and what type of world it creates.

It is time copyright scholars take seriously the critique of the culture industry. This critique goes beyond merely commenting on the problems associated with the production of creative work within capitalism and industrialization and also argues that capitalism warps creativity in such a way that it loses not only its democratic character but also its revolutionary potential. Of course, I am not the first to say any of this and so am opting to rip from an excellent essay by David Butt to help elaborate on the work of the Frankfurt School and its application to creativity today. Butt uses these theorists to examine the popular movie *Fight Club*, an excellent example of revolutionary potential sucked dry by the culture industry. I'll pull his theoretical frame here and allow it to do its work in a different context. Butt notes:

The production of art has been the homogenisation of cultural styles and forms, the loss of art's power to transcend and transform, and the creation and promotion by the Culture Industry of an illusory gratification that promises sublimity but in fact only reinforces the monotony and routine of modern life. Adorno and Horkheimer contemplate an industrialised society in grim relief, in which the individual becomes a unit of labour and an object of production. ...

Most people living today in the societies of the West have since birth been under the rational influence of the industrial and economic forces the Frankfurt School warn against. *We're inside their hypothesis: the inheritors and product of the cultural universe that they predicted and described.* Sixty years on, many of the effects and symptoms described in the *Dialectic of Enlightenment* are evident in Western societies. New technologies and industries represent an evolution of the Culture Industry into new paradigms of influence over communities and individuals [italics added].²³

Especially relevant is the idea that we live inside the hypothesis of Horkheimer and Adorno. It is difficult to see the prison bars when one doesn't realize it is a prison.

Butt goes on to say that, "the Culture Industry's audience is degraded by the consumption of its products, which are aesthetically and emotionally hollow."²⁴ For Adorno, the Culture Industry creates a shift so great in how culture is produced that culture has become nothing but a commodity. Naomi Klein has eloquently articulated the scope to which we understand our lives as intricately linked to brands. We construct our lives as meaningful by the brands we align with—whether these are movies, music, clothing, or food.²⁵ Everything and everybody is a commodity. To continue to quote Butt:

Society increasingly becomes a construct, a thing designed. Branded environments replace branded products: shiny, pre-fabricated mini-universes replete with lowest common denominator gratifications. And there is a prospect that the system could become so effective that any competing or contentious idea or movement could be effortlessly undermined or appropriated. In this case escape from the status quo, from technological progress and the ideology of production, would become forever impossible—or even, as theorist Herbert Marcuse suggests in *One-Dimensional Man*, unthinkable:

To quote Butt quoting Marcuse:

The more rational, productive, technical, and total the repressive administration of society becomes, the more unimaginable the means and ways by which the administered individuals might break their servitude and seize their own liberation.²⁶

The critical theorists, Horkheimer, Adorno, Marcuse, were right. This is a landscape where the worst of property rights rears its ugly head and the ongoing and endless battles over ownership corrupt all that is creative. The escape option seems limited. Instead creativity is so commodified that there is no resistance left. Within the sphere of the culture industry, lawsuits are spawned because one has not wrung every last dollar from an expired creative product. The conversations are about old versus new business models, market failures, and consumer demands. The only option seems to be the commercial option.

The culture industry creates product that is an endless simulation of what is already owned or searches for original things outside its own boundaries, originality that can be culturally appropriated and assimilated. Ironically, the culture industry, while vociferously protecting its own intellectual property, treats art produced outside the realm of its borders as free for appropriation. An example highlights the problems associated with property rights and cultural appropriation within the culture industry.

The producers of *12 Monkeys* fought a protracted legal battle over the use of a chair, a battle that held up distribution of the movie until the legal issues were resolved. When described this way, it seems trivial—how could a chair design be so important? Isn't the "owner" of the chair being irrational? However, in a world where property rights matter, they should matter equally for everyone. If those players within the major entertainment industries want to protect their own work in a maximalist fashion, then these rules should restrict them from appropriation when it suits their needs as well.

In this case, Terry Gilliam was inspired by a drawing of a chair design by Lebbeus Woods, called the "NeoMechanical Tower," which appeared in a 1987 catalogue.²⁷ The use of the chair in the context of a new creative product highlights the problems of appropriation within the culture industry. For Gilliam, the appropriation was an attribution, but he seemed quite blind to his appropriation as part of the commodity world of Hollywood film making. Woods, the designer of the chair, took a different view. Woods sees architecture itself as a political act. He argues that architects as a general rule:

[B]elieve themselves creators, or innovators, when in actuality they are nothing more nor less than the executors of a physical and social order designed by those institutions presently holding political authority and power.²⁸

Woods had not been asked if his chair design could be used in *12 Monkeys* and the design went well beyond inspiration to copying. Thus, his case highlights the

hypocrisy of an industry that appropriates from those places where originality exists while seeking maximal protection for the products that they produce.

This story suggests that, not only is the culture industry itself heavily reliant on ripping and remixing, but, ultimately, once caught up within the world of property boundaries, things get much more difficult to produce. In order to protect property, the culture industry has created a negative feedback loop where it has become mired in contracts, licensing agreements, and ownership issues. As a result, sampling anything is simply not an option. I am not particularly sympathetic to those who seek to play both sides and appropriate when it suits their needs while refusing to allow others to appropriate their work. For the entertainment industry, the roadblocks to new and creative works of art may become financially too difficult. For non-corporate artists, the costs of copyright mean they will look for ways around monopolies—and so, ironically, copyright means many will not use creative work because of the expense involved. The result for corporate players is that it is easier to reproduce within the territory of the already owned than to make something new and/or gain the necessary permissions. The result for non-corporate players is that they cannot afford the licensing costs associated with copyrighted works.

What the culture industry gives us is the endless recycling of worn ideas, the remake of the old, and a system reliant on the cult of personality instead of originality. The culture industry mines the surrounding culture for new and vibrant ideas. It produces a system of appropriation without recognizing it as such, as the example of parkour from the last chapter demonstrates. The culture industry produces simulation and simulation replaces authenticity.

The future of the culture industry is this:

In the world of the culture industry, you can be arrested and prosecuted for taking a photo in a movie. In the world of the culture industry, you can be charged with a criminal offense for downloading music to your computer. In the world of the culture industry, commercially driven infotainment is the primary product to consume. In the world of the culture industry, the agenda for what is considered quality art is set by corporations designed to maximize profit. In the world of the culture industry, those spaces not yet commodified must be mined for new ideas because the center cannot hold without the circulation of signs, but this circulation gets stale without constant input. In the world of the culture industry our cultural heritage and the potential for cultural preservation are left to companies governed only by the profit motive, meaning that they have no interest in preserving the commodities that link us together.²⁹

This is the desert of the real, an arid space devoid of freedom. This is culture as commodity where we are the passive recipients. It doesn't mean we cannot be entertained; the entire point is entertainment and the stifling of autonomous subjectivity and revolutionary spirit, but it does impose limits on the type of creativity that will be valued and developed. What happens is that we do not participate in our world made possible by new technology. It is a surveillance system built into the concept of the state itself.

Welcome, as they say, to the desert of the real. Baudrillard's desert of the real is the landscape within which we currently discuss issues of copyright law. The underlying

architecture of the world of copyright is grounded firmly in profits and cultural consumption. The products that are created, however, produce the mass consumer discussed in the previous chapter. While the law is the architecture and the frame, the average consumer of culture does not even know it exists—they simply enjoy, consume, and are entertained by the culture industry. For the most part, the average person seems not to notice that they have opted out of cultural production and instead sit waiting for the next episode of their favorite television program. For some, the cage is visible and the inauthenticity of the simulation apparent, but possible alternatives seem unimaginable. For still others, self-expression outside the framework of modern consumer culture becomes essential to creating a meaningful life: a good life—a do it yourself (DIY) life. It may be that authenticity is not possible within the desert of the real—that once signs have been sufficiently delinked from reality, none of us has sufficient autonomy to live authentically. We are all trapped in this language game and must only think of what might be the next move. However, seeking to construct culture from the bottom up instead of having it served up whole from the top down is, I would argue, a substantively different cultural position worth examining.

Thus, having established the critique of the culture industry, it is necessary to step back and note that lots of creative goods are possible within this commodified process, and the vast majority of people are perfectly happy to turn on their televisions and settle down to watch what is poured out for them. Products of the culture industry can be highly entertaining, critically interesting, and worth the price of admission. Conversely, there is nothing to suggest that creativity produced in the following scenarios will be superior on every level. The key distinction to make here is in *who produces* and for what purposes, and the manifestation of culture as a consumer good where one consumes, instead of culture as a participatory act, where one produces.

What is the future of copyright, then, within the context of the desert of the real—our lives as simulation? Is there a way to resist the all-consuming logic of the real—our lives as simulation? Revolution and politics seemed to have failed. Masses marching in the streets are shot down or disappeared. Politics itself has become a spectacle, involving much posturing on television but otherwise simply a dimension of the hyperreal. Resistance must become active, not reactive; as much about building something new as it is tearing down the old.

Importantly, for the world of culture, resistance is about creating the authentic instead of more commodities. However, is it even possible to find authenticity in the desert of the real? There may be no real answer to this question, but to the extent there is, it must be found outside the boundaries set by the culture industry.

Skiping through the desert of the real

To use Lebbius Woods as a bridge, let me quote from his ideas on invention:

Self-invention inevitably draws upon and embraces the full scope of an individual's experiences. No one is born brand new each day, each moment. Much is drawn from conceptions of the past in the form of personal memories and

reflections, as well as a social consensus about what the past was and meant—history and tradition. This, indeed, forms a framework for personal interpretations and interactions with the present, but not more than that. Today the burden of responsibility for inventing meaning and usefulness, through action, is on each individual, drawing as he or she might from all available resources. This is the essence—and the crisis—of the Post-Modern condition, the condition that informs the way people live on the anarchical landscape of emptied meaning and voided authority.³⁰

In a landscape emptied of significance and without clear authority, Woods acknowledges that our creative energies must provide the meaning in the world. It is the power of creation that is the very connection existing between the individual and the larger world of inspiration.

Concepts of creativity from below, authenticity, opting out, self-expression, the culture industry, and intellectual property are central to the copyright landscapes in the last section of this chapter. The landscape remains the desert of the real, in part because, if Baudrillard is correct, we cannot escape it. Horkheimer and Adorno didn't hold out much hope. Marcuse played with the hippies and thought it was possible to escape one-dimensionality, but, 30 years later, his critique resounds more meaningfully than his alternatives.

Escape may be impossible because the very concept of authenticity is a mirage, a desire brought about by industrialization and a romantic longing for a past that might not ever have existed. Despite the problematic concept of the authentic, claims of authenticity are possible because the construction of an authentic world is a bottom-up process of creation. The possibility of the authentic is in imagining and connecting to culture through an active participation in the world. It is also a process of reclaiming that which has already been commodified. As Graham St. John notes, "reclaiming is a perpetual struggle," but one that is designed to reterritorialize the "territory captured by the market/state."³¹ "The reclaimers desire to wrest music and dance from the grip of the transnational music and entertainment industry, and will repurpose available technologies with that intention."³² What this last section does is focus on the reclamation process as well as the process of building something outside the world governed by intellectual property law. This is creativity from the bottom up.

Where tripping is unintentional and directed by forces outside the control of the individual, skipping suggests both a playful and intentional approach to creativity and culture. Skipping is a joyful act and one that can be self-affirming, even if the destination is the same. After all, to skip anywhere (especially as an adult) means to resist conventional norms of behavior. Skipping through the desert of the real suggests a playful and open approach to culture and creativity. It is also an approach that is more conscious of the surroundings. When copyright policy is not used as a club, but instead turned on its head to facilitate sharing, then a different way of creating is made possible. Such an open revolution is possible once a different set of starting assumptions is embraced.³³

A future articulating an open revolution begins from a different set of assumptions than those found at the heart of the culture industry. First, in an open revolution it is

understood that copyright can harm the creative process as much as help it and should not be treated as the only mechanism for facilitating creation. Second, a more flexible system to protect creative work is necessary. Third, creative labor has a social component where we all rely upon the work of others, and thus the benefits of creative work should also have a social component and be more freely shared. It is often forgotten that the "value" of something cultural is in its circulation. A book, for example, is written to be read by others—an activity not well suited to property rights, given that, as we criminalize the act of reading, or listening, or viewing, we limit the very idea upon which these methods of communication rest. Author Paulo Coelho perhaps describes it best when he explains why he posts his books free online. He states, "suddenly ... I could talk to people, who, by nature of having read my works, understand my soul."³⁴ The social nature of this type of communication is intrinsic to why we create.

Finally, it should not come as a surprise that people will create without a strong copyright framework, or without recourse to copyright at all. William Patry notes that prior to the change in the law which automatically copyrighted everything fixed in a tangible form, very few people bothered to register their work with the copyright office and even fewer renewed the copyrights.³⁵ Bill Ivey argues that three conditions need to be present for artists to contribute creatively to society:

First, conditions must be conducive to originality; artists need to be able to find a way to enter and function in our complex arts system. Second, they need respect for their ideas and their approach to problem solving, and respect in the form of sufficient compensation to maintain a creative life. Third, artists must be free to draw on—to synthesize—the work of contemporaries as well as creativity from the past.³⁶

What Ivey argues against is strong and "heavy" copyright protection. While many policy makers begin from the assumption that intellectual property is essential for the creative process, a different type of world is created if one starts from the assumption that copyright can actually harm the creative process.

If escape from the hyperreal is impossible, what are the options for seeking to live a meaningful life in the desert of the real? There may be a variety of ways to interact with the hyperreal. One can embrace it, resist it, be ignorant of it, or celebrate it. The heart of what I want to accomplish in this chapter is to point to the spaces of possibility when creativity is unleashed from a property rights, commodity-driven discourse. People pushing the edges of creativity from this radical space reject the culture industry and the control this industry has over cultural expression. Instead, we enter the world where music is made, not produced; where art is the connecting tissue between individuals; where artists understand that it is the reception of their work that makes it art, not its creation. This is an information culture fraught with desire—a desire to communicate, remake, appropriate, and share, just because we can.

Richard Sherwin, in his book *When the Law Goes Pop* argues that we all crave enchantment and that part of human creativity is seeking mythic experiences that go beyond the world of reason. As he puts it:

The extent of our need dictates our willingness to yield to the spell of belief, just as the extent of our fear of deceit dictates the speed with which disenchantment, detached irony, and passive resignation will soon follow. The magic power (or eros or seduction) of words and images remains, but we are increasingly ill-disposed to risk yielding to its call. This is how it is in a culture of superficial stimulation and simulation. The quick enchantments and meager payoffs that they allow require the rapidity and constancy of information and image flow to stand in for (perhaps to divert us from) the depth and stability of meaning that the culture lacks. For without the means of experiencing more profound enchantments, without communal rituals and social dramas through which the culture's deepest beliefs and values may be brought to life and collectively reenacted, those beliefs ultimately lose their meaning and die. And at that point we will have become what mass commercial communication practices encourage us to be: scattered impulses alert to each moment's promise of immediate gratification.³⁷

For Sherwin, the further we move into the hyperreal, the less authentic is our ability to tap into the enchanted world. "Passively experiencing life as an extension of onscreen reality" only means that "self and social reality suffer a loss of meaning."³⁸ Cultural creativity, then, is connecting to the possibility of enchantment.

In the world freed from the structure of the commodity, people create connections, they create meaning, and they share it with others. We should have, as Bill Ivey notes, "the right to an artistic life," meaning not one where entertainment is consumed, but one where we create.³⁹ Culture is a gift economy and it is worth elaborating on the power of the gift for this process to make sense. Lewis Hyde's work on the gift is instrumental to understanding the alternative to a commodity-driven future (one already embraced and lived by many). To Hyde, "gifts are best described ... as anarchist property. The connections, the 'contracts,' established by their circulation differ in kind from the ties that bind in groups organized through centralized power and top-down authority."⁴⁰ Gifts create bonds that transcend the commercial. A different type of relationship is established through the exchange of gifts rather than the exchange of commodities.⁴¹

The use of the gift economy, while emerging from a non-capitalist past where the gift solidifies personal relations, is especially relevant to the world of art. The tension between art as a commodity and art as a gift is central to the modern copyright wars and of course is not new. For Hyde, embracing art as commodity destroys the potential for circulation and gift giving that is central to the artistic process:

The more we allow such commodity art to define and control our gifts, the less gifted we will become, as individuals and as a society. The true commerce of art is a gift exchange, and where that commerce can proceed on its own terms we shall be heirs to the fruits of gift exchange: in this case, to a creative spirit whose fertility is not exhausted in use, to the sense of plenitude which is the mark of all erotic exchange, to a storehouse of works that can serve as

agents of transformation, and to a sense of an inhabitable world—an awareness, that is, of our solidarity with whatever we take to be the source of our gifts, be it the community or the race, nature, or the gods. But none of these fruits will come to use where we have converted our arts to pure commercial enterprises.⁴²

The gift is central to social cohesion, and it is possible to create community around commercial products; the law's job is to interfere to stop that social connection. The gift exists in its circulation, as Hyde notes, "the gift is property that perishes";⁴³ however, the gift is alive in its flow between people and inspires new layers of creativity. The idea of the gift has been overwhelmed by commercial culture, and the predominant narrative that people will only create if they are rewarded monetarily blinds us to the possibility of the gift.

Hyde is not ignorant to the necessities of the market in modernity. After all, one must live within a market economy. However, while he acknowledges that the artist will move between the market and the gift economy, it is vital that there remains a "protected gift-sphere" where art can be produced without the imposing logic of market forces.⁴⁴ To continue to develop art as a gift, recognize that it is produced even when the possibility of payment is absent, allows art to give the world its greatest achievement—the development of an inner richness that commercialism cannot reproduce. It allows for the re-enchantment of the world. The world devoid of the inner life of the gift, often associated with modern capitalism, is the world of inauthenticity that many seek to escape. The world of the gift, however, looks and feels radically different.

Here is what it looks like:

Imagine a scene—thousands of people in the desert dancing to music mixed by a DJ from a multitude of sources, none of which is appropriately licensed. The music ebbs and flows, peaks in a burst of flames and then subsides. Everyone here has explicitly rejected, at least for the moment, the culture industry and instead has engaged in whatever form of radical self-expression best suits their current interests.

The sound system, the music, the DJs, and the stage are all gifts, brought to the desert for a single week at the expense of the giver. This is Burning Man and one small slice of what happens there—rave culture. While some might dismiss Burning Man and rave as narcissism, hedonism, or an irrelevant countercultural expression with no lasting impact, to discount Burning Man is to avoid considering the radical ethic through which the event is organized and the nodal connection it has with other like-minded events around the world. Burning Man creates the space for an alternative way of being, a fragile and temporary place that is a "protected gift-sphere."

That it is allowed to exist at all within contemporary state practices is astonishing. One aspect that is part of Burning Man (and there are many diverse aspects to this arts festival) is rave culture. Rave also transcends what happens at a single event and denotes a type of dance culture that has evolved over the decades in an effort to retain its authenticity and avoid commercialization. To quote one internet source on rave culture:

Rave culture is an echo of these two contradictory images. It is retrotuturist, heading in opposite directions at the same time: forward, to the seductive

dystopia of Blade Runner's Los Angeles, 2019, and backward, to the psychedelic utopia of the 'Summer of Love'.⁴⁵

What happens in most strands of rave culture that have not yet been co-opted by the market is to provide a distinctly anti-capitalist approach to culture and music. The music of rave culture is techno—to continue:

Techno is the end of natural law of pop music: the end of harmony, of melodic development, of album-oriented marketing, of live performance in the "classic rock" sense. Techno signals the death of the song, to be replaced by the unresolved, infinite track. It is the death of the star, of message, of meaning. It is a revolutionary concept, but a recording company's nightmare. ...

The genre is also anti-capitalist at the same time. Dozens of 12-inch singles are released every week, but few of the producers or musicians—there is usually no band—use the same name twice; they form short partnerships, release a couple of tracks and move on. None seem worried about fame or fortune; the 'image' of the music is transported directly from composer to consumer, without any interfering middleman.⁴⁶

Rave culture is on the margins—raves have no permanent home, but pop up in one place and are gone the next. Raves are liminal spaces—as a break from the drudgery of whatever "real" lives are. They also have transnational appeal, locating themselves throughout both the industrialized and developing world. In the process, culture is created and shared; and, most importantly, meaning is made from the bottom up. All participate in the creation of meaning—the dancers, the DJs, the music. Rave culture's emergence was so threatening to the social order that countries throughout the world sought to regulate and render illegal the rave throughout the 1990s. While the law seeks to ban them, the rave is a cultural space where top-down cultural creation is disrupted in favor of the radically participatory.

Despite their short-term nature, these temporary autonomous zones are essential lights to the future of creativity, unmoored from capitalist interests and set free to develop, explore and define meaning.⁴⁷ The interesting thing is—there isn't really a copyright law in sight where culture is created on the margins. Culture evolves too rapidly, and is based too closely on the exchange between people and the community that these connections make to deploy the law. All of this makes one wonder what future there is for copyright when creativity comes from the bottom up and is designed to create a meaningful connection between the viewer and the viewed, the creator and the public. Here, the future for copyright is minimal, but the spread of ideas from people to people is essential.

It is important to note the change of attitude that comes with the DIY culture of the bottom up. Much effort is put into figuring out how to resist capitalism, co-optation, and what Foucault calls disciplinary power.⁴⁸ The attitude that emerges from the creative flow of the rave and countercultural movements on the margin is not a reactive attitude against power but an affirmation of an entirely different world

altogether. The rave is an undisciplined space and outside the control of territorial regulation. Efforts to reign in this space abound as the market seeks to commodify its popularity and the state seeks to manage its existence.

The attitude of creativity from the bottom up, not as a form of resistance but of producing something authentic is exemplified by those whom Anthony D'Andrea calls expressive expatriates or global nomads.⁴⁹ While much of this book has dealt with the flow of commodities and culture, it is the vector of people that remakes and makes culture. Cultural change occurs when people from different cultures interact, share ideas, and bring home new ways of thinking and doing things. Often the global nomad eschews the idea of home entirely and leaves to never return. Global nomads create the authentic and in the process develop new permutations of community, finding the culture on the margins of capitalism not fully entrenched by the market, and they develop the promise of cultural miscegenation in the land of the nation-state.

The expressive expatriate escapes consumer life and expresses cultural dissent by often moving both intellectually and physically to the margins. As D'Andrea notes:

While consumer societies, according to expatriates and marketing analysis alike, appear to be blindly marching toward the abyss of spiritual void, cultural dissent in the West often manifests itself in the will to escape toward marginal positions and locations. The margin seems to provide some favorable conditions for the experimentation of alternative lifestyles that attempt to integrate labor, leisure and spirituality in ways that are deemed more meaningful according to those who evade the center.⁵⁰

These expatriates constitute a *negative diaspora* based upon "counter-hegemonic practice and lifestyle."⁵¹ While the state's interest in territorializing its populations helps to bind them to the nation-state and stabilizes the management of the population, the efforts of the expressive expatriate disrupt these boundaries by working around the state to live on the margins and produce an aesthetic life. It is through an "ethnography of hyper-mobile formations" that we can see the possibility of life outside the efforts to manage populations (biopower).⁵² This is a life that searches out alternative modernities that place as central the possibility of "nomadic spirituality" and a life based on art and personal connections, and outside the grasp of material and commercial culture.⁵³

This means creating new areas on the margins where sufficient freedom can be found to live a non-commodified existence. Once the terrain becomes too commercialized and draws in those who consume instead of create culture, the expressive expatriate will move on and seek out the new margins and begin again. Expressive expatriates seek to opt out of global cultural convergence while utilizing the tools of modernity to structure a new way of life. They also illuminate the problem with staying on the edge—it must constantly move to keep ahead of commodification and the territorializing efforts of the state.

Today, these people create what Hakim Bey would call temporary autonomous zones—around the world. This is a culture based upon the fusion of music, dance,

and placing the purchasing of goods within a context of environmental sensitivity and human-based economics.⁵⁴ They seek out spaces where they can create culture from the bottom up. This type of cultural exchange has limited access to copyright or interest in this type of legal protection. Furthermore, people functioning in cultural creation from the bottom up cannot afford to hire the lawyers that would be necessary to assert such rights even if they sought to protect them. They try to live within the protected gift sphere, making money in order to survive, but displacing the pathway to consumer desire inherent in the neo-liberal state. While expressive expatriates and rave culture point to the fluidity of the creative sphere and the temporary nature of its being, it is Burning Man that helps us see one possible way that copyright and creation from the bottom up interact.

To enter the world of Burning Man is to enter a gift economy based upon art and cultural production. Burning Man is a week-long event that takes place in the desert of Nevada.⁵⁵ It is a "radical experiment in self-expression," where each participant is responsible for his or her own food, water, and entertainment. However, given this precondition of self-sufficiency, the economy of Burning Man, which has turned into a temporary city of around 48,000–50,000 people, functions as a gift economy.

Nothing is bought or sold (except ice and coffee, and the proceeds of these go to local charities); instead members of the community gift everything to each other. Individual connections occur when strangers meet, talk, and exchange small gifts. Larger installations exist, where camps create elaborate structures, music, bars, workshops, and costumes.

Everything is given freely. Everyone participates in the creation of this culture and everyone is given the opportunity to express themselves in whatever manner they like. Daniel Pinchbeck offers the following insights into Burning Man:

The essential point of Burning Man is not what it is now but what it suggests for the future, which is not just a new cultural form but the possibility of a new way of being, a kind of radical openness toward experience that maintains responsibility for community. Radical openness means no closure, perpetual process and transformation, and embracing paradox, contraction, and uncomfortable states. Every instant becomes synchronistic, every contact a contact high.⁵⁶

It is the openness of Burning Man, its very framework that gives it the radical potential for a future without the constraints we place on culture and being today. As a result, Burning Man is a strange anarchist concoction of the Road Warrior, Alice in Wonderland, Mardi Gras, a DIY art festival and an extreme camping trip that culminates with the ritual burning of the effigy of a man.

In the words of artist Larnie Fox, whose 24-foot bamboo windmill was one of the art installations at Burning Man in 1997:

There is a yet unnamed art movement that may prove to be of some significance, and Burning Man is close to its center. It often manifests itself as circus, ritual, and spectacle. It is a movement away from a dialogue between an individual artist and a sophisticated audience, and towards collaboration

amongst a big, wild, free and diverse community. It is a movement away from galleries, schools and other institutions and towards an art produced in and for casual groups of participants, more akin to clans and tribes, based on aesthetic affinities and bonds of friendship. It is a movement away from static gallery art and formal theater and towards site-specific, time-specific installation and performance. It is a rejection of spoon-fed corporate culture and an affirmation of the homemade, the idiosyncratic, the personal. It is profoundly democratic. It is radically inclusive, it is a difficult challenge, and it is beckoning.⁵⁷

Burning Man is a space that has created its own culture, has its own newspaper, has its own "alternative" newspaper, has civic structures, has rituals, and even has its own licensing agreement. It is the case that copyright plays a role here, but a limited one. A different balance has been struck that allows for flow—the reasons for the licensing, and the flows of creative work emerging in this space, are substantially different than what comes out of the mainstream culture industry.

Much like David Bollier's concept of "property on the outside,"⁵⁸ Burning Man has incorporated a copyright licensing agreement to protect the participants and artists. Their intent is anti-consumeristic and thus they use copyright to resist the commodification of what they understand to be an important form of individual/community self-expression. According to their FAQs regarding the registration of any camera that can take video images:

What's with this? Why register cameras at Burning Man?

1. To protect Burning Man. Nobody wants to see Burning Man on a Nike ad.
2. To protect our privacy. This is not Spring Break at Fort Lauderdale. Most of us come to Burning Man to enjoy and explore freedoms that we don't experience elsewhere. We choose to express ourselves as we please, to dress or undress as we please. This is a form of radical self-expression. The issue is: do you want some protection from having your image exploited by pornographers. Unlike the rest of us, pornographers don't do it for free.
3. To protect artists' rights. Artists need protection against commercial exploitation of their work by third parties.

The FAQs go on to answer the question:

What if I'm making a commercial video, or I change my mind and want to sell footage?

Commerce isn't evil; artists have a right to sell their work—but we oppose turning Burning Man into a commodity. If you desire to film for a commercial purpose, you do so only if you receive a written approval from Burning Man for your proposed project.⁵⁹

In this world, copyright is designed as a boundary between the creative and the commodified. It is used as a protective barrier for what happens within the temporary

autonomous zone that is Burning Man. As such, it serves as an interesting example of the future of copyright—a limited future; one where copyright law itself can have a function, but that function has nothing to do with creativity. Rather it serves to protect creativity from the exploitation that inevitably follows.

Not everyone sees the agreement regarding film and video as protecting a culture by using the law as a barrier to outside commercial exploitation. Just prior to the 2009 Burning Man event, the Electronic Frontier Foundation (EFF) criticized the policy as a misuse of the Digital Millennium Copyright Act (DMCA) and, even worse, at odds with the otherwise anti-property and free culture of Burning Man itself.⁶⁰ To the Burning Man staff, the debate must be more nuanced than the EFF has suggested. For example, when an entity called Voyeur Video took unauthorized footage at Burning Man of nude participants and sold them commercially, Burning Man was able to successfully litigate to defend the privacy of their participants, the stated goal of their licensing agreement.⁶¹ They would not have been able to do so but for their licensing agreement.

While Burning Man has an interest in protecting their event from unauthorized commercialization and the privacy of their participants from becoming the subjects of pornography, they are clear in their respect for comments and criticism about the event, the opportunity to post all things about Burning Man in any number of different forums and the possibility of posting personal pictures on websites. Anyone who has ever googled Burning Man knows that there are plenty of photos out there of participants, suggesting that only loose enforcement of the copyright terms are used. However, for the staff at Burning Man, using the notice and takedown powers of the DMCA has allowed them to stop several porn sites from using images from Burning Man to make money.⁶² As with numerous other artistic efforts, the goal here is to remain inside the gift economy and away from commercialization.

Andie Grace clarifies the noncommercial aspects of the Burning Man policy:

We're also not at all interested in [sic] preventing participants from sharing their personal imagery or impressions of the event on third party sharing sites in a noncommercial manner, so long as they observe the concerns about privacy and commercialism. We're delighted to see people sharing videos, stories, and pictures on our official Facebook page, and we know that it, along with Flickr, YouTube, Vimeo, etc. are representative of the way many of us share personal imagery in the digital age. Frankly, we'd rather gouge out our own eyes than get in the way of that kind of personal expression in our community. That's why we've engaged with groups like the EFF and Creative Commons to continue exploring and evolving our policies to reflect the evolution of intellectual property itself. In fact, Burning Man's lead attorney on intellectual property, Terry Gross, was the EFF's first General Counsel—and he wrote the very licenses to which Ms. McSherry objects in the post, but she unfortunately fails to mention that their ongoing conversation behind the scenes has, even before her post, been helping us to frame the next step in evolving the licensing of image use at Burning Man.⁶³

The debate of course did not end with this dialogue and discussion, but it does highlight that even the most gift-centered space must deal with the ravages of a property system designed to destroy its ethic.

Burning Man is Do It Yourself Culture—building from the bottom up. The wave of “amateurs” making movies, music, interesting bits, news, stories, and everything else has always been there—underground newspapers, zines, photos, this is the culture that is vibrant, alive, and communicated. As described in the last chapter, the DIY of culture from the bottom up is being termed “user-generated content.” This can be dizzying since the content is unfiltered and overwhelming, and much of it is probably junk. What these efforts point to, however, is that the concept of giving is key here, not the concept of owning. This is the parallel future of copyright outside the boundaries of the law.

Economists can't explain how it even exists.

The future of copyright in the land of remixing, and liminal spaces, and pirate utopias, is no future for copyright at all. However, it almost seems inevitable that even the most radical of cultures is appropriated by the culture industry, breaks down over time, or becomes part of the next advertisement for the greatest commercial product ever. For example, Absolute Vodka has recently produced an ad clearly inspired by Burning Man. If we are all always ripping, burning, and remixing, then the flows are inevitable. They go both ways, it is just that many seek to stifle the flow because they seem incapable of seeing the full landscape.

Conclusion

How to put the final brushstrokes on my many different landscapes? If one needs to escape the drudgery of everyday life, of mechanized and alienated labor, of social conformity, then what options exist? Ultimately, how can any action remain uncommodified when post-industrial capitalism has turned the experience, ideas, and intangibles into the next form of private property? I've tried to do a couple things in this chapter. First, to follow the trends that structure contemporary copyright law towards the likely future it creates. Second, to think about the future of creativity and the possibility of creative futures not bound by property rights. I've sought to paint landscapes, to evoke some emotion, in my articulation of the future. It is unclear if any of these futures stands alone: the culture industry needs something authentic to poach from and remake into property, and they will look wherever they can find it. Marginal cultures cannot escape the pervasive imagery of the culture industry. Burning Man may be something different, but even it suffers from the larger frame that it seeks to actively help replace. As Carlsson notes:

Burning Man has a powerful effect on the imagination. It is not “real” liberation, but a temporary faux “escape” from the economy (that costs you hundreds of dollars). Nonetheless, it's a real experiment, and a direct manifestation of yearning. People yearn to escape the limits of economic life, to be more than just “workers.” There aren't many chances to experience a crowd of like-minded

people, sharing a collective euphoria produced by artistic and technological self-activity. At Burning Man there is a taste of such a post-economic life, even if the sour aroma of the cash nexus is barely hidden beneath the play.⁶⁴

If one seeks to opt out, to create a parallel and *do it yourself* culture, it is clear that we all still swim within the hyperreal and only so much escape is possible. The position that this chapter endorses is not a reaction to dominant culture, but simply an active creation that leaves the dominant culture behind and ignores copyright to do so. However, it is mostly the case that truly creative acts will ultimately be subject to appropriation, as was the case with rave culture.

And the cycle continues. Open systems must deal with abuse and the inevitable transformation from the margin to the center. Closed systems protected by copyright may think they can guard their "property," but, as the thriving world of fan fiction suggests, intangible worlds tend to flow—they become reclaimed. The key to the future is transformation; the future is not stable or set, but evolving and shifting. Resistance and alternatives look different outside the boundaries of law. Graham St. John in his work on technoculture highlights the ways in which rave and dance cultures can manifest different types of resistance that should not be discounted. He states:

The trouble is that multitudinous actions rooted in artistic, anarchist, and spiritual movements will invariably be revealed as failures, ineffectual and futile when gauged by the parameters of conventional contestatorial politics. The hyper-liminal and nomadic world of hedonists, anarchists, artists, travelers, exiles, queers, pirates, hackers, visionaries, and other protagonists may be lost to the framework which primarily or solely desires "representational" and "striatic" solutions.⁶⁵

So, ultimately, to focus on those creating meaning is to create a radically different vision of what is possible. Such a future does not demonstrate a significant need for copyright at all. If there is a future, it is a protective role, not an ownership role. The future may be able to use some limited amount of copyright, but what the future really needs is for more active participants in the creative process to become engaged. We all need to stop consuming culture and start performing it.

The end impact of Burning Man is not simply the enjoyment of a week outside of consumer society and the possibility to participate in a gift economy for a moment, but the transformative affect that this process can have once we return to what "burners" call the default world. As one person noted in the "afterburn" analysis:

We believe our future lies outside the plastic fencing that encloses Black Rock City. Our city, in this scheme of things, is like a heart. Steadily beating, it annually pumps activists and energy back into what is called the default world. Having changed ourselves and having helped to change the lives of others, we now think that it's time to change the world that we must live in every day.⁶⁶

To the degree that this chapter is a rallying cry—figure out what self-expression means to you, stop worrying about property rights, and gift your ingenuity to the world.

Notes

- 1 Some of these ideas were first published in the *Journal of Futures Studies* in 2001, but in the spirit of "ripping, burning, and remixing," they are being refurbished here. Other parts of this chapter were presented at a conference on the Future of Copyright at the University of South Carolina School of Law in the fall of 2007.
- 2 Lebbeus Woods, "Gallery 10," *Anarchitecture—Architecture as a Political Act*, accessed March 28, 2011, <http://septimus7.tripod.com/abea/gallery10.html>.
- 3 Verzola, *Towards a Political Economy of Information*, op. cit.
- 4 Halbert, *Resisting Intellectual Property*, op. cit.; Halbert, "Globalized Resistance to Intellectual Property," op. cit.
- 5 Boyle, "The Second Enclosure Movement and the Construction of the Public Domain," op. cit.; James Boyle, "On Intellectual Property—Fencing Off Ideas," *Dacalus: Proceedings of the American Academy of Arts and Sciences* 131, no. 2 (2002): 13.
- 6 Josh Constine, "SOPA Protests Sway Congress: 31 Opponents Yesterday, 122 Now," *TechCrunch*, January 19, 2012, <http://techcrunch.com/2012/01/19/sopa-opponents-supporters>.
- 7 Wark, *A Hacker Manifesto*, op. cit.
- 8 Wendell Bell, "Making People Responsible: The Possible, the Probable, and the Preferable," in *Advancing Futures: Futures Studies in Higher Education*, ed. James Allen Dator (Westport, CT: Praeger, 2002), 39.
- 9 *Matrix [Blu-ray]* (Warner Home Video, 2011).
- 10 Jean Baudrillard, *Simulacra and Simulation* (Ann Arbor: University of Michigan Press, 1995).
- 11 Robin Andersen, *Consumer Culture and TV Programming* (Boulder, CO: Westview Press, 1995), 93.
- 12 "Sophia Stewart Matrix Lawsuit," *Snapes*, November 15, 2009, www.snopes.com/politics/business/matrix.asp.
- 13 One such example of contractual language comes from the terms of service agreement for the virtual game, *Shadowbane*.
If at our request you send certain specific submissions (e.g., Communications, including, postings and creative submissions) or, despite our request that you not send us any other creative materials, you send us creative suggestions, ideas, notes, drawings, concepts or other information, the Submissions shall be deemed, and shall remain, the property of Ubi. None of the Submissions shall be subject to any obligation of confidence on the part of Ubi, and Ubi shall not be liable for any use or disclosure of any Submissions. Without limitation on the foregoing, Ubi shall exclusively own all now known or hereafter existing rights to the Submissions of every kind and nature, in perpetuity, throughout the universe and shall be entitled to unrestricted use of the Submissions for any purpose whatsoever, commercial or otherwise, without compensation to the provider of the Submissions. You waive any and all moral rights in any such Submissions as well as any claim to a right of credit or approval." See: Debora Halbert, "Public Lives and Private Communities: The Terms of Service Agreement and Life in Virtual Worlds," *First Monday* 14, no. 12 (December 7, 2009): online.
- 14 While copyright trolls tend to be the owners of a portfolio of copyrighted materials they didn't create (see Mullin), they can also be a single user trying to capitalize on their idea from a much more successful permutation of it. For more on copyright trolls, see Joe Mullin, "Is This the Birth of the Copyright Troll?" *Law.com*, August 16, 2010, www.law.com.

- law.com/jsp/cc/PubArticleCC.jsp?id=1202466627090; Caroline Horton Rockafellow, "Copyright Trolls—A Different Embodiment Of The Patent Troll?" *IP Frontline*, November 23, 2006, www.ipfrontline.com/depts/article.aspx?id=13469&deptid=3#.
- 15 Ivey, *Arts, Inc.*, op. cit., 224.
- 16 I'm not sure if I made up TRIPing through the desert of the real, but I most definitely am lifting "when corporations rule the world" from the title of Korten's book. See: David C. Korten, *When Corporations Rule the World* (San Francisco, CA: Berrett-Koehler Publishers, 2001).
- 17 The formative influence of multinational corporations in the passage of the TRIPS agreement has been well documented. See: Duncan Matthews, *Globalising Intellectual Property Rights: The TRIPs Agreement* (London and New York: Routledge, 2002); Drahos, *Information Feudalism* op. cit.; Carolyn Deere, "The Implementation Game: Developing Countries and the Politics of Trips (1995–2006)," (Oxford: University of Oxford, 2007). Undeterred by a changing landscape of resistance, these same interests have spent the past few decades using the U.S. government to ensure that countries signed "trips-plus" agreements. Globalized copyright and patent laws protect the primary international economic players and this neo-liberal future is dominated by the corporation.
- 18 Ruth Gana Okediji, "Copyright and Public Welfare in Global Perspective," *Indiana Journal of Global Legal Studies* 7 (1999): 118.
- 19 Lawrence Lessig, *Code: version 2.0*, op. cit.; Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law To Lock Down Culture and Control Creativity* (London: Penguin, 2004).
- 20 Jon M. Garon, "Media and Monopoly in the Information Age: Slowing the Convergence at the Marketplace of Ideas," *Brain League IP Services* (n.d.): 55–56, www.brainleague.com/case_studies/media.pdf.
- 21 Chrystia Freeland, "The Rise of the New Global Elite," *The Atlantic Monthly*, February 2011, 46.
- 22 Max Horkheimer and Theodor W. Adorno, *Dialectic of Enlightenment: Philosophical Fragments*, trans. Gunzelin Schmid Noerr (Stanford, CA: Stanford University Press, 2002); Theodor W. Adorno, *The Culture Industry: Selected Essays on Mass Culture*, trans. J. M. Bernstein (London: Routledge, 2001); Herbert Marcuse, *One-dimensional Man: Studies in the Ideology of Advanced Industrial Society* (Boston, MA: Beacon Press, 1968).
- 23 David Butt, "Fight Club and the Culture Industry: Alienation, Liberation, and Revolution Fantasy," *Kagablog*, October 30, 2007, <http://kaganof.com/kagablog/2007/10/30/fight-club-and-the-culture-industry-alienation-liberation-and-revolution-fantasy>.
- 24 Ibid.
- 25 Klein, *No Logo*, op. cit.
- 26 Butt, "Fight Club and the Culture Industry: Alienation, Liberation, and Revolution Fantasy," op. cit.
- 27 Woods, "Gallery 10," op. cit., accessed March 28, 2011, www.coldbacon.com/art/lebbeuswoods-12monkeys.html.
- 28 Woods, "Gallery 10," op. cit.
- 29 Ivey, *Arts, Inc.*, op. cit., 42–45.
- 30 Woods, "Gallery 10," op. cit.
- 31 Graham St. John, *Technomad: Global Raving Countercultures* (London and Oakville, CT: Equinox Pub., 2009), 23.
- 32 Ibid.
- 33 The lesson learned from the open access revolution has rippled out from the kernels of the GPL (general public license) and Linux to give us the concept of Access to Knowledge, Open Access textbooks, classes, and journals, and is working to establish a significant and countervailing trend to the corporate-dominated future discussed above. There are now many actors seeking to embrace, develop and project the open access paradigm—hackers, musicians, artists, academics, librarians, code writers, authors, movie

- makers, and those who do not consider intellectual property before they embrace the impulse to share—taking advantage of the platforms designed to generate culture from the bottom up. These processes are not necessarily anti-copyright, but instead strike a different balance between copyright and the free flow of information.
- 34 *The Week*, October 14, 2011.
- 35 Patry, *Moral Panics and the Copyright War*, op. cit., 68. Specifically more than 21,000 works were published in the United States between 1790 and 1800 but that only 648 copyright registrations were made in this same period, resulting in a registration rate of 3.28 percent, at a time when registration was mandatory to get protection. He goes on to say, "nor has the picture changed appreciably in the intervening 200 years." Another layer of complexity is that of those books still under copyright until 2025, only 174 (1.7 percent) are still in print (p. 68).
- 36 Ivey, *Arts, Inc.*, op. cit., 58.
- 37 Richard Sherwin, *When Law Goes Pop: the Vanishing Line Between Law and Popular Culture* (Chicago, IL: University of Chicago Press, 2000), 228.
- 38 Ibid., 243.
- 39 Ivey, *Arts, Inc.*, op. cit., 94–123.
- 40 Hyde, *The Gift*, op. cit., 110.
- 41 Ibid., 85.
- 42 Ibid., 206.
- 43 Ibid., 10.
- 44 Ibid., 361.
- 45 "Ishtkur's Guide to Rave Culture," *UtahRaves.com*, June 2008, www.utahraves.com/showthread.php?t=9235&page=1.
- 46 Ibid.
- 47 The concept of the Temporary Autonomous Zone (TAZ) is from Hakim Bey's work, in itself an example of a book set free from copyright and hence published by numerous different presses and in multiple different languages, reaching a far larger audience than it most likely would have through a traditional copyright paradigm. Hakim Bey, *The Temporary Autonomous Zone, Ontological Anarchy, Poetic Terrorism* (Charleston, SC: BiblioBazaar, 2007).
- 48 Foucault, *Security, Territory, Population*, op. cit., 45.
- 49 D'Andrea, *Global Nomads Techno and New Age as Transnational Countercultures in Ibiza and Goa*, op. cit.
- 50 Ibid., 10.
- 51 Ibid., 13–14.
- 52 Ibid., 32.
- 53 Ibid., 214–22.
- 54 In her MA thesis, Quack claims that, by the mid-'90s Burning Man could not be considered a true TAZ because of its relationship to authority both internally and externally. However, there are remaining elements of a TAZ that should not be overlooked within the event. Larissa Quack, "Re-Presenting the Present: The (R)evolution of the Burning Man Festival" (Masters Thesis in Cultural Anthropology, University of Amsterdam, 2007), 48, www.linkedin.com/in/larissaquack.
- 55 "The Burning Man Project: Welcome Home," accessed April 5, 2011, www.burningman.com.
- 56 Daniel Pinchbeck, "Heat of the Moment: The Art and Culture of Burning Man – Critical Essay," *Artforum*, November 2003, http://findarticles.com/p/articles/mi_m0268/is_3_42/ai_110913976/pg_3/?tag=contentcoll.
- 57 Larrie Fox, "Art Installations: Your Art on the Playa," *Burning Man*, accessed April 5, 2011, www.burningman.com/installations.
- 58 David Bollier, *Silent Theft: The Private Plunder of Our Common Wealth* (New York: Routledge, 2002), 179.

- 59 "Burning Man: Preparation—PERSONAL USE OF VIDEO CAMERAS," accessed April 5, 2011, www.burningman.com/preparation/event_survival/video_cameras.html.
- 60 Corynne McSherry, "Snatching Rights On the Playa," *Electronic Frontier Foundation*, August 12, 2009, www.eff.org/deeplinks/2009/08/snatching-rights-playa.
- 61 Andie Grace, "'Snatching Digital Rights' or Protecting Our Culture? Burning Man and the EFF," *Burning Blog*, August 14, 2009, <http://blog.burningman.com/photos/videos/media/snatching-digital-rights-or-protecting-our-culture-burning-man-and-the-eff>.
- 62 Ibid.
- 63 Ibid.
- 64 Chris Carlsson, "Burning Man: A Working-Class, Do-It-Yourself World's Fair," *Processed World*, Winter 2005/2004, www.processedworld.com/Issues/issue2005/burningman.html.
- 65 St. John, *Technomad*, 17.
- 66 Quoted in Quzak, "Re-Presenting the Present: The (R)evolution of the Burning Man Festival," op. cit., 93.

BIBLIOGRAPHY

- "2012 Republican Platform." GOP. Accessed May 21, 2013. www.gop.com/2012-republican-platform_home.
- "ACG: American Continental Group: Chris Israel." 2011. www.acg-consultants.com/our-team/chris-israel.
- Acheson, Archibald Lloyd Keith and Christopher John Maule. *Much Ado About Culture: North American Trade Disputes*. Ann Arbor: University of Michigan Press, 2001.
- Adler, Allan. "Testimony before the House Committee on Oversight and Government Reform on Government Mandates on Journal Articles." *The Association of American Publishers*. July 2010. <http://publishers.org/psp/publicpolicy>.
- Adorno, Theodor W. *The Culture Industry: Selected Essays on Mass Culture*. Translated by J. M. Bernstein. London: Routledge, 2001.
- Agusta, Daniel. "Fake George Lilanga." Accessed June 2, 2010. www.lilanga.org.
- Allen, Alexis. "Comments—Bartling in the Name of Balance: Evaluating Solutions to Copyright Conflict in Viacom International v. YouTube." *Brigham Young University Law Review*, no. 4 (2007): 1023.
- Anderson, Benedict. *Imagined Communities: Reflections on the Origin and Spread of Nationalism*. New York and London: Verso, 1991.
- Anderson, Jane. *Access and Control of Indigenous Knowledge in Libraries and Archives: Ownership and Future Use*. New York: American Library Association and The MacArthur Foundation, 2005.
- Andersen, Robin. *Consumer Culture and TV Programming*. Boulder, CO: Westview Press, 1995.
- Andrés, Edit. "Dog Eat Dog: Who Is in Charge of Controlling Art in the Post-Socialist Condition?" *Third Text* 23, no. 1 (January 2009): 65–77.
- Andrea, Fernandes. "The Picasso of Africa: George Lilanga." *Mental Floss Blog*. June 5, 2009. www.mentalfloss.com/blogs/archives/26206.
- "Anonymous Takes Over Sentencing Commission Website." *Huffington Post*. January 26, 2013. www.huffingtonpost.com/2013/01/26/anonymous-sentencing-commission_n_2557250.html.
- "Anti-toll Privatization Lobby Formed by Washington Lobbyists." *Tollroadnews*. February 9, 2007. www.tollroadnews.com/node/1792.
- Appadurai, Arjun. *Modernity at Large: Cultural Dimensions of Globalization*. Minneapolis: University of Minnesota Press, 1996.
- APT1: *Exposing One of China's Cyber Espionage Units*. Mandiant Intelligence Center. 2013. <http://intelreport.mandiant.com>.

- Armitage, John. *Paul Virilio: From Modernism to Hypermodernism and Beyond*. London and Thousand Oaks, CA: SAGE, 2000.
- "A 'Test Suite' of Fair Use Examples for Service Providers and Content Owners." Electronic Frontier Foundation. Accessed June 4, 2013. www.eff.org/pages/UGC-test-suite.
- Atteberry, Jeffrey. "Information/Knowledge in the Global Society of Control: A2K Theory and the Postcolonial Commons." In *Access to Knowledge in the Age of Intellectual Property*, edited by Gaëlle Krikorian and Amy Kapczynski, 329–52. New York: Zone Books, 2010.
- "Attending and Mending the Knowledge Ecosystem." *Knowledge Ecology International*. Accessed June 11, 2013. www.keionline.org.
- Authur, Charles. "The Geek: Stuck on You: The Magic Trick That's Changing the Web." *The Independent*. August 17, 2005. LexisNexis.
- Bagdikian, Ben. *The Media Monopoly*. 6th edn. Boston, MA: Beacon Press, 2000.
- Baker, C. Edwin. *Media Concentration and Democracy: Why Ownership Matters*. Cambridge: Cambridge University Press, 2007.
- Baker, Chris. "Meet Leland Chee, the Star Wars Franchise Continuity Cop." *Wired*. August 18, 2008. www.wired.com/entertainment/hollywood/magazine/16-09/ff_starwarsanon?currentPage=all.
- Band, Jonathan and Jonathan Gerafi. "Foreign Ownership of Firms in IP-Intensive Industries." *Policybandwidth.com*. March 2013. <http://infojustice.org/wp-content/uploads/2013/03/foreignownrep.pdf>.
- Banks, Mark. *The Politics of Cultural Work*. New York: Palgrave Macmillan, 2007.
- Barber, Benjamin. *Jihad Vs. McWorld: Terrorism's Challenge to Democracy*. New York: Random House Digital, Inc., 2010.
- Basheer, Shamnad and Annalisa Primi. *The WIPO Development Agenda: Factoring in the "Technologically Proficient" Developing Countries*. SSRN Scholarly Paper. Rochester, NY: Social Science Research Network, October 19, 2008. <http://papers.ssrn.com/abstract=1289288>.
- Baudrillard, Jean. *Simulacra and Simulation*. Ann Arbor: University of Michigan Press, 1994.
- Baumgarten, Jon A. *US-USSR Copyright Relations Under the Universal Copyright Convention*. New York: Practising Law Institute, 1973.
- Bayart, Jean-François. *Global Subjects: A Political Critique of Globalization*. Cambridge and Malden, MA: Polity, 2007.
- Beamer, Keola. "Sending Aloha From Maui, Hawaii." *A Brief History of Slack Key Guitar*. Accessed June 9, 2010. www.kbeamer.com/sk_history.html.
- Beebe, Barton. "An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005." *University of Pennsylvania Law Review* 156, no. 3 (2008): 549–624.
- Bell, Jim and Todd Phillips. "Footprints in New Snow: The NIC's First Report." *Nunatsiag News*, May 12, 1995. www.nunatsiagonline.ca/archives/april0199/nvt90401_34.html.
- Bell, Tom. "The Specter of Copyism v. Blockheaded Authors: How User-Generated Content Affects Copyright Policy." *Vanderbilt Journal of Entertainment and Technology Law* 10, no. 4 (2008): 841–61.
- Bell, Wendell. "Making People Responsible: The Possible, the Probable, and the Preferable." In *Advancing Futures: Futures Studies in Higher Education*, edited by James Allen Dator, 33–52. Westport, CT: Praeger, 2002.
- Bendix, Regina. *In Search of Authenticity: The Formation of Folklore Studies*. Madison: University of Wisconsin Press, 1997.
- Benkler, Yochai. *The Wealth of Networks: How Social Production Transforms Markets and Freedom*. New Haven, CT: Yale University Press, 2006.
- Bert and Ernie Are on the Drugs, 2007. www.youtube.com/watch?v=hhVcDYdRgr0&feature=youtube_gdata_player.
- Bert and Ernie Parody—Ernie I'm Horny, 2009. www.youtube.com/watch?v=0IEIP09PObo&feature=youtube_gdata_player.
- Bettig, Ronald V. *Copyrighting Culture: The Political Economy of Intellectual Property*. Boulder, CO: Westview Press, 1996.
- Bey, Hakim. *The Temporary Autonomous Zone, Ontological Anarchy, Poetic Terrorism*. Charleston, SC: BiblioBazaar, 2007.
- Bhabha, Homi. *The Location of Culture*. New York: Routledge Classics, 1994.
- "Biography: Chris Israel: U.S. Coordinator for International Intellectual Property Enforcement." June 2006. www.netcaucus.org/biography/chris-israel.shtml.
- Bishop, Jack. "Concentrations of Power and Property in the Music Industry." *redOrbit*. October 2005. www.redorbit.com/news/technology/258789/concentrations_of_power_and_property_in_the_music_industry.
- Blankenhorn, Dana. "Judge: Prodigy Is Liable for User-generated Content." *Interactive Age* 2, no. 16 (June 5, 1995): 35.
- Blum, Robert. "The Flow of People and Ideas." In *Cultural Affairs and Foreign Relations*, 1–7. Englewood Cliffs, NJ: Prentice-Hall, 1963.
- Boateng, Boatena. *The Copyright Thing Doesn't Work Here: Adinkra and Kente Cloth and Intellectual Property in Ghana*. Minneapolis: University of Minnesota Press, 2011.
- "Bob Greenberg on Web 2.0's Impact." *AdWeek*. January 1, 2007. www.adweek.com/news/advertising/bob-greenberg-web-20s-impact-87448.
- Bodeen, Christopher. "Chinese Hackers: Professional Cyberpies?" *Marine Corps Times*. February 25, 2013. www.marinecorpstimes.com/article/20130225/NEWS/302250306/Chinese-hackers-Professional-cyberpies.
- Bogle, Deborah. "Consumer Revolution—Online." *The Australian*. September 30, 1999. LexisNexis.
- Boldrin, Michele and David K. Levine. *Against Intellectual Monopoly*. Cambridge: Cambridge University Press, 2008.
- Bollier, David. *Silent Theft: The Private Plunder of Our Common Wealth*. New York: Routledge, 2002.
- Bonisteel, Sara. "Japan to Give 'Nobel Prize' for Foreign Comic-Book Artists." May 22, 2007. www.foxnews.com/story/0,2933,274673,00.html.
- Bourdieu, Pierre. *The Field of Cultural Production*. New York: Columbia University Press, 1993.
- Boxer, Steve. "Power to the People: User-Generated Content Is Transforming Gaming into a Communal Experience." *The Daily Telegraph*. October 20, 2007. LexisNexis.
- Boyle, James. *The Public Domain: Enclosing the Commons of the Mind*. New Haven, CT and London: Yale University Press, 2008.
- . "The Second Enclosure Movement and the Construction of the Public Domain." *Law and Contemporary Problems* 66, no. 1 (2003): 33.
- . "On Intellectual Property—Fencing off Ideas." *Daedalus: Proceedings of the American Academy of Arts and Sciences* 131, no. 2 (2002): 13.
- . *Shamans, Software, and Spleens: Law and the Construction of the Information Society*. Cambridge, MA: Harvard University Press, 1996.
- Bradsher, Keith. "Hollywood Bars Films To Protest Soviet Piracy." *The New York Times*. June 12, 1991. www.nytimes.com/1991/06/12/movies/hollywood-bars-films-to-protest-soviet-piracy.html?pagewanted=1.
- Bridgeport Music, Inc. v. Dimension Films, 383 F. 3d 390 (Court of Appeals, 6th Circuit 2004).
- Brown, Michael F. *Who Owns Native Culture?* Cambridge, MA: Harvard University Press, 2003.
- Brown, Wendy. *Walled States, Waning Sovereignty*. New York and Cambridge: Zone Books, distributed by the MIT Press, 2010.
- Buckley, B. "SueTube: Web 2.0 and Copyright Infringement." *The Columbia Journal of Law & the Arts* 31, no. 2 (2008): 235–65.
- Buhle, Paul. *Radical Hollywood: The Untold Story Behind America's Favorite Movies*. New York: New Press, 2002.
- "Bureau of Educational and Cultural Affairs." Department of State. Accessed September 10, 2010. <http://exchanges.state.gov>.
- Burger, Peter. "The Berne Convention: Its History and Its Key Role in the Future." *Journal of Law & Technology* 3 (Winter 1988): 1–69.

- Burke, Kelly. "Obama Administration Announces New Open Access Policy." *Intellectual Property Watch*. February 26, 2013. www.ip-watch.org/2013/02/26/obama-administration-announces-new-open-access-policy/?utm_source=post&utm_medium=email&utm_campaign=alerts.
- . "Obama Takes Swipe At Patent Trolls In Call For Further Reform." *Intellectual Property Watch*. February 15, 2013. www.ip-watch.org/2013/02/15/obama-takes-swipe-at-patent-trolls-in-call-for-further-reform/?utm_source=post&utm_medium=email&utm_campaign=alerts.
- "Burning Man: Preparation—Personal Use of Video Cameras." Accessed April 5, 2011. www.burningman.com/preparation/event_survival/video_cameras.html.
- Butt, David. "Fight Club and the Culture Industry: Alienation, Liberation, and Revolution Fantasy." *Kagablog*, October 30, 2007. <http://kaganof.com/kagablog/2007/10/30/fight-club-and-the-culture-industry-alienation-liberation-and-revolution-fantasy>.
- Callahan, Mathew. *The Trouble with Music*. Edinburgh and Oakland, CA: AK Press, 2005.
- Carlson, Chris. "Burning Man: A Working-Class, Do-It-Yourself World's Fair." *Processed World*, Winter 2004/05. www.processedworld.com/Issues/issue2005/burningman.html.
- Carney, Timothy P. "GOP Sides with Mickey Mouse on Copyright Reform." *Washington Examiner*, December 5, 2012. washingtonexaminer.com/article/2515183.
- Carter, Mary E. *Electronic Highway Robbery: An Artist's Guide to Copyrights in the Digital Era*. Berkeley, CA: Peachpit Press, 1996.
- Caruso, David B. "'Harry Potter' Copyright Case Illustrates Blurry Line on Fan-produced Content." *USA Today.com*, April 20, 2008. www.usatoday.com/life/books/2008-04-20-harrypotter-lawsuit_N.htm?loc=interstitialskip.
- Casino Royale Parkour Chase, 2010. www.youtube.com/watch?v=jjubOZLpp4A&feature=youtube_gdata_player.
- Caute, David. *The Dancer Defects: The Struggle for Cultural Supremacy During the Cold War*. Oxford: Oxford University Press, 2005.
- Clad Vader: Day Shift Manager—A Galaxy Not So Far Away: S1 Ep1. 2006. www.youtube.com/watch?v=4wGR4-Scuj0&feature=youtube_gdata_player.
- "Challenging the Wisdom of the Trans-Texas Corridor." *Corridor Watch*. Accessed September 7, 2011. www.corridorwatch.org/ttc_2007/CWP0702090.htm.
- Chamillionaire—Ridin'. 2009. www.youtube.com/watch?v=CtwJvgPJ9xw&feature=youtube_gdata_player.
- Chan, Cindy. "Underwater Robot to Stake Canada's Arctic Claim." *Epoch Times*, April 8, 2010. www.theepochtimes.com/n2/content/view/32982.
- Chander, Anupam and Sunder Madhavi. "The Romance of the Public Domain." *California Law Review* 92 (October 2004): 1331–73.
- Charles, Ed. "Crowd-Sourcing Really Rocks." *The Australian*, August 29, 2008. LexisNexis.
- Chief Bolma. "Around the World ... Waka Waka Hey Hey!" *WFMU's Bevire of the Bly*, March 2, 2010. <http://blog.wfmu.org/freeform/2010/03/waka-waka-hey-hey.html>.
- Chong, Terrence. "The State and the New Society: The Role of the Arts in Singapore Nation-building." *Asian Studies Review* 34 (June 2010): 131–49.
- Christopher Knight for School Board TV Commercial #1. 2006. www.youtube.com/watch?v=nL5B0lefik&feature=youtube_gdata_player.
- "Circumpolar Inuit Declaration on Arctic Sovereignty." *Inuit Tapiriit Kanatami*, April 2009. www.itk.ca/circumpolar-inuit-declaration-arctic-sovereignty.
- "Code of Best Practices in Fair Use." Center for Social Media, School of Communication, American University. Accessed January 29, 2011. www.centerforsocialmedia.org/fair-use.
- "Code of Best Practices in Fair Use for Online Video." Center for Social Media. February 22, 2010. www.centerforsocialmedia.org/fair-use/related-materials/codes/code-best-practices-fair-use-online-video.
- Colten Roasts Bush. 2007. www.youtube.com/watch?v=BSE_3VX_2A&feature=youtube_gdata_player.
- Coleman, Elizabeth Burns. "The Disneyland of Cultural Rights to Intellectual Property: Anthropological and Philosophical Perspectives." In *Intellectual Property and Traditional Cultural Expressions in a Digital Environment*, edited by Christoph Graber and Mira Burri-Nenova, 49–72. Cheltenham and Northampton, MA: Edward Elgar, 2008.
- Comaroff, John and Jean Comaroff. *Ethnicity, Inc.* Chicago, IL: University of Chicago Press, 2009.
- Connell, Raewyn. *Southern Theory: The Global Dynamics of Knowledge in Social Science*. Cambridge and Malden, MA: Polity, 2007.
- Constine, Josh. "SOPA Protests Sway Congress: 31 Opponents Yesterday, 122 Now." *TechCrunch*, January 19, 2012. <http://techcrunch.com/2012/01/19/sopa-opponents-supporters>.
- Conyers, John. "Conyers in the House: Intellectual Property." Accessed May 20, 2013. <http://conyersinthehouse.blogspot.com/p/intellectual-property.html>.
- . "A Reply to Larry Lessig." *The Huffington Post*, March 6, 2009. www.huffingtonpost.com/john-conyers/a-reply-to-larry-lessig_b_172642.html.
- Coombe, Rosemary J. "Contingent Articulations: A Critical Cultural Studies of Law." In *Law in the Domains of Culture*, edited by Austin Sarat and Thomas R. Kearns, 21–64. Ann Arbor: University of Michigan Press, 2000.
- . "Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue." *Texas Law Review* 69 (June 1991): 1853.
- Coppa, Franca. "Is YouTube Blocking Your Vids? Exercise Your Right To Fair Use!" *Organization for Transformative Works*, January 4, 2009. <http://transformativeworks.org/news/youtube-blocking-your-vids-exercise-your-right-fair-use>.
- "Copyright Alliance." Accessed September 9, 2011. <http://copyrightalliance.com/content.php?id=44>.
- Coser, Lewis, Charles Kadushin, and Walter Powell. *Books: The Culture and Commerce of Publishing*. New York: Basic Books, 1982.
- Couts, Andrew. "Meet the Muzzled Copyright Crusader Who Believes Laws Are Paralyzing Progress." *Digital Trends*, March 15, 2013. www.digitaltrends.com/mobile/the-great-copyright-contrarian-dt-interviews-derek-khanna.
- Cowen, Tyler. *Creative Destruction*. Princeton, NJ: Princeton University Press, 2002.
- Cox, Geoff, Joasia Krysa and Anya Lewin, eds. *Economising Culture*. Autonomedia, 2005.
- Cox, Neil. *The Picasso Book*. London and New York: Tate; distributed in the United States and Canada by Harry N. Abrams, 2010.
- D'Andrea, Anthony. *Global Nomads: Techno and New Age as Transnational Countercultures in Ibiza and Goa*. London and New York: Routledge, 2007.
- Darch, Colin. "Ideology, Illusion and the Global Copyright Regime." In *The Rio Papers: Rio de Janeiro—Brasil*, 2010. <http://copysouth.org/portal/theriopapers>.
- Dator, Jim. "De-Colonizing the Future." *Journal of Futures Studies* 9, no. 3 (February 2005): 93–104.
- . "Some Futures for Cultures." Honolulu: Hawaii Research Center for Futures Studies November 1986. www.futures.hawaii.edu/dator/culture/somefuts.html.
- David, Matthew. *Peer to Peer and the Music Industry: The Criminalization of Sharing*. London and Thousand Oaks, CA: SAGE, 2010.
- Davies, Ioan. "Narrative, Knowledge and Art: On Lyotard's Jewishness." In *The Politics of Jean-François Lyotard: Justice and Political Theory*, edited by Chris Rojek and Bryan Turner, 84–101. New York: Routledge, 1998.
- Davis, Philip M. and William H. Walters. "The Impact of Free Access to the Scientific Literature: A Review of Recent Research." *Journal of the Medical Library Association* 99, no. 3 (July 2011): 208–17.
- de Certeau, Michel. *The Practice of Everyday Life*. Berkeley: University of California Press, 1984.
- Deere, Carolyn. *The Implementation Game: Developing Countries and the Politics of Imports 1993–2006*. Dept. of Politics and International Relations, University of Oxford Division of Social Sciences: Lincoln College (Oxford: University of Oxford), 2007.

- De Jong, Ferdinand. "Hybrid Heritage." *African Arts* 42, no. 4 (Winter 2009): 1-5.
- Demers, Joanna Teresa. *Steal This Music: How Intellectual Property Law Affects Musical Creativity*. Athens: University of Georgia Press, 2006.
- Dennis, Christopher. "The 'Afro-Colombianization' of Hip-Hop and Discourses of Authenticity." In *Postnational Musical Identities: Cultural Production, Distribution, and Consumption in a Globalized Scenario*, edited by Ignacio Corona and Alejandro L. Madrid, 185-207. Lanham, MD and Boulder, CO: Lexington Books, 2008.
- Denzin, N.K., Y.S. Lincoln, and L.T. Smith. *Handbook of Critical and Indigenous Methodologies*. Thousand Oaks, CA: Sage Publications, Inc., 2008.
- "Department for Culture Media and Sport." Accessed September 10, 2010. www.culture.gov.uk.
- "Department of Education Copyright Status Notice." November 18, 2004. www2.ed.gov/notclamped/notices/copyright/index.html.
- Dirlik, Arif. "Globalization, Indigenism, and the Politics of Place." *The Free Library*. January 1, 2003. www.thefreelibrary.com/Globalization,+indigenism,+and+the+politics+of+place.-a0136653839.
- Dizard, Wilson. *Inventing Public Diplomacy: The Story of the U.S. Information Agency*. Boulder, CO: Lynne Rienner Publishers, 2004.
- Doctorow, Cory. "South Korea's US-led Copyright Policy Leads to 65,000 Acts of Extra-judicial Censorship/disconnection/threats by Govt Bureaucrats—Boing Boing." October 26, 2010. <http://boingboing.net/2010/10/26/south-koreas-us-led.html>.
- Dominick, Mark. "Millennials Defy the Old Models; Younger Online Consumers Leaning More Towards User-Generated Content." *Television Week*. May 7, 2007. LexisNexis.
- Dommann, Monika. "Lost in Tradition? Reconsidering the History of Folklore and Its Legal Protection Since 1800." In *Intellectual Property and Traditional Cultural Expressions in a Digital Environment*, edited by Christoph Beat Graber and Mira Burri-Nenova, 3-16. Cheltenham and Northampton, MA: Edward Elgar, 2008.
- Draho, Peter. *Information Feudalism: Who Owns the Knowledge Economy?* New York: New Press, 2003.
- . "IP World—Made by TNC Inc." In *Access to Knowledge in the Age of Intellectual Property*, edited by Gaëlle Krikorian and Amy Kapczynski, 197-215. New York: Zone Books, 2010.
- Dvorak, John. "Viacom Versus Fair Use." *PCMag*. May 13, 2008. www.pcmag.com/article2/0,2817,2304366,00.asp.
- Earnest, Ernest Penney. *Expatriates and Patriots: American Artists, Scholars, and Writers in Europe*. Durham, NC: Duke University Press, 1968.
- Eddie Izzard—Death Star Canten, 2007. www.youtube.com/watch?v=Sv5iEK-H2zw&feature=youtu_gdata_player.
- Ehrenfeld, Rachael. "Turning Off the Tap of Terrorist Funding." *Middle East Forum*, September 19, 2003. www.meforum.org/572/turning-off-the-tap-of-terrorist-funding.
- . "Funding Terrorism: Sources and Methods." In *Confronting Terrorism*, 2002. library.lanl.gov/cgi-bin/getdoc?event=CT2002&document=30.
- Ehrenfeld, Rachel and R. James Wooley. "Foreword." *Funding Evil: How Terrorism Is Financed—and How to Stop It*. Chicago, IL: Bonus Books, 2003.
- Eldred v. Ashcroft, 537 US 186 (Supreme Court 2003).
- Eligon, John. "Harry Potter Author Wins Copyright Ruling." *New York Times*. September 8, 2008. <http://cityroom.blogs.nytimes.com/2008/09/08/harry-potter-author-wins-copyright-ruling>.
- Elkin-Koren, Niva. "Making Room for Consumers under the DMCA." *Berkeley Technology Law Journal* 22, no. 3 (2007): 11-19.
- "English." *Tunigaugiti—Welcome to the Government of Nunavut*. Accessed August 29, 2010. www.gov.nu.ca/english.
- ERIC Education Resources Information Center. "Copyright Policy." Accessed September 14, 2011. www.eric.ed.gov/ERICWebPortal/resources/html/about/copyright_policy.html.

- Emesto. "MegaUpload Shut Down by the Feds, Founder Arrested." *Torrentfreak*. January 19, 2012. <http://torrentfreak.com/megaupload-shut-down-120119>.
- "Facts About Nunavut." *Chronological History*. Accessed September 1, 2010. www.gov.nu.ca/english/about.
- Fair Copyright in Research Works Act*. US Government Printing Office, 2008. <http://judiciary.house.gov/hearings/legislation11.html>.
- "Fair Use Principles for User Generated Video Content." *Electronic Frontier Foundation*. Accessed June 4, 2013. www.eff.org/pages/fair-use-principles-user-generated-video-content.
- "Fair Use: Koons Wins Appeal in Copyright Suit (Blanch V. Koons)." *NEWSgrot*. November 3, 2006. http://newsgrist.typepad.com/underbelly/2006/11/koons_wins_appe.html.
- Ferenstein, Gregory. "White House Anti-IP Theft Strategy Comes Out Swinging Against China." *TechCrunch*. February 20, 2013. <http://techcrunch.com/2013/02/20/white-house-anti-ip-theft-strategy-comes-out-swinging-against-china>.
- Fiesler, Casey. "Everything I Need to Know I Learned from Fandom: How Existing Social Norms Can Help Shape the Next Generation of User-Generated Content." *Vanderbilt Journal of Entertainment and Technology Law* 10 (2008): 729.
- "Film Industry Praises Obama's 'Understanding' of IP's Importance." *Intellectual Property Watch*. November 7, 2012. www.ip-watch.org/2012/11/07/film-industry-praises-obamas-understanding-of-ips-importance/?utm_source=post&utm_medium=email&utm_campaign=alerts.
- Fleishman, Lana C. "The Empire Strikes Back: The Influence of the United States Motion Picture Industry on Russian Copyright Law." *Cornell International Law Journal* 26 (Winter 1993): 189-238.
- Florida, Richard. *Who's Your City? How the Creative Economy Is Making Where to Live the Most Important Decision of Your Life*. New York: Basic Books, 2008.
- . *The Flight of the Creative Class: The New Global Competition for Talent*. New York: HarperCollins, 2007.
- . *The Rise of the Creative Class: And How It's Transforming Work, Leisure, Community and Everyday Life*. New York: Basic Books, 2002.
- Ford, Sam. "If It Doesn't Spread It's Dead (part One): Media Viruses and Memes." *Convergence Culture Consortium*. February 11, 2009. www.convergenceculture.org/weblog/sam_ford.
- Foucault, Michel. *Security, Territory, Population: Lectures at the Collège de France, 1977-78*. Basingstoke and New York: Palgrave Macmillan; République Française, 2007.
- . "What Is an Author?" In *Language, Counter-memory, Practice: Selected Essays and Interviews*, edited by D.F. Bouchard, translated by S. Simon. Ithaca, NY: Cornell University Press, 1977.
- Fox, Lanie. "Art Installations: Your Art on the Playa." *Burning Man*. Accessed April 5, 2011. www.burningman.com/installations.
- "Fox Lawyers C&D Buffy Fandom Musical." *LawGeek*. October 19, 2005. http://lawgeek.typepad.com/lawgeek/2005/10/fox_lawyers_cd.html.
- Fox News Edits Criticism of McCain Out of Daily Show Clip?* 2008. www.youtube.com/watch?v=0gh6r5ALVMo&feature=youtu_gdata_player.
- Fox, Nicola. *Against the Machine: The Hidden Luddite Tradition in Literature, Art, and Individual Lives*. Washington, DC: Island Press/Shearwater Books, 2002.
- Fraser, Matthew. *Weapons of Mass Distraction: Soft Power and American Empire*. New York: Thomas Dunne Books, 2005.
- Freeland, Christia. "The Rise of the New Global Elite." *The Atlantic Monthly*, February 2011.
- Friedman, Thomas L. *The World Is Flat: A Brief History of the Twenty-First Century*. New York: Farrar, Straus and Giroux, 2007.
- Fuchs, Gerhard and Philip Shapira. *Rethinking Regional Innovation and Change: Path Dependency or Regional Breakthrough?* New York: Springer, 2005.

- "Funding Terrorism." *Source Watch*. Accessed March 11, 2011. www.sourcewatch.org/index.php?title=Funding_terrorism.
- "G7 Leaders Enjoy Arctic Outing before Talks." *CBC News*, February 5, 2010. www.cbc.ca/canada/story/2010/02/05/g7-north.html.
- García Canclini, Néstor. *Hybrid Cultures: Strategies for Entering and Leaving Modernity*. Minneapolis: University of Minnesota Press, 1995.
- Garon, Jon M. "Media and Monopoly in the Information Age: Slowing the Convergence at the Marketplace of Ideas." *Brain League IP Services* (n.d.). www.brainleague.com/case_studies/media.pdf.
- Geertz, Clifford. *The Interpretation of Cultures*. New York: Basic Books, 1977.
- Gegeo, D.W. "Cultural Rupture and Indigeneity: The Challenge of (Re)visioning 'Place' in the Pacific." *The Contemporary Pacific* 13, no. 2 (2001): 491–507.
- Gibson, Johanna. *Creating Selves: Intellectual Property and the Narration of Culture*. Aldershot and Burlington, VT: Ashgate, 2006.
- . "The Lay of the Land: The Geography of Traditional Cultural Expression." In *Intellectual Property and Traditional Cultural Expressions in a Digital Environment*, edited by Christoph Beat Graber and Mira Burri-Nenova. Cheltenham and Northampton, MA: Edward Elgar, 2008.
- Gienow-Hecht, Jessica. *Sound Diplomacy: Music and Emotions in Transatlantic Relations, 1850–1920*. Chicago, IL: University of Chicago Press, 2009.
- Gjelten, Tom. "Is All the Talk About Cyberwarfare Just Hype?" *NPR*, March 15, 2013. www.npr.org/2013/03/15/174352914/is-all-the-talk-about-cyberwarfare-just-hype.
- Glade, William. "Issues in the Genesis and Organization of Cultural Diplomacy: A Brief Critical History." *Journal of Arts Management, Law & Society* 39, no. 4 (Winter 2009/10): 240–59.
- Glazze, Georg. "The Discursive Constitution of a World-Spanning Region and the Role of Empty Signifiers: The Case of Francophonie." *Geopolitics* 12, no. 4 (Winter 2007): 656–79.
- Global Intellectual Property Center. *Intellectual Property: Creating Jobs, Saving Lives, Improving the World*. U.S. Chamber of Commerce, 2008. http://gipcdev.blackbarn.net/sites/default/files/reports/documents/gipc_ipbook.pdf.
- Goldstein, Paul. *Intellectual Property: The Tough New Realities That Could Make or Break Your Business*. New York: Portfolio, 2007.
- . *Copyright's Highway: From Gutenberg to the Celestial Jukebox*. Rev. edn. Stanford, CA: Stanford University Press, 2003.
- Goodlatte, Bob. "Congressman Bob Goodlatte's Weekly Column: The Technology Sector Is Vital to Our Economic Recovery." *The Lynchburg Times*, June 21, 2011. <http://lynchburgtimes.com/news/2011/06/21/congressman-bob-goodlatte%E2%80%99s-weekly-column-the-technology-sector-is-vital-to-our-economic-recovery>.
- Gourley, Brenda. "It's Time to Adapt—and Quickly—if We're to Survive in the User-generated Content World." *The Independent* (London), May 1, 2007. LexisNexis.
- Graber, Christoph. "Using Human Rights to Tackle Fragmentation in the Field of Traditional Cultural Expressions: An Institutional Approach." In *Intellectual Property and Traditional Cultural Expressions in Digital Environment*, edited by Christoph Graber and Mira Burri-Nenova, 96–120. Cheltenham and Northampton, MA: Edward Elgar, 2008.
- Grace, Andie. "'Snatching Digital Rights' or Protecting Our Culture? Burning Man and the EFF." *Burning Blog*, August 14, 2009. <http://blog.burningman.com/photosvideomedial/snatching-digital-rights-or-protecting-our-culture-burning-man-and-the-eff>.
- Grant, Peter. "Invasion of the Hamster Video: Comcast and Verizon Test Market for Putting Homemade Videos on TV." *The Globe and Mail*, November 8, 2006. LexisNexis.
- Griffin, Marie. "User Generated Content: Web 2.0 Tools Doesn't Mean Your Audience Will Automatically Participate." *Media Business*, November 1, 2007. LexisNexis.
- Habermas, Jürgen. *The Structural Transformation of the Public Sphere: An Inquiry Into a Category of Bourgeois Society*. Cambridge, MA: MIT Press, 1991.
- Hackett, Regina. "Chihuly Settles Copyright Lawsuit." *Seattle PI*, August 4, 2006. www.seattlepi.com/visualart/280101_chihuly04.html.

- Halbert, Debora. "Public Lives and Private Communities: The Terms of Service Agreement and Life in Virtual Worlds." *First Monday* 14, no. 12 (December 7, 2009): online.
- . "What If ... WIPO Never Existed?" CopySouth Research Group, September 7, 2009. <http://copysouth.org/porta/node/10>.
- . "Globalized Resistance to Intellectual Property." *Globalization*, 2005. <http://globalization.icaap.org/content/v5.2/halbert.html>.
- . *Resisting Intellectual Property*. London and New York: Routledge, 2005.
- . *Intellectual Property in the Information Age: The Politics of Expanding Ownership Rights*. Westport, CT: Quorum, 1999.
- Hamelink, Cees J. "Intellectual Property Rights." In *Who Owns the Media? Global Trends and Local Resistances*, 43–48. New York: Zed Books, 2004.
- Han, Angela. "Public Funding for the Arts: 2010 Update." Grantmakers in the Arts, 2010. www.giarts.org/article/public-funding-arts-2010-update.
- Hargreaves, Ian. "Digital Opportunity: A Review of Intellectual Property Growth." Intellectual Property Office, May 18, 2011. www.ipo.gov.uk/ipreview.htm.
- Harris, La and Jacqueline Wasilewski. "Indigeneity, an Alternative Worldview: Four R's (Relationship, Responsibility, Reciprocity, Redistribution) Vs. Two P's (Power and Profit). Sharing the Journey Towards Conscious Evolution." *Systems Research and Behavioral Science* 21, no. 5 (2004): 489–503.
- "Harry Potter in the Restricted Section." Chilling Effects Clearinghouse, January 13, 2002. www.chillingeffects.org/fanfic/notice.cgi?NoticeID=522.
- Heilbrun, James and Charles M. Gray. *The Economics of Art and Culture*. Cambridge University Press, 2001.
- Helft, Miguel. "At First, Funny Videos. Now, a Reference Tool." *New York Times*, January 18, 2009.
- . "YouTube Teams with Congress to Show Lawmakers at Work." *The New York Times*, January 12, 2009.
- Helprin, Mark. *Digital Barbarism: A Writer's Manifesto*. New York: Harper Paperbacks, 2010.
- . "A Great Idea Lives Forever. Shouldn't Its Copyright?" *The New York Times*, May 20, 2007. sec. Opinion. www.nytimes.com/2007/05/20/opinion/20helprin.html?_r=1&adxnls=1&pagewanted=2&adxnls=1299481200-JSugZnfwMzJ4wppST/RA.
- Hetcher, Steven. "User-Generated Content and the Future of Copyright: Part One—Investiture of Ownership." *Vanderbilt Journal of Entertainment and Technology Law* 10, no. 4 (2008): 863–92.
- Hopper, Paul. *Understanding Cultural Globalization*. Cambridge: Polity, 2007.
- Horkheimer, Max and Theodor W. Adorno. *Dialectic of Enlightenment: Philosophical Fragments*. Translated by Gunzelin Schmid Noerr. Stanford, CA: Stanford University Press, 2002.
- "Hot Topics: Publisher Mergers." *University of California Berkeley Library Collections Scholarly Communication*, 2008. www.lib.berkeley.edu/scholarlycommunication/publisher_mergers.html.
- Houmfi, Mahamadou. "Shakira Used Cameroonian Pop Song for World Cup Anthem Without Asking." *The Observers*, May 5, 2010. <http://observers.france24.com/en/content/20100513-shakira-used-cameroon-pop-song-world-cup-anthem-without-asking?page=2>.
- Howkins, John. *The Creative Economy: How People Make Money from Ideas*. London: Penguin, 2002.
- Hunt, Kurt. "Copyright and Youtube: Pirate's Playground or Fair Use Forum?" *Multimedia Telecommunications Technology Law Review* (2007): 197–222.
- Hunter, Dan and John Quiggin. "Money Ruins Everything." *Hastings Communications and Entertainment Law Journal* 30 (2008): 203–55.
- Hyde, Lewis. *The Gift: Creativity and the Artist in the Modern World*. 25th anniversary edn. 2nd Vintage Books edn. New York: Vintage Books, 2007.
- "Indigeneity in the Contemporary World." Accessed November 6, 2010. www.indigeneity.net.
- Ingram, Matthew. "Content Generators Transforming More Than Just the Web." *The Globe and Mail*, December 21, 2006. LexisNexis.
- "Internet and Media Industry Leaders Unveil Principles to Foster Online Innovation While Protecting Copyrights." *User Generated Content Principles*, October 18, 2007. www.ugcprinciples.com/press_release.html.

- "Inuit Art." Winnipeg Art Gallery. Accessed September 17, 2010. wag.ca/art/inuit.
- "Inuit Gallery of Vancouver—Specializing in Inuit Art, Northwest Coast Art, Native Indian Art, Canadian Aboriginal Art, Jewelry, Sculptures, Prints, Drawings, Masks." Accessed October 21, 2010. www.inuit.com/?p2=/modules/xgalleries/showgallery.jsp&curAlbid=7.
- "IP Hall of Fame—Bruce Lehman." *Inductees*, 2006. 2006. www.iphalloffame.com/inductees/2006/Bruce_Lehman.aspx.
- "Ikkur's Guide to Rave Culture." *UtahRaves.com*. June 2008. www.utahraves.com/showthread.php?t=9235&page=1.
- Ivey, Bill. *Arts, Inc.: How Greed and Neglect Have Destroyed Our Cultural Rights*. Berkeley: University of California Press, 2010.
- James, Meg. "YouTube Prevails in Huge Copyright Suit with Viacom." *Los Angeles Times*. April 18, 2013. <http://articles.latimes.com/2013/apr/18/entertainment/la-et-ct-youtube-prevails-copyright-suit-viacom-20130418>.
- Jardin, Xeni. "Why Was Colbert Press Corps Video Removed from YouTube?" *Boing Boing*. May 4, 2008. <http://boingboing.net/2006/05/04/why-was-colbert-pres.html>.
- Jazi, Peter. "On the Author Effect: Contemporary Copyright and Collective Creativity." *Cardozo Arts & Entertainment Law Review* 10 (1992): 293–320.
- Jauss, Hans Robert and Timothy Bahti. *Toward an Aesthetic of Reception*. Minneapolis: University of Minnesota Press, 1982.
- Jenkins, Henry. *Convergence Culture: Where Old and New Media Collide*. New York: New York University Press, 2006.
- Jeschke, Rebecca. "Free Speech Battle Over Online Parody of 'Colbert Report.'" *Internet Business Law Services*. Accessed June 4, 2013. www.ibls.com/internet_law_news_portal_view.aspx?n=latestnews&id=1728.
- Johns, Adrian. *Piracy: The Intellectual Property Wars from Gutenberg to Gates*. Chicago, IL: University of Chicago Press, 2009.
- Jue, Tim. "Criticism Mounts as Home Videos Show BART Cop Shooting, Killing Unarmed Rider." *California Beat*. January 5, 2008. www.californiabeat.org/2009/01/04/criticism-mounts-as-home-videos-show-bart-cop-shooting-killing-unarmed-rider.
- Juraga, Dubravka. *Socialist Cultures East and West: A Post-Cold War Reassessment*. Westport, CT: Praeger, 2002.
- Kain, Erik. "IP Protection Standards In TPP Represent The Downside Of The Trans-Pacific Partnership." *Forbes*. January 25, 2012. www.forbes.com/sites/erikkain/2012/01/25/ip-protection-standards-in-tpp-represent-the-dark-side-of-the-trans-pacific-partnership.
- Kaminski, Michael. "The Influence and Imagery of Akira Kurosawa." *The Secret History of Star Wars*. 2007. <http://secrethistoryofstarwars.com/kurosawa1.html>.
- Karaca, Banu. "The Art of Integration: Probing the Role of Cultural Policy in the Making of Europe." *International Journal of Cultural Policy* 16, no. 2 (2010): 121–37.
- Keegan, Victor. "Taking Stock of Virtual Economics." *The Guardian*. January 11, 2007. LexisNexis.
- Khanna, Derek. *Three Myths About Copyright Law and Where to Start to Fix It*. RSC Policy Brief. November 16, 2012. rsc_policy_brief_three_myths_about_copyright_law_and_where_to_start_to_fix_it-november_16_2012.pdf.
- Killock, Jin. "Cameron: Copyright Is Out of Date." Open Rights Group, November 5, 2010. www.openrightsgroup.org/blog/2010/cameron-copyright-is-out-of-date.
- Kilmi, Jaak. *Disco and Atomic War*. OU Eetruksus and Helsinki Filmi. 2009.
- Kim Dotcom—Mr President, 2012. www.youtube.com/watch?v=MokNvbIrQCM&feature=youtu.be_gdata_player.
- Kim, Eugene. "Youtube: Testing the Safe Harbors of Digital Copyright Law." *Southern California Interdisciplinary Law Journal* 17 (Fall 2007): 139–72.
- Kinner, Scott. "Champions of Web 2.0 See a Shift to More Participation by the Public." *The Boston Globe*. October 10, 2005. LexisNexis.
- Kiyindou, Alain. "Cultural Diversity." In *Word Matters: Multicultural Perspectives on Information Societies*, edited by Alain Ambrosi, Valerie Peugeot, and Daniel Pimienta, 2006. <http://vecam.org/article597.html>.

- Kline, Naomi. *No Logo*. Tenth anniversary edn. New York: Picador, 2009.
 Knight, Chris. "The Knight Shift: Viacom Hits Me with Copyright Infringement for Posting on YouTube a Video That Viacom Made by Infringing on My Own Copyright!" *The Knight Shift*. August 29, 2007. <http://theknightshift.blogspot.com/2007/08/viacom-hits-me-with-copyright.html>.
 Konstantin, Kakaes. "Scientists' Victory Over the Research Works Act Is Like the SOPA Defeat." *Future Tense*. February 28, 2012. www.slate.com/blogs/future_tense/2012/02/28/research_works_act_elsevier_and_politicians_back_down_from_open_access_threat.html.
 Korten, David C. *When Corporations Rule the World*. San Francisco, CA: Berrett-Koehler Publishers, 2001.
 Kraidy, Marwan. *Hybridity, or the Cultural Logic of Globalization*. Philadelphia, PA: Temple University Press, 2005.
 Kravets, David. "Obama Appoints Scholar as New Copyright Czar." *Wired.com*. September 25, 2009. www.wired.com/threatlevel/2009/09/obama-taps-new-copyright-czar.
 Krepinevich, Andrew. "Cyber Warfare: A 'Nuclear Option'?" Center for Strategic and Budgetary Assessments, 2012. www.csbonline.org/wp-content/uploads/08/CSIA_Cyber_Warfare_For_Web_1.pdf.
 Krikorian, Gaëlle and Amy Kapczynski. *Access to Knowledge in the Age of Intellectual Property*. New York: Zone Books, 2010.
 Kroes, Neelie. "A Digital World of Opportunities." *Europa*. November 5, 2010. <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/10/619&format=HTML&aged=0&language=EN&guiLanguage=en>.
 Kropotkin, Peter. *Mutual Aid*. New York: Cosimo Classics, 2009.
 Krug, Peter. "Piracy's End? Breakthrough in Copyright." *Post-Soviet Media Law & Policy Newsletter*. December 22, 1993. www.vii.org/monroe/issue03/krug.htm.
 Kuik, Tim. "Piracy in Russia: An Epidemic." *Whittier Law Review* 20 (1999): 831-37.
 Landes, William M. *The Economic Structure of Intellectual Property Law*. Cambridge, MA: Belknap Press of Harvard University Press, 2003.
 Landler, Mark and David E. Sanger. "U.S. Demands China Crack Down on Cyberattacks." *The New York Times*. March 11, 2013, sec. World / Asia Pacific. www.nytimes.com/2013/03/12/world/asia/us-demands-that-china-end-hacking-and-set-cyber-rules.html.
 Lardner, Richard. "Pentagon Forming Cyber Teams to Prevent Attacks." *Yahoo! News*. Accessed March 22, 2013. <http://news.yahoo.com/pentagon-forming-cyber-teams-prevent-attacks-183120743-finance.html>.
 Lasica, J. D. *Darknet: Hollywood's War Against the Digital Generation*. Hoboken, NJ: Wiley, 2005.
 Lastowka, Greg. "User-Generated Content and Virtual Worlds." *Vanderbilt Journal of Entertainment & Technology Law* 10 (2008): 893-917.
 Laven, David and Timothy Baycroft. "Border Regions and Identity." *European Review of History* 15, no. 3 (June 2008): 255-75.
 "Lawsuit Dropped over 'Colbert Report' Parody." *Monie.com*. April 23, 2007. www.nbnews.com/id/18277460/ns/business-us_business/t/lawsuit-dropped-over-colbert-report-parody.
 "Lebbeus Woods." Accessed March 28, 2011. www.coldbacon.com/art/lebbeuswoods-12monkeys.html.
 Lee, Timothy B. "Fair Use Gets a Fair Shake: YouTube Tot to Get Day in Court." *Art & Technology*. August 21, 2008. <http://arttechnica.com/uncategorized/2008/08/fair-use-gets-a-fair-shake-youtube-tot-to-get-day-in-court>.
 Lemos, Robert. "Russian Crypto Expert Arrested at Def Con." *CNET*. July 17, 2001. <http://news.cnet.com/2100-1001-270082.html>.
 Leonard, Devin. "How Disney Bought Lucasfilm—and Its Plans for 'Star Wars'." *BusinessWeek: Companies and Industries*. March 7, 2013. www.businessweek.com/articles/2013-03-07/how-disney-bought-lucasfilm-and-its-plans-for-star-wars.
 Lessig, Lawrence. "Aaron's Laws—Law and Justice in a Digital Age." 2013. www.youtube.com/watch?v=9HAw1i4gOU4&feature=youtu.be.
 ———. "Prosecutor as Bully." *Huffington Post*. January 14, 2013. www.huffingtonpost.com/lawrence-lessig/aaron-swartz-suicide_b_2467079.html.

- "Copyright and Politics Don't Mix." *The New York Times*. October 21, 2008, sec. Opinion. www.nytimes.com/2008/10/21/opinion/21lessig.html.
- "In Defense of Piracy." *The Wall Street Journal*. October 11, 2008. www.wsj.com.
- *Remix: Making Art and Commerce Thrive in the Hybrid Economy*. New York: Penguin Press, 2008.
- *Code: Version 2.0*. New York: Basic Books, 2006.
- *Free Culture: How Big Media Uses Technology and the Law to Lock down Culture and Control Creativity*. New York: Penguin Press, 2004.
- *The Future of Ideas: The Fate of the Commons in a Connected World*. New York: Random House, Inc., 2002.
- "Level 4—Fair Use—YouTube Help." Accessed June 4, 2013. <http://support.google.com/youtube/bin/static.py?hl=en&page=guide.cs&guide=25903&topic=25068>.
- Levitt, Peggy. "Not Just Made in the U.S.A.: Seeing National Culture Transnationally." *New Global Studies* 4, no. 1 (March 1, 2010).
- "Library Copyright Alliance." Accessed February 10, 2011. www.librarycopyrightalliance.org/about/index.shtml.
- Liebler, R. "Open Access to Publicly Funded Research Signed into Law: 'Congress Has Just Unlocked the Taxpayers' \$29 Billion Investment in NIH.'" Copyright Advisory Network, January 2, 2008. <http://librarycopyright.net/wordpress/?p=62>.
- "List of Resources on Intellectual Property." *America.gov*. April 29, 2008. www.america.gov/st/econ-english/2008/April/20080429235644eafas0.1053299.html.
- Lister, Tim. "WikiLeaks Cables Assess Terrorism Funding in Saudi Arabia, Gulf States." CNN. December 6, 2010. http://articles.cnn.com/2010-12-06/world/wikileaks.terrorism.funding_1_saudi-arabia-terrorist-funding-terrorist-groups?_s=PM:WORLD.
- Litman, Jessica. "Billowing White Goo." *The Columbia Journal of Law & the Arts* 31, no. 4 (2008): 587–602.
- *Digital Copyright*. Amherst, MA: Prometheus Books, 2006.
- Löhr, Isabella. "Intellectual Property Rights Between Nationalization and Globalization. Introduction." In *Intellectual Property Rights and Globalization*, eds Isabella Löhr and Hannes Siegrist, 27–45. Leipzig, Germany: Leipziger Universitätsverlag, 2011.
- "Lucasfilm Ltd. Wins Major Copyright Infringement Lawsuit Against *Star Wars* Stonutrooper Pirate." *Business Wire*. October 11, 2006. www.businesswire.com/news/home/20061011005170/en/Lucasfilm-Ltd.-Wins-Major-Copyright-Infringement-Lawsuit.
- Lyotard, Jean François. *The Postmodern Condition: A Report on Knowledge*. Minneapolis: University of Minnesota Press, 1984.
- MacQueen, Magnus. "The Revolution Must Be Televised: Instead of Being a Threat, User-Generated Content Is an Exciting Opportunity That Can Revitalize the Art of Documentary Film-Making." *The Guardian*. October 30, 2006. LexisNexis.
- Macrae, Fiona. "Red Bull Gives You. ... Increased Risk of Heart Disease, Say Scientists." *Mail Online*. August 15, 2008. www.dailymail.co.uk/health/article-1045195/Red-Bull-gives-increased-risk-heart-disease-say-scientists.html.
- Maggs, Peter B. "New Directions in US-USSR Copyright Relations." *The American Journal of International Law* 68, no. 3 (July 1974): 391–409.
- Magnusson, Lars and Jan Ottosson. *The Evolution of Path Dependence*. Cheltenham and Northampton, MA: Edward Elgar Publishing, 2009.
- Marcuse, Herbert. *One-dimensional Man: Studies in the Ideology of Advanced Industrial Society*. Boston, MA: Beacon Press, 1968.
- Marke, Julius. *Copyright and Intellectual Property*. New York: Fund for the Advancement of Education, 1967.
- Marx, Karl and Friedrich Engels. *The Communist Manifesto*. New York: Appleton-Century-Crofts, 1955.
- Masnick, Mike. "Eric Holder Claims Terrorists Are Involved in 'IP Theft.'" *Information Liberation*. May 20, 2013. www.informationliberation.com/?id=43881.
- "Will Howard Bernman Step Down From Leading Copyright Subcommittee?" *Techdirt*. January 24, 2008. www.techdirt.com/articles/20080123/16460153.shtml.
- Mason, Matt. *The Pirate's Dilemma: How Youth Culture Is Reinventing Capitalism*. 1st edn. New York: Free Press, 2008.
- Matrix [Blu-ray]*. Warner Home Video, 2011.
- Matthews, Duncan. *Globalising Intellectual Property Rights: The TRIPS Agreement*. London and New York: Routledge, 2002.
- May, Christopher. *The Global Political Economy of Intellectual Property Rights: The New Enclosures*, 2nd edn. Oxford and New York: Routledge, 2009.
- "Concentrated Industry, Fragmented Consumption: The Global Music Industry in the New Millennium." In *Resounding International Relations: On Music, Culture, and Politics*, edited by Marianne Franklin, 29–51. New York: Palgrave Macmillan, 2005.
- "The International Political Economy of Intellectual Property Rights." *European Intellectual Property Review* 27, no. 5 (2005): 199.
- May, Christopher and Susan K. Sell. *Intellectual Property Rights: A Critical History*. Boulder, CO: Lynne Rienner Publishers, 2006.
- Mazer, Roslyn A. "From T-Shirts to Terrorism: That Fake Nike Swoosh May Be Helping to Fund Bin Laden's Network." *The Washington Post*. September 30, 2001.
- McChesney, Robert Waterman. "The Political Economy of International Communications." In *Who Owns the Media? Global Trends and Local Resistances*, 3–22. New York: Zed Books, 2004.
- McSherry, Corynne. "Snatching Rights on the Playa." Electronic Frontier Foundation. August 12, 2009. www.eff.org/deeplinks/2009/08/snatching-rights-playa.
- "Media Piracy in Emerging Economies: A Report by the Social Science Research Council." 2011. <http://piracy.ssrc.org/about-the-report>.
- Meldrum, Andrew. "How Much Did Picasso's Paintings Borrow from African Art?" *The Guardian*. March 15, 2006. www.guardian.co.uk/artanddesign/2006/mar/15/art.
- Merges, Robert P. *Justifying Intellectual Property*. Cambridge, MA: Harvard University Press, 2011.
- Mets, Monique A. J., Sander Ketzer, Camilla Blom, Maartje H. Gerven, Gitta M. Willigenburg, Berend Olivier, and Joris C. Venter. "Positive Effects of Red Bull® Energy Drink on Driving Performance During Prolonged Driving." *Psychopharmacology* 214, no. 3 (November 2010): 737–45.
- Meyer, Manulani A. "Our Own Liberation: Reflections on Hawaiian Epistemology." *The Contemporary Pacific* 13, no. 1 (2001): 124–48.
- Michael Jackson—Thriller, 2009. www.youtube.com/watch?v=sOnqkJTMaA&feature=youtu.be_gdata_player.
- Michaels, Jim. "Pentagon Expands Cyber-attack Capabilities." *USA Today*. April 21, 2013. www.usatoday.com/story/news/nation/2013/04/21/pentagon-expanding-offensive-cyber-capabilities/2085135.
- "Ministério Da Cultura—MinC." Accessed September 10, 2010. www.cultura.gov.br/site.
- Mittelman, James H. *Whither Globalization? The Vortex of Knowledge and Ideology*. New York and London: Routledge, 2004.
- Moffat, Charles. "Pablo Picasso—The Most Famous Artist of the 20th Century." *The Art History Archive*. Accessed July 22, 2010. www.lilithgallery.com/arthistory/cubism/Pablo-Picasso.html.
- Moglen, Eben. "Anarchism Triumphant: Free Software and the Death of Copyright." *First Monday* 4, no. 8 (August 2, 1999). <http://firstmonday.org/ojs/index.php/fm/article/view/684>.
- Monbiot, George. "Academic Publishers Make Murdoch Look Like a Socialist." *The Guardian*. August 29, 2011. www.guardian.co.uk/commentsfree/2011/aug/29/academic-publishers-murdoch-socialist.
- Morgan, Richard. "Beyond Massive Passives." *Daily Deal/The Deal*. March 5, 2007. LexisNexis.
- Morozov, Evgeny. *The Net Delusion: The Dark Side of Internet Freedom*. Reprint. New York: Public Affairs, 2012.
- "MPAA's Chris Dodd Takes Aim at SOPA Strike." *Los Angeles Times*. January 17, 2012. <http://latimesblogs.latimes.com/entertainmentnewsbuzz/2012/01/dodd-takes-aim-at-sopa-strike.html>.

- Mullin, Joe. "Is This the Birth of the Copyright Troll?" *Law.com*. August 16, 2010. www.law.com/jsp/cc/PubArticleCC.jsp?id=1202466627090.
- Nair, Manjula S. "Defining Indigeneity: Situating Transnational Knowledge." *World Society Focus Paper Series*. World Society Foundation, Zurich. January 31, 2006. www.uzh.ch/wsf/WSFocus_Nair.pdf.
- National Endowment for the Arts, Research Division. *International Data on Government Spending on the Arts*. 2000. www.nea.gov/research/ResearchNotes_chrono.html.
- "National Security Council." *The White House*. Accessed May 29, 2013. www.whitehouse.gov/administration/eop/nsc.
- National Security Council. "Cyberspace Policy Review: Assuring a Trusted and Resilient Information and Communications Infrastructure." Accessed May 29, 2013. www.whitehouse.gov/cybersecurity.
- Naughton, John. "The Networker: Writers Who Work for Nothing: It's a License to Print Money." *The Observer* (UK). March 11, 2007. London: LexisNexis.
- Nederveen Pieterse, Jan. *Globalization and Culture: Global Melange*. Lanham, MD: Rowman & Littlefield, 2004.
- Neigel, Connie. "Piracy in Russia and China: A Different U.S. Reaction." *Law and Contemporary Problems* 63 (Fall 2000): 179-99.
- Netanel, Neil Weinstock. *Copyright's Paradox*. Oxford: Oxford University Press, 2008.
- New, William. "Revolving Door: US Copyright General Counsel Joins Music Industry." *Intellectual Property Watch*. August 29, 2012. www.ip-watch.org/2012/08/29/revolving-door-us-copyright-general-counsel-joins-music-industry/?utm_source=post&utm_medium=email&utm_campaign=alerts.
- Newcity, Michael A. *Copyright Law in the Soviet Union*. New York: Praeger, 1978.
- Nickerson, Marcia and Jay Kaufman. "Aboriginal Culture in the Digital Age." Aboriginal Voice Culture Working Group, n.d. www.kta.on.ca/documents/AboriginalCultureinalDigitalAge.pdf.
- Ninkovich, Frank A. *The Diplomacy of Ideas: U.S. Foreign Policy and Cultural Relations, 1938-1950*. Cambridge: Cambridge University Press, 1981.
- Noam, Eli M. *Media Ownership and Concentration in America*. New York: Oxford University Press, 2009.
- "Notes—'Recoding' and the Derivative Works Entitlement: Addressing the First Amendment Challenge." *Harvard Law Review* 119, no. 5 (2006): 1488.
- "Notes on the Fair Access to Science and Technology Research Act." *Harvard Open Access Project*. Accessed May 21, 2013. http://cyber.law.harvard.edu/hoap/Notes_on_the_Fair_Access_to_Science_and_Technology_Research_Act.
- "Nunavut Bureau of Statistics." *Nunavut*. Accessed September 1, 2010. www.gov.nu.ca/cia/stat.
- "Nunavut Irked by Arctic Sovereignty Talk." *CBC News*. April 9, 2010. www.cbc.ca/canada/north/story/2010/04/09/north-arctic-sovereignty-nunavut-premier.html.
- "Nunavut Mining Symposium." *2010 Nunavut Mining Symposium*. April 13, 2010. www.nunavutminingsymposium.ca.
- Nye, Joseph S. *Soft Power: The Means to Success in World Politics*. New York: PublicAffairs, 2004.
- Obama, Barack. "Remarks by the President at the Export-Import Bank's Annual Conference." *The White House*. March 11, 2010. www.whitehouse.gov/the-press-office/2010/03/11/remarks-president-export-import-banks-annual-conference.
- Office of the President. "Administration's White Paper on Intellectual Property Enforcement Legislative Recommendations." March 2011. www.whitehouse.gov/sites/default/files/ip_white_paper.pdf.
- "Office of the U.S. Intellectual Property Enforcement Coordinator." *The White House*. Accessed May 21, 2013. www.whitehouse.gov/omb/intellectualproperty/quotes.
- Office of the United States Trade Representative. "USSTR Announces Results of Special 301 Review of Notorious Markets." February 2011. www.ustr.gov/about-us/press-office/press-releases/2011/february/ustr-announces-results-special-301-review-notorious.

- "USSTR Ron Kirk Joins Vice President Joe Biden to Announce the Joint Strategic Plan on Intellectual Property Enforcement." June 2010. www.ustr.gov/about-us/press-office/press-releases/2010/june/ustr-ron-kirk-joins-vice-president-joe-biden-announce.
- "Office of the United States Trade Representative." Accessed September 10, 2010. www.ustr.gov.
- Okediji, Ruth Gana. "Copyright and Public Welfare in Global Perspective." *Indiana Journal of Global Legal Studies* 7 (1999): 117.
- Patry, William F. *Moral Panics and the Copyright Wars*. Oxford and New York: Oxford University Press, 2009.
- Patterson, Judge Robert P. *Warner Bros. Entertainment Inc. et al. v. RDR Books et al.* (Southern District Court 2008).
- Patterson, L. and Stanley W. Lindberg. *The Nature of Copyright: A Law of Users' Rights*. Athens: University of Georgia Press, 1991.
- "PCT Government Relations, LLC." Accessed August 9, 2011. www.pctgr.com/welcome.
- Peck, Robin. "Fair Copyright in Research Works Act Challenges Federal Funding." *Information Today, Inc.* September 22, 2008. <http://newsbreaks.infotoday.com/Newsbreaks/Fair-Copyright-in-Research-Works-Act-Challenges-Federal-Funding-50849.asp>.
- Peñalver, Eduardo and Katyal, Sonia K. *Property Outlaws: How Squatters, Pirates, and Protesters Improve the Law of Ownership*. New Haven, CT: Yale University Press, 2010.
- "Picasso and Africa, Idea Behind the Art." *BBC News*. Accessed June 2, 2010. http://news.bbc.co.uk/2/shared/spl/hi/picture_gallery/06/africa_picasso_and_africa/html/1.stm.
- Pinchbeck, Daniel. "Heat of the Moment: The Art and Culture of Burning Man—Critical Essay." *ArtForum*. November 2003. http://findarticles.com/p/articles/mi_m0268/is_3_42/ai_110913976/pg_3/?tag=content:coll.
- Pink, Daniel. "Japan, Ink: Inside the Manga Industrial Complex." *Wired Magazine* Issue 15.11. October 22, 2007. www.wired.com/techbiz/media/magazine/15-11/ff_manga.
- Plunkett, Sandy. "Good Guys, or Just Another Mob of Yahoos?" *Sidney Morning Herald*. July 5, 1999. LexisNexis.
- Poster, Mark. *Information Please: Culture and Politics in the Age of Digital Machines*. Durham, NC: Duke University Press, 2006.
- "President Obama Signs America Invents Act, Overhauling the Patent System to Stimulate Economic Growth, and Announces New Steps to Help Entrepreneurs Create Jobs." *The White House*, September 16, 2011. www.whitehouse.gov/the-press-office/2011/09/16/president-obama-signs-america-invents-act-overhauling-patent-system-stim.
- Pride and Prejudice—Harry Potter Style*, 2006. www.youtube.com/watch?v=vge5pUSJIRY&feature=youtube_gdata_player.
- "Primitivism." Tate Gallery. Accessed June 4, 2010. www.tate.org.uk/inmap/pages/animated/keyterms.htm.
- Prince, Russell. "Globalizing the Creative Industries Concept: Travelling Policy and Transnational Policy Communities." *Journal of Arts Management, Law & Society* 40, no. 2 (Summer 2010): 119-39.
- "Principles for User Generated Content Services: Foster Innovation, Encourage Creativity, Thwart Infringement." *User Generated Content Principles*. Accessed June 4, 2013. www.usapprinciples.com.
- Prodhan, Georgina. "Artists Welcome EU Music Copyright Extension." *Reuters*. September 12, 2011. www.reuters.com/article/2011/09/12/us-europe-copyright-idUSTRE78U35U20110912.
- Puscas, Ioana. "On Vulnerability in the South: Sovereignty in the Post-Colonial Space." *Alternatives: Turkish Journal of International Relations* 8, no. 4 (Winter 2009): 79-93.
- Quaak, Larissa. "Re-presenting the Present: The (R)evolution of the Burning Man Festival." Masters Thesis in Cultural Anthropology. University of Amsterdam, 2007. www.linkedin.com/in/larissaquaak.
- Quanchi, M. "Indigenous Epistemology, Wisdom and Tradition: Changing and Challenging Dominant Paradigms in Oceania." In *Social Change in the 21st Century*. Queensland University of Technology, 2004. <http://eprints.qut.edu.au/630>.

- Quinn, Gene. "Red Bull Wins Trademark Lawsuit." *IPWatchdog.com*. May 2, 2008. <http://ipwatchdog.com/2008/05/02/red-bull-wins-trademark-lawsuit/id=169>.
- Raferty, Brian. "A Sidesplitting Work of Frivolous Genius." *Wired*. October 2008.
- Raisel. "Lexicon of Love? Why the Harry Potter Lexicon Lawsuit Isn't Only About Derivative Works and Fair Use." April 24, 2008. <http://thelearnedfangirl.com/2008/04/24/lexicon-of-love-why-the-harry-potter-lexicon-lawsuit-isnt-only-about-derivative-works-and-fair-use>.
- Raphael, Max and John Tagg. *Proudhon, Marx, Picasso: Three Studies in the Sociology of Art*. Atlantic Highlands, NJ: Humanities Press, 1980.
- Raustalia, Kari and Chris Sprigman. "What Can the Jeff Koons Lawsuit Teach Us About Copyright Law? A Guest Post." *Freakonomics*. February 17, 2011. www.freakonomics.com/2011/02/17/what-can-the-jeff-koons-lawsuit-teach-us-about-copyright-law-a-guest-post.
- "RDR Books." Accessed February 16, 2011. www.rdrbooks.com/rdrbooks/RDR_Books.html.
- Read, Herbert. *To Hell with Culture: And Other Essays on Art and Society*. London and New York: Routledge, 2002.
- "Red Bull GmbH—Company History." Accessed April 27, 2011. www.fundinguniverse.com/company-histories/Red-Bull-GmbH-Company-History.html.
- "Red Bull: The Wind Beneath Wings That Travel Around the Globe." *The International Business & Technology Newspaper for the Beverage Industry*. Accessed April 27, 2011. http://beveragemanager.net/Article-Single-News.176.0.html?&tx_ttnews%5Btt_news%5D=4007&tx_ttnews%5BbackPid%5D=118&cHash=0126c6c198a8c95cb895d2062a793aeb.
- Red River Gorge 08, 2008. www.youtube.com/watch?v=JKGEazgY9g&feature=youtu.be_gdata_player.
- Reilly, Ryan J. "Eric Holder: Aaron Swartz Case 'A Good Use of Prosecutorial Discretion.'" *Huffington Post*. March 6, 2013. www.huffingtonpost.com/2013/03/06/eric-holder-aaron-swartz_n_2819161.html.
- . "Aaron Swartz Prosecutors Weighed 'Guerilla' Manifesto, Justice Official Tells Congressional Committee." *Huffington Post*. February 22, 2013. www.huffingtonpost.com/2013/02/22/aaron-swartz-prosecutors_n_2735675.html.
- Reuss, Richard and JoAnne Reuss. *American Folk Music and Left-wing Politics, 1927–1957*. Lanham, MD: Scarecrow Press, 2000.
- Richmond, Yale. "Cultural Exchange and the Cold War: How the Arts Influenced Policy." *Journal of Arts Management, Law & Society* 35, no. 3 (Fall 2005): 239–45.
- Riley, Michael and John Walcott. "China-Based Hacking of 760 Companies Shows Cyber Cold War." *Bloomberg*. December 14, 2011. www.bloomberg.com/news/2011-12-13/china-based-hacking-of-760-companies-reflects-undeclared-global-cyber-war.html.
- Robbins, Cheryl. "Autonomy Is Key to Preserving Taiwan's Indigenous Cultures." *Taiwan Today*. April 23, 2010. <http://taiwantoday.tw/ct.asp?xItem=100364&ctNode=423>.
- Robinson, Nathan. "Prosecutors Sought 30 Years for Swartz's JSTOR Download, 35 for Headley's Mumbai Massacre." *Huffington Post*. January 30, 2013. www.huffingtonpost.com/nathan-robinson/headley-mumbai-massacre-conviction_b_2571156.html.
- Rocksafellow, Caroline Horton. "Copyright Trolls—A Different Embodiment of the Patent Troll?" *IP Frontline*. November 23, 2006. www.ipfrontline.com/depts/article.aspx?id=13469&deptid=3#.
- Rogers v. Koons, 960 301 (F.2d 1992).
- Rohter, Larry. "Legislator Calls for Clarifying Copyright Law." *New York Times*. August 29, 2011, sec. C.
- Rojek, Chris and Bryan Turner, eds. *The Politics of Jean-François Lyotard: Justice and Political Theory*. New York and London: Routledge, 2002.
- Rose, Mark. *Authors and Owners: The Invention of Copyright*. Cambridge, MA: Harvard University Press, 1993.
- Rosenberg, Alyssa. "Former President Clinton Calls For Copyright Flexibility, Crowdfunding, and Creative Sustainability." April 26, 2013. <http://thinkprogress.org/alyssa/2013/04/26/1930001/former-president-clinton-calls-for-copyright-flexibility-crowdfundng-and-creative-sustainability/?mobile=nc>.
- Rossini, Carolina, Maira Sutton, and Gwen Hinze. "Anti-Counterfeiting Trade Agreement." Electronic Frontier Foundation. Accessed May 29, 2013. <http://www.eff.org/issues/acta>.
- Roth, John, Douglas Greenburg, and Serena Wille. *National Commission on Terrorist Attacks upon the United States: Monograph on Terrorist Financing*. 2004. www.9-11commission.gov/staff.../911_TerrFin_Monograph.pdf.
- Sanchez, Julian. "750,000 Lost Jobs? The Dodgy Digits Behind the War on Piracy." *Artechnica*. October 7, 2008. <http://arstechnica.com/tech-policy/2008/10/dodgy-digits-behind-the-war-on-piracy>.
- Sandoval, Greg. "Foreign Hackers Steal More Than a Terabyte of Data Per Day in Ongoing Cyberwar." *The Verge*. February 27, 2013. www.theverge.com/2013/2/27/4035378/new-report-finds-hackers-stealing-terabyte-daily.
- Sardar, Ziauddin. "Colonizing the Future: The 'Other' Dimension of Futures Studies." *Futures* 25, no. 2 (March 1993): 179–87.
- Saunders, Frances Stonor. *The Cultural Cold War: The CIA and the World of Arts and Letters*. New York: New Press, 2000.
- Scherer, Michael. "The Truthiness Hurts." *Salon.com*. May 1, 2006. www.salon.com/2006/05/01/colbert_10.
- Schleifer, Yigal. "Blogs, YouTube: The New Battleground of Gaza Conflict." *Christian Science Monitor* 101, no. 40 (January 23, 2009): 4.
- Scott, David. *Radio Free Europe/Radio Liberty and Voice of America: Soft Power and the Free Flow of Information*. U.S. Government Printing Office, 2009.
- "Secretary Locke Joins Vice President Biden for Intellectual Property Enforcement Strategy Event." Department of Commerce. June 22, 2010. www.commerce.gov/blog/2010/06/22/secretary-locke-joins-vice-president-biden-intellectual-property-enforcement-strategy.
- Sell, Susan K. "The Global IP Upward Ratchet, Anti-Counterfeiting and Piracy Enforcement Efforts: The State of Play." *P2P Foundation*. December 17, 2011. http://p2pfoundation.net/IP_Maximalists.
- . *Private Power, Public Law: The Globalization of Intellectual Property Rights*. Cambridge: Cambridge University Press, 2003.
- . *Power and Ideas: North-South Politics of Intellectual Property and Antitrust*. Albany: State University of New York Press, 1998.
- Sengupta, Somini. "U.S. Pursues Richard O'Dwyer as Intermediary in Online Piracy." *The New York Times*. July 12, 2012, sec. Technology. www.nytimes.com/2012/07/13/technology/us-pursues-richard-odwyer-as-intermediary-in-online-piracy.html.
- Seville, Catherine. "Nineteenth-century Anglo-US Copyright Relations: The Language of Piracy Versus the Moral High Ground." In *Copyright and Piracy: An Interdisciplinary Critique*, edited by Lionel Bentley, Jennifer Davis, and Jane C. Ginsburg, 19–43. Cambridge: Cambridge University Press, 2010.
- Shakira—Waka Waka (This Time for Africa) The Official 2010 FIFA ... 2010. www.youtube.com/watch?v=pLpeEdMnucQ&feature=youtu.be_gdata_player.
- Shapiro, Michael J. "Sovereignty and Exchange in the Orders of Modernity." *Alternatives: Global, Local, Political* 16, no. 4 (1991): 447–77.
- Sherman, Brad and Leanne Wiseman. "Towards an Indigenous Public Domain." In *The Future of the Public Domain: Identifying the Commons in Information Law*, ed. by Lucie M. C. J. Guibault, 259–77. Frederick, MD and Alphen aan den Rijn: Kluwer Law International, 2006.
- Sherwin, Richard. *When Law Goes Pop: The Vanishing Line Between Law and Popular Culture*. Chicago, IL: University of Chicago Press, 2000.
- Shirky, Clay. *Here Comes Everybody: The Power of Organizing Without Organizations*. New York: Penguin Press, 2008.
- Shuster, George N. "The Nature and Development of U.S. Cultural Relations." In *Cultural Affairs and Foreign Relations*, 8–40. Englewood Cliffs, NJ: Prentice-Hall, 1963.
- "simcoe/ART." July 6, 2009. <http://simcoeart.com/page/6>.
- Snijders, Joost. *Arts under Pressure: Promoting Cultural Diversity in the Age of Globalization*. London and New York: Zed Books, 2003.

- . "The Abolition of Copyright: Better for Artists, Third World Countries and the Public Domain." *Gazette* 62, no. 5 (October 1, 2000): 379–406.
- Smith, David A. *Money for Art: The Tangled Web of Art and Politics in American Democracy*. Chicago, IL: Ivan R. Dee, 2008.
- Smith, Gerry. "Report for NATO Justifies Killing of Hackers in a Cyberwar." *Huffington Post*. March 22, 2013. www.huffingtonpost.com/2013/03/22/nato-hackers-cyber-war_n_2932531.html?utm_hp_ref=world&ir=World.
- Smith, Hedrick. *The Power Game: How Washington Works*. New York: Random House, 1988.
- Smith, Linda Tuhiwai. *Decolonizing Methodologies: Research and Indigenous Peoples*. London: Zed Books, 1999.
- "Sophia Stewart Matrix Lawsuit." *Snopes*. November 15, 2009. www.snopes.com/politics/business/matrix.asp.
- "South American Indians to Receive Royalties from Potato Sales." *Survival International*. April 1, 2011. www.survivalinternational.org/news/7144.
- Spalovsky. "Injury Statistics." *Text*. April 15, 2013. www.cpsc.gov/Templates/cpsc/pages/LandingPage.aspx?id=63997&repLanguage=en.
- Sparke, Matthew. *In the Space of Theory: Postfoundational Geographies of the Nation-state*. Minneapolis: University of Minnesota Press, 2005.
- "Spencer Victory." *YouTube*. Accessed June 5, 2013. www.youtube.com/user/victorypro.
- Star Wars Cops Funny*. 2007. www.youtube.com/watch?v=3zYOW7v6TFE&feature=youtu.be_gdata_player.
- States News Service. "Senate, House Judiciary Committee Leaders Focus on Fighting Online Infringement." April 4, 2011.
- Stebbins, Michael. "Expanding Public Access to the Results of Federally Funded Research." The White House Office of Science and Technology Policy. February 22, 2013. www.whitehouse.gov/blog/2013/02/22/expanding-public-access-results-federally-funded-research.
- Steger, Manfred. *Globalization: A Very Short Introduction*. Oxford: Oxford University Press, 2013.
- . *Globalization*. New York: Sterling Publishing Company, Inc., 2010.
- Steger, Manfred and Paul James. "Three Dimensions of Subjective Globalization." *Protophysics* 27 (2011): 53–70.
- St. John, Graham. *Tednomad: Global Raving Countercultures*. London and Oakville, ON: Equinox Publishers, 2009.
- Stoll, Robert. "Symposium Series Number 6." *University of Washington School of Law*. 2001. www.law.washington.edu/casrip/symposium/Number6.
- Story, Alan. "Bum Berne: Why the Leading Copyright Convention Must Be Repealed." *Houston Law Review* 40, no. 3 (2003): 763–801.
- "Strategy for Targeting Organized Piracy (STOP)." *United States Patent and Trademark Office*. Accessed August 9, 2011. www.uspto.gov/ip/global/stopfakes.jsp.
- Sullivan, Andrew. "Why I Blog." *The Atlantic*. November 2008. www.theatlantic.com/magazine/archive/2008/11/why-i-blog/307060.
- Sundara Rajan, Mira. *Copyright and Creative Freedom: A Study of Post-socialist Law Reform*. London and New York: Routledge, 2006.
- Sunder, Madhavi. *From Goods to a Good Life: Intellectual Property and Global Justice*. New Haven, CT: Yale University Press, 2012.
- Sunstein, Cass R. *Infotopia: How Many Minds Produce Knowledge*. New York: Oxford University Press, 2006.
- Swartz, Aaron. "Guerilla Open Access Manifesto." *Pastebin*. July 2008. <http://pastebin.com/cfxMVAy>.
- "Taiwan Aboriginal Page." Accessed September 17, 2010. www.taiwanfirstnations.org/index.html.
- "Taiwan Indigenous Culture Park." Accessed December 4, 2010. [www.tacp.gov.tw/tacpeng/home02_2.aspx?ID=\\$2001&idk=2&exec=L](http://www.tacp.gov.tw/tacpeng/home02_2.aspx?ID=$2001&idk=2&exec=L).

- Tande, Dibussi. "Undermining African Intellectual and Artistic Rights: Shakira, Zangalewa and the World Cup Anthem—Dibussi Tande: Scribbles from the Den." May 23, 2010. www.dibussi.com/2010/05/undermining-african-intellectual-and-artistic-rights-.html.
- Taylor, Pauline B. "Recent Developments in Soviet Copyright Policy." *The Russian Review* 32, no. 4 (October 1973): 421–24.
- Taylor, Richard. "The Digital Economy Act 2010 and Online Copyright Infringement." *The Law Gazette*. September 9, 2010. www.lawgazette.co.uk/in-practice/the-digital-economy-act-2010-and-online-copyright-infringement.
- Tchouikina, Sofia. "The Crisis in Russian Cultural Management: Western Influences and the Formation of New Professional Identities in the 1990s–2000s." *Journal of Arts Management, Law & Society* 40, no. 1 (Spring 2010): 76–91.
- Tengan, Ty P. Kāwika. "Unsettling Ethnography: Tales of an Ōiwi in the Anthropological Slot." *Anthropological Forum* 15 (November 2005): 247–56.
- "The Burning Man Project: Welcome Home." Accessed April 5, 2011. www.burningman.com.
- "The Democratic Party Platform." *Democrats.org*. Accessed May 21, 2013. <http://my.democrats.org/platform-fbs>.
- "The Nasher Museum of Art—Exhibitions—Picasso and the Allure of Language." Accessed June 2, 2010. www.nasher.duke.edu/exhibitions_picasso_africa.php.
- The National Bureau of Asian Research. "The Report of the Commission on the Theft of American Intellectual Property." May 2013. http://ipcommission.org/report/IP_Commission_Report_052213.pdf.
- "The Principles for User Generated Content Services: A Middle-Ground Approach to Cyber-Governance." *Harvard Law Review* 121, no. 5 (2008): 1387–1408.
- "The Washington Declaration on Intellectual Property and the Public Interest." *Infojustice.org*. 2011. <http://infojustice.org/washington-declaration>.
- Thomas, Pradip. *Who Owns the Media? Global Trends and Local Resistances*. London, New York and Penang, Malaysia: Zed Books, Southbound, 2004.
- Thompson, John B. *Books in the Digital Age: The Transformation of Academic and Higher Education Publishing in Britain and the United States*. Cambridge and Malden, MA: Polity Press, 2005.
- Thomson, Charles and Walter Laves. *Cultural Relations and US Foreign Policy*. Bloomington: Indiana University Press, 1963.
- "Thriller" (original Upload). 2007. www.youtube.com/watch?v=hMnk7lh9M3o&feature=youtu.be_gdata_player.
- "Thriller" on 13 Going On 30. 2007. www.youtube.com/watch?v=wO0810JIF4Q&feature=youtu.be_gdata_player.
- Tiefenbrun, Susan. "Piracy of Intellectual Property in China and the Former Soviet Union and Its Effects upon International Trade: A Comparison." *Buffalo Law Review* 46 (Winter 1998): 1–69.
- Treverton, Gregory, Carl Matthies, Karl J. Cunningham, Jeremiah Goulka, Greg Ridgeway, and Anny Wong. *Film Piracy, Organized Crime and Terrorism*. Safety and Justice Program and the Global Risk and Security Center. RAND Corporation, 2009. www.rand.org/pubs/monographs/2009/RAND_MG742.pdf.
- Tuccille, Jerome. "Oakland Police Shooting of Oscar Grant Made a Story by Citizen Journalists." *Examiner.com*. January 9, 2009. www.examiner.com/article/oakland-police-shooting-of-oscar-grant-made-a-story-by-citizen-journalists.
- Tushnet, Rebecca. "User-Generated Discontent: Transformation in Practice." *The Columbia Journal of Law & the Arts* 31, no. 4 (2008): 497–516.
- . "Payment in Credit: Copyright Law and Subcultural Creativity." *Law and Contemporary Problems* 70 (2007): 135–74.
- . "Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It." *The Yale Law Journal* 114, no. 3 (2004): 535–90.
- . "Legal Fictions: Copyright, Fan Fiction, and a New Common Law." *Loyola of Los Angeles Entertainment Law Journal* 17, no. 3 (1997): 651–686.

- "UK Copyright Laws to Be Reviewed." BBC. November 4, 2010, sec. UK Politics. www.bbc.co.uk/news/uk-politics-11695416.
- "UK Copyright Laws to Be Reviewed, Announces Cameron." BBC News. November 4, 2010. www.bbc.co.uk/news/uk-politics-11695416.
- "Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office." U.S. Department of Commerce. July 8, 2002. www.usc.doc.gov/omo/dmp/doors/door10_14.html.
- United Nations. "United Nations Declaration on the Rights of Indigenous Peoples." September 2007. www.un.org/esa/socdev/unpfii/en/drip.html.
- United States of America v. Aaron Swartz*, 1 (United States District Court, District of Massachusetts 2012).
- Urban, Jennifer, David Hansen, Patricia Aufderheide, and Peter Jaszi. "Report on Orphan Works Challenges: For Libraries, Archives, and Other Memory Institutions." Center for Social Media. January 2013. <http://centerforsocialmedia.org/fair-use/related-materials/documents/report-orphan-works-challenges-libraries-archives-and-other-mem>.
- "U.S. Copyright Office—Fair Use." *Fair Use*. November 2009. www.copyright.gov/fls/fl102.html.
- "U.S. Copyright Office—Legislative Developments (111th Congress)." Accessed March 13, 2011. www.copyright.gov/legislation.
- "User-Generated Content and Social Media." *IAB Reports*. Accessed June 3, 2013. www.iab.net/guidelines/508676/1488/ugeplatform.
- "User-Generated Content: Monetizing the People." *Min's Media Report* 5, no. 13 (June 21, 1999).
- "US Film Industry (Also) Likes Democrats' Platform on IP and Internet Freedom." *Intellectual Property Watch*. September 4, 2012. www.ip-watch.org/2012/09/04/us-film-industry-also-likes-democrats-platform-on-ip-and-internet-freedom/?utm_source=post&utm_medium=email&utm_campaign=alerts.
- "US Film Industry Praises Republicans On IP And Internet Freedom." *Intellectual Property Watch*. August 30, 2012. www.ip-watch.org/2012/08/30/us-film-industry-praises-republicans-on-ip-and-internet-freedom/?utm_source=post&utm_medium=email&utm_campaign=alerts.
- "US IP Czar Proposes Limits on Civil Rights and Liberties to Protect Big Content." Computer & Communications Industry Association. March 16, 2011. www.cciainet.org/index.asp?sid=5&artid=210&evflag=False.
- U.S. Office of the President. *Administrative Strategy on Mitigating the Theft of U.S. Trade Secrets*. February 2013.
- Vaidhyanathan, Siva. *Copyrights and Copywrongs: The Rise of Intellectual Property and How it Threatens Creativity*. New York: New York University Press, 2001.
- Veracini, Lorenzo. "Settler Colonialism and Decolonisation." *Borderlands E-Journal* 6, no. 2 (2007). www.borderlands.net.au/vol6no2_2007/veracini_settler.htm.
- Verzola, Roberto. *Towards a Political Economy of Information: Studies on the Information Economy*. Quezon City, Philippines: Foundation for Nationalist Studies, 2004.
- "*Viacom International, Inc. et al. v. Youtube, Inc. et al.*, Document 1." Accessed June 5, 2013. <http://docs.justia.com/cases/federal/district-courts/new-york/nysdce/1:2007cv02103/302164/1>.
- "*Viacom International, Inc. et al. v. Youtube, Inc. et al.*, Document 21." Accessed June 5, 2013. <http://docs.justia.com/cases/federal/district-courts/new-york/nysdce/1:2007cv02103/302164/21>.
- "*Viacom International, Inc. et al. v. Youtube, Inc. et al.*, Document 56." Accessed June 5, 2013. <http://docs.justia.com/cases/federal/district-courts/new-york/nysdce/1:2007cv02103/302164/56>.
- "Viacom's Copyright Infringement Lawsuit Against YouTube and Google." *FindLaw*. March 13, 2007. <http://news.findlaw.com/nytimes/docs/google/viacomyoutube31307cmp2.html>.
- Volkh, Eugene. "The Criminal Charges Against Aaron Swartz (Part 1: The Law)." *The Volkh Conspiracy*. January 14, 2013. www.volkh.com/2013/01/14/aaron-swartz-charges.

- Von Lohmann, Fred. "Viacom Gives Fair Use a Wide Berth on YouTube." *Electronic Frontier Foundation*. April 23, 2007. www.eff.org/deeplinks/2007/04/viacom-gives-fair-use-wide-berth-youtube.
- Waka Waka (El Negro No Puede) Original 1982-89. 2010. www.youtube.com/watch?v=Lm0gym7DfwE&feature=youtube_gdata_player.
- WAKA WAKA Remix—Shakira vs. Golden Sounds.m4e. 2010. www.youtube.com/watch?v=Ukz9PhV5KZo&feature=youtube_gdata_player.
- Wark, McKenzie. *A Hacker Manifesto*. Cambridge, MA: Harvard University Press, 2004.
- Web Junk 2.0 on VH1 Features My School Board Commercial!. 2007. www.youtube.com/watch?v=ddyVQwpByug&feature=youtube_gdata_player.
- "Weird Al" Yankovic—White & Nerdy. 2009. www.youtube.com/watch?v=N9qYF9DZPdw&feature=youtube_gdata_player.
- Weisman, Carl. "Diamonds Are Forever. Why Not a Drug Patent?" *Xconomy*. Accessed March 13, 2011. www.xconomy.com/seattle/2009/05/29/you-can-own-a-diamond-forever-why-not-a-drug-patent.
- "Welcome to the City of Iqaluit." Accessed September 1, 2010. www.city.iqaluit.nu.ca/apps/fusebox/index.php?fa=c.displayHome.
- White & Nerdy in Lego. 2007. www.youtube.com/watch?v=Nh9mVbKwY&feature=youtube_gdata_player.
- Williams, Rachel. "Copyright: UK Designer Wins Star Wars Court Battle." *The Guardian*. July 31, 2008, sec. Film. www.guardian.co.uk/film/2008/aug/01/starwars.design.
- Winseck, Dwanye. "NZ Feels the Throttling Effects of New Maximalist Copyright Laws." *The Globe and Mail*. November 8, 2011. www.theglobeandmail.com/technology/digital-culture/nz-feels-the-throttling-effects-of-new-maximalist-copyright-laws/article4183070.
- Woodmansee, Martha. *The Construction of Authorship: Textual Appropriation in Law and Literature*. Durham, NC and London: Duke University Press, 1994.
- . "On the Author Effect: Recovering Collectivity." *Cardozo Arts & Entertainment Law Review* 10 (1992): 279-92.
- . "The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author.'" *Eighteenth Century Studies* 17, no. 4 (1984): 425.
- Woods, Lebbeus. "Gallery 10." *Anarchitecture—Architecture as a Political Act*. Accessed March 28, 2011. <http://septimus7.tripod.com/ibea/gallery10.html>.
- Woolley, John T. and Gerhard Peters. "George W. Bush: Remarks on Signing the Stop Counterfeiting in Manufactured Goods Act." *The American Presidency Project*. March 16, 2006. www.presidency.ucsb.edu/ws/?pid=65347.
- . "William J. Clinton: Remarks on the National Economy." *The American Presidency Project*. December 3, 1999. www.presidency.ucsb.edu/ws/?pid=57019.
- . "George Bush: Remarks at the Annual Meeting of the United States Chamber of Commerce." *The American Presidency Project*. April 30, 1990. www.presidency.ucsb.edu/ws/?pid=18427.
- . "William J. Clinton: Statement on Congressional Action on Digital Millennium Copyright Legislation." *The American Presidency Project*. October 12, 1998. www.presidency.ucsb.edu/ws/?pid=55077.
- . "Ronald Reagan: Radio Address to the Nation on Free and Fair Trade." *The American Presidency Project*. September 13, 1986. www.presidency.ucsb.edu/ws/?pid=36412.
- Wu, Tim. *The Master Switch: The Rise and Fall of Information Empires*. Reprint. New York: Vintage, 2011.
- Yager, Loren. *Intellectual Property: Observations on Efforts to Quantify the Economic Effects of Counterfeit and Pirated Goods*. Government Accounting Office. April 12, 2010. www.gao.gov/products/GAO-10-423.
- Yu, Peter K. "ACTA and Its Complex Politics." *The WIPO Journal* 3, no. 1 (2011): 1-16.
- . *The Second Coming of Intellectual Property Rights in China*. Occasional Papers in Intellectual Property from Benjamin N. Cardozo School of Law, Yeshiva University, no. 11. New York: Benjamin N. Cardozo School of Law, Yeshiva University, 2002.

- Zachary, G. Pascal. "In a High-tech World, Top-down Innovation." *The International Herald Tribune*, July 31, 2007. LexisNexis.
- Zac Sands Climbing No Redemption 5.13 Red River Gorge, 2007. www.youtube.com/watch?v=VldO6u9-3-0&feature=youtu.be_gdata_player.
- Zaslavskaya, Olga. "From Dispersed to Distributed Archives: The Past and the Present of Samizdat Material." *Poetics Today* 29, no. 4 (Winter 2008): 669-712.
- Zassoursky, Ivan. *Media and Power in Post-Soviet Russia*. Armonk, NY: M.E. Sharpe, 2004.
- Zellen, Barry. "Cold Front: Hillary, Ottawa, and the Inuit: A Year After the Inuit Re-Assert Their Sovereignty, Washington Takes Their Side." *Journal of Military and Strategic Studies* 12, no. 3 (Spring 2010): 5-11.
- Zittrain, Jonathan. *The Future of the Internet—And How to Stop It*. New Haven, CT and London: Yale University Press, 2009.

INDEX

access to knowledge 1-4, 5, 6, 38, 41, 214
 access to medicine 7, 33
 activism 8, 12, 15, 51; and access to knowledge 5, 42; and development agenda 7; as deviant 51, 68-69, 76; and Kim DotCom 16; and protection of traditional knowledge 152
 African art 127-30
 Al-Qaeda and piracy 70, 72-73
 American cultural diplomacy 91-93
 America Invents Act 37
 Anonymous 15
 Anti-Counterfeiting Trade Agreement (ACTA) 4, 16, 58-62, 215
 anti-music 120
 art: and African art 127-30; and appropriation 19, 62, 123, 130, 136, 217; avant garde 101, 126; and border crossing 110-11, 118-19, 120, 132-33; and Burning Man 229-35; and CIA 101; and cultural policy 89-98, 102; as culture 10, 11, 29, 44, 49, 124-26, 151, 153, 158, 228, 231; as commodity 10, 60, 100, 124, 126, 156, 161-63, 183-84, 185, 219, 221-23, 228-29; and copyright 17, 18, 50, 150, 161-62, 221; and inspiration 174, 197, 227; and the public interest 44, 198, 219; and relation to the state 29, 35, 44, 89, 100-101, 104, 105-9; and Russia 99-101, 102; and socialist art 101; and traditional cultural expressions 145, 150, 151, 153, 154, 155-56, 158, 161, 165

Artic 152, 168-74
 artist: as amateur 181, 184, 197; as cultural producers 18, 87, 227-28, 236; and exploitation 126; and filesharing 78; as "hacker class" 27; and the information age 15; as professional 183-84; and relationship to copyright 8, 43, 46, 51, 62, 224; and relationship to the state 35, 60, 87, 89-98, 105-9; and traditional artists 161-63, 171-74
 author: and author function 129, 184; and Berne Convention 107-8; and censorship 97; as critic of IP 51; and fan fiction 133-34, 197; as owner 7, 19, 29, 40, 42, 45-46, 48, 87, 125, 161, 214; and moral rights 103; as original 62, 128, 144, 161-63, 184, 190; and piracy 62, 98; and user generated content 182
 Berne Convention 88, 99, 107, 108, 130
 Bureau of Educational and Cultural Affairs 90, 105
 Burning Man 229-35
 Bush, George H.W. 31
 Bush, George W. 32, 34, 38, 61, 69, 73, 188
 Business Software Alliance (BSA) 35
 Central Intelligence Agency (CIA) 92-93, and abstract expressionism 101
 Clinton, Hillary 170
 Clinton, William Jefferson 9, 31, 33, 49, 69
 Cold War: and American cultural agenda 17, 80-100, 215; capitalism vs

- communism 6, 98, 104; and copyright 88, 98-102; and cultural politics 90-98, 121; and culture as ideology 90-98; and free flow of ideas/information 87-88, 96, 97, 104, 149; and parallel to China 64; and soft power 90
- Colonialism 121; and indigenous people 148; and settler colonialism 147-49; and copyright 149-52
- colonization of the lifeworld 19, 131
- Computer Fraud and Abuse Act 1
- copyright: and access to knowledge 1, 38-44, 96; and American bureaucracy 33-37; and anti-copyright activists 25, 68, 76, 196, 214-15; and balancing rights 12, 37, 77, 102, 181, 191, 196-99, 226-27; as a barrier 17, 77, 79, 88, 174, 195, 224; and censorship 99, 195-96; and Cold War 87-104; and colonialism 121-24, 146-52; and colonizing the future 151-52; and concentration of ownership 12, 49, 95, 213-14, 219-20; and commodification of culture 18-19, 144, 150-51, 158, 161-64, 193, 219, 228; and corporate control 12, 18, 48, 95, 103, 130, 219-20; and cultural appropriation 171-74, 190, 192; and cultural creativity 27, 124, 127-28; and expansion of 16, 32, 34, 79; and fair use vs. free use 99; and fan culture 189, 192-93; as frame and prison 3, 11, 14-15, 216, 219, 221; and free speech 195-96, 221; and the future 3, 199-200, 214-37; and the gift 228-37; and government regulation 79, 29-44, 104-5; and impact of technology 12, 47, 48, 77, 109; and infringement 78-79 90, 102, 109, 181, 186-88, 196; and innovation 31, 98, 162; and libraries 96-97; maximalism 11-13, 16, 45-49, 58, 77; minimalism 6, 8, 13, 59; and moral rights 103; and myths of 25-26; and national security 63-68; and national culture 106-7; and national treatment 100, 130; and need for flexibility 132-35, 190; and open source 49-50, 168; and orphan works 37, 78, 109; and perpetual protection 45-46; and piracy 30, 58, 64, 68-76, 98, 102-3, 119, 121, 123, 218; and political economy 4-11, 62, 119-23; and politics of 13, 16-17, 36, 98; as property 4, 27, 33, 47, 96, 108, 124, 190 216-17, 221; and Russia 98-104; and traditional knowledge 18, 129, 144-75; and trolls 33, 219; and user-generated content 18, 181-200
- corporate convergence 130-32
- corporate globalization 120, 220
- counterfeit goods 32, 36, 62, 63, 70, 71, 73, 75
- creative commons 7-8, 31, 46, 49, 228, 234
- cultural policy 80, 89, 90, 92-98, 101, 102, 105-7, 109, 110
- Cultural Bill of Rights 197-99
- culture industry 3, 8, 18, 80, 88, 95, 125, 126, 144, 181-85, 188-89, 192, 196, 214-25, 235
- culture: as American foreign policy tool 89, 90-95; and appropriation 123, 126-30, 145; and convergence culture 132-35; as commodity 8-9, 15, 17, 18-19, 90, 126, 130-32, 144, 159-64, 173, 175, 182-86, 188, 190, 192, 197, 216-25; and colonization 146-53, 173; and copyright 14, 17, 98, 124, 146-53, 173; and cultural policy 19, 88, 89, 92, 102, 125; and cultural turn 122; and democratic culture 195-96; and DIY 230-36; and "fair culture" 12; and flow 8, 19, 86, 89, 90-91, 96, 98, 99, 118, 120, 121-23, 126-30, 173, 175, 182, 214; and folk culture 96-97; and globalization 122-23, 172, 174; and hybridity 118-20, 121-26, 135-38, 164-68; and ideology 17, 88, 90-92, 98, 120, 126; and indigenous knowledge 18, 144-75; and the legitimacy of the nation-state 10-11, 16, 29, 80, 89, 90-92, 100, 102, 104-11, 120, 121, 124, 125; and national culture 9, 11, 17, 29, 78, 86-111, 121, 125; and preservation 18, 153-59; as property 96, 124, 175; and sharing 60, 90, 183, 191, 225-35; and user-generated content 181, 184-89, 235; and Western culture 86-87, 91, 97, 102, 121-23; and youth culture 88, 190
- cyberattack 61, 63, 65, 66
- cybersecurity 61, 63, 65-67
- decolonization 147-49
- decommodification of culture 184-85
- democratization of technology 184-85
- derivative works 99, 185-86, 192, 197-98
- development agenda 7
- Digital Millennium Copyright Act (DMCA) 31, 32, 34, 60, 181, 185, 194-95, 199, 234

direct copying as playing a legitimate social function 188-89, 198

Dodd, Christopher 26, 44

DVD piracy and organized crime 71-72, 74

Eisenhower, Dwight 91, 94

Electronic Frontier Foundation (EFF) 59, 194, 234

Enforcement of Intellectual Property Rights Act 34, 37

Espin, Victoria 34-35

expatriates 107, 130, 231-32

Fair Access to Science and Technology Research (FASTR) 42

Fair Copyright in Research Work Act see also Research Works Act

fair use 23, 31, 35, 77, 99, 134, 186-87, 193, 195-96, 197, 199

fan fiction 18, 133-35

file sharing 16, 32, 61, 76, 78, 214

First amendment 196

Free and Open Source Software (FOSS) 214

free flow of information 4, 17, 35, 87-88, 96, 97, 104, 149

General Agreement on Tariffs and Trade (GATT) 31

General Public License (GPL) 31

geographical indications 4, 157

gift economy 228-29, 232, 234

global indigeneity 164-68

Global Intellectual Property Center 68

globalization: 5-6, 10, 130; and corporate globalization 120, 220; and counter-globalization 214; and cultural turn 120-23, and culture 108, 111, 130; and deterritorialized culture 109-10, 120, 125; and intellectual property 6, 10, 16; and the nation-state 10, 17, 28, 164, 169; and neo-liberal globalization 169, 220

Goodlatte, Bob 43

Google 9, 30, 59, 77, 80, 185, 195

governmentality 51, 63

hackers 27, 61, 63-65, 81, 236

Hargreaves Report 58, 77-79

Harry Potter 133-34, 192, 197

Hawaiian slack key guitar 135-36

heritage of mankind 173

House UnAmerican Activities Committee (HUAC) 87

indigenous knowledge see traditional knowledge

information age 2-3, 15, 28, 31, 47, 60, 77, 137, 159; postmodern information age 14; role of the state in 27; privatization of knowledge 27, 69, 213; political economy of 51; deviants of 75; convergence 131

information future 27-28

information society 5, 167

Innovative Design Protection and Prevention of Piracy Act 37

intellectual property (IP): and aging effect 7-8; and American foreign policy 36, 47, 88-90; and American political parties 25-26, 37, 43; and China 63-68; as colonial legacy 121-22, 143-49, 173; and culture 10-11, 18, 44, 47, 98-111, 121, 137, 173, 192, 226-35; and development 6, 121; expansion of 3-4, 5, 7, 11-13, 28, 29, 32-33, 37, 44, 47, 50, 213-16, 220; and the future 14, 27, 28, 33, 43, 51, 60, 214-15; as global 4-5, 8, 16, 48-49; ideology of 8, 100-101, 151, 183; and immigration 80-81, 96; and industry revolving door 44; and innovation 30-33, 36, 43, 47, 144; maximalism 5-6; 11-13, 16, 26, 28, 44, 45-49; minimalism 5-6; and neo-liberal globalization 5-6, 58-60, 105; and piracy/theft 17, 26, 30, 32-33, 35, 43, 60, 70-76, 96, 102-3, 122-23, 131; and political economy 4-11, 15, 27, 46, 48-49, 215; pro-intellectual property advocates 4, 11-13, 28, 47; and the public interest 5-6, 37, 51, 77-78, 80, 214-16, 219; and resistance 7, 15, 50, 59, 76, 214; and the role of the state 27, 29, 80, 100-107; and the Soviet Union 98-104; and terrorism 69-76; and three-strikes laws 4, 214; and trade 30-31, 106, 108; and traditional cultural expressions 144-75; and the United States 6, 7, 16, 25-51, 67, 88; and U.S. bureaucracy 33-37; and U.S. national security 60-68, 81; and U.S. Chamber of Commerce 68-69

intellectual property bar 34, 37

International Intellectual Property Framing Database 34

internet 9, 15, 16, 25, 26, 30, 41, 43, 45, 50, 62, 65, 75, 130, 181, 183, 185, 188, 189, 190, 195, 197, 199, 200, 214, 220

Inuit 152, 161 168-74

Internet Service Providers (ISPs) 185-86
Israel, Chris 34

JSTOR 1-2

Kappos, David 33-34
Kastenmeier, Robert 37
Kirk, Ron 36, 69

language games 13-15, 17, 26, 39, 45, 49,
60, 64, 66, 67, 152, 158, 225

Lehman, Bruce 34
Lenz, Stephanie 186, 191
Lilanga, George 161-63

manga 109, 132-33
Megapload 16, 181
Motion Picture Association of America
(MPAA) 26, 30, 44, 181,

Napster 45, 181, 214
nation-state: and colonization 146-50,
164; and corporate control 5; and
cultural authenticity 11, 106-11,
120-21, 136, 155; and cultural flow
across boundaries 107-11, 119-21, 130;
and globalization 7, 10-11, 120, 17, 59,
130-32, 164, 174, 220; and hybridity 7,
119-26, 136-37; and intellectual
property policy 4, 6, 28-29, 59-60,
107-8; and legitimacy of 106-7, 109,
231; and national cultural policy 105-8,
231; and political economy of
information 13, 220; and protection of
intellectual property 68, 70; and
traditional cultural expressions 144, 155,
164-66, 175;

National Endowment for the Arts 44, 95
National Intellectual Property Rights
Coordination Center 34

national treatment 98, 100, 107-8
neo-liberal indigeneity 159-64
neoliberalism 5, 76, 108, 162
net-neutrality 35

new enclosure movement 214
No Electronic Theft Act 32

Non-Governmental Organizations (NGOs)
6, 7, 8, 59, 68, 108, 136, 143
Nunavut, territory of 168-71

Obama, Barack 29, 30-31, 33, 34, 35, 36,
37, 61, 66, 67, 69, 75, 195
Office of International Intellectual Property
Enforcement 34

Office of the United States Intellectual
Property Enforcement Coordinator 30, 34
open access 1, 14, 38, 40, 42, 43, 214
open source 31, 35, 168, 214
orphan works 37, 78, 109

parkour 191-92, 224
patents 4, 7, 12, 27, 28, 30, 33, 43, 47, 49,
66, 67, 70, 214

Picasso, Pablo 126-30
Protect Intellectual Property Act (PIPA) 50
piracy 7, 8, 17, 120-24, 69, 78, 129, 174,
218; and biopiracy 214; and China
64-65; and discourse 62-63; and free
flow of ideas 79, 107; and music
119-20; and national security 26, 58-68;
and Russia 98, 102-3; and terrorism 17,
32, 70-76; and the United States 30,
32-33, 34-35, 44, 58-63, 67, 131
principles for user-generated content
185-86

Prioritizing Resources and Organization of
Intellectual Property Act (PRO-IP) 34
public domain 5, 6, 7, 35, 38-40, 43, 45,
48, 100, 103, 118, 145, 156
PubMed 38, 39-41

re-skilling creativity 185
Reagan, Ronald 29, 30, 31, 69, 95
Recording Industry Association of America
(RIAA) 44, 181
remixing as decommmodification 185
Research Works Act 38, 39-43
Rowling, J.K. 133-34, 192

samizdat 100
Smith, Lamar 44
soft power 86, 90, 95
Sonny Bono Copyright Term Extension
Act 32

Soviet Union: and All Union Copyright
Agency 99-100; and censorship 88, 99;
and Cold War 88, 90-104; and
copyright infringement 102-3; and
cultural policy 89, 90, 102; and
exchange of ideas 104; and flow of
culture 111; and national treatment 100;
and political art 94; and UNESCO 99
Special 301 34, 69, 103

Star Wars: Akira Kurosawa 137; and
derivative works 192-93; and
Christopher Knight 194
Stop Counterfeiting in Manufactured
Goods 32

Stop Online Piracy (SOPA) 44, 50, 215
Strategy Targeting Organized Piracy
(STOP) 34
Survival International 143-44
Swartz, Aaron 1-4, 10, 15,

Temporary Autonomous Zones (TAZ)
230-32
three strikes laws 4, 78, 214
Trade Related Aspects of Intellectual
Property Agreement (TRIPS) 6, 7, 29,
31, 34, 45, 60, 76, 103, 106, 108, 214
trade secrets 63, 65, 66, 67, 80
Trademarks 4, 28, 33, 34, 37, 44, 62, 63,
65, 66, 70, 75, 132, 193, 214
traditional cultural expressions 135, 144-46,
149, 161, 163, 168, 174
traditional knowledge 143-80; and
colonization 146-53; and copyright 145,
150; and heritage of mankind 173; and
hybridity 135, 164-68; and the nation-
state 144, 168-74; and protection of
146-80; and the public domain 149-51,
158, 162, 163; and neo-liberal
indigeneity 159-64; and
neotraditionalism 153-59
transformative works 17, 188-89, 193, 195,
198
Trans-Pacific Partnership (TPP) 60

United States Chamber of Commerce 67,
68-70
United States Copyright Office 34, 44,
227

United States Department of State 34, 90,
92, 93, 105, 106
United States Information Agency 92-94
United States Intellectual Property
Enforcement Coordinator 30, 34
United States Patent and Trademark Office
(USPTO) 33-34, 44
United States Trade Representative
(USTR) 30, 36, 65, 103, 106
Universal Copyright Convention 99
user generated content 181-200

Valenti, Jack 70, 71, 102-3
Vander Ark, Steven 133-34
vectoralist class 27-28, 213, 214

Washington Declaration on Intellectual
Property and the Public Interest 51
Web 2.0 33, 183, 184
White House Press Corps Dinner 188-89
World Intellectual Property Organization
(WIPO) 6, 7, 103, 122
World Trade Organization (WTO) 5, 103,
108, 132, 214

YouTube 181, 182; and copyrighted works
187-96; and fan culture 191; and free
speech 196; and new copyright balance
197-98; and notice and take down
procedures 186; and political discourse
189, 195-96; and social and political
value of copyright infringement 187-89,
190; and user-generated content 182,
186, 190-96, 200; and Viacom 194-95