

Reimagining and Resisting Intellectual Property  
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When I first became interested in copyright, I was a stranger to many dimensions of intellectual property law. I had not read the Copyright Act or the case law. I didn't know the legal difference between a copyright and a patent, what the idea/expression dichotomy was, or how to define fair use. I understood plagiarism, having been well educated in the etiquette of source citation, but I did not understand the relationship between plagiarism and copyright violations. It had been the non-legal questions about the philosophical origins of authorship and how it was possible to own creative work that peaked my interest in copyright.

As my interest in the subject matter grew, it became necessary to learn more about the legal parameters of copyright law specifically and intellectual property law more generally. Thus, I became interested in the ways in which copyright was being legally extended as it confronted the new technologies of the information age. As the bottle that protected creative work faded away, to use John Perry Barlow's metaphor, the content became less protectable. However, even as protectability became increasingly difficult due to the digital nature of creative work, the laws were expanded to provide greater legal protection to those who argued they owned copyrightable content. The desire to own what only has value through circulation and to control every possible exchange of this information has led to ever larger circles of protection being drawn around copyrighted and patented work. While many doubt the law will ever be able to stop the free flow of information, new legislation giving copyright industries even more power and recent arrests under that legislation should make us worry about the depth to which the power of the state will be utilized in an *attempt* to stop the unregulated flow of information.

As I learned more about the subject, I gradually came to understand the language of the law. While it was still possible to think outside the law, I found myself increasingly developing my critique based upon the law. I could easily identify copyright violations where before I had been more interested in the philosophical implications posed by defining a creative work as property. In other words, I became co-opted by the law. The more I read the case law and law journals, the more I came to speak from a position inside status quo. My ability to critique the law became increasingly bounded by the law itself and the language used by those within the legal profession to discuss issues of intellectual property. I began to

speak in terms of incentives and public goods. I began to start any discussion of intellectual property by what was and was not allowed under the law. It became clear that the very act of studying the subject had transformed my standpoint from an outsider to an insider. I even thought about going to law school. While I remained critical of the overextension of property rights that has been going on for the past decade, I also found myself highly sensitized to violations of the law, even as I felt much of what constitutes intellectual property law was unjust and unfair.

My own co-optation corresponds with the process I see individuals go through as they begin to learn about their “rights” under copyright law. Initially, most folks have little or no awareness of copyright and patent law. They probably do not read the copyright notice prior to watching a movie or feel guilty about sharing music with friends (or strangers). Most people do not know that virtually everything they write down is automatically copyrighted, nor do they probably see their own writing as having much worth, in the monetary sense of the word. Most people remain outside the boundaries of copyright law in terms of their own cultural creation and only enter the framework of the law as consumers and possible copyright infringers. Thus, to them, it isn’t controversial to photocopy an article or make a copy of a CD they “own” – these things seem like “rights” that should be associated with the purchase of a product. However, to intellectual property owners, who wish to control the use of an item even after its purchase, there are multiple ways in which a person can break the law. Under current interpretations of the balance between the rights of consumer and those of information owners, there is no question about who comes out ahead.

However, as people make the transition from consumer to producer of copyrighted material, they too undergo the transformation of being co-opted by the law. Suddenly, what had been something they wanted to share with others becomes property. Instead of being concerned with the impact or reach of their ideas, they become concerned with issues of “theft,” “misappropriation,” and “rewards.” Certainly, nobody wants their ideas taken and used by someone else without at least an acknowledgement, but once within copyright or patent law, the idea of property becomes overwhelmingly powerful, at least to some. The more money involved, the harder it is to remain above the claims of the law. Once creative work is put within the copyright framework, its legal status as property in need of protection becomes of utmost concern. The work, and the author, can be paralyzed by questions of what constitutes fair use, what, if anything, can be borrowed, appropriated, or used from others without their permission. People also gain a

heightened concern for what others can borrow, use, and appropriate without permission from them.

Creation becomes even more difficult as everyone starts worrying about property and not about sharing the results of their intellectual or creative work. These problems are compounded by the very real problem of theft that accompanies high stakes research. However, the lines between theft and cultural exchange are thin and easily confused.

Concerns about ownership reach an almost hysterical pitch when the Internet is brought into the picture. After all, how do you protect anything on the web? How will one get paid? How do you stop others from taking your work without permission? The solutions become increasingly draconian with each new lobbying round by major intellectual property interests. Once the framework of property is introduced and people become suspicious of how their work will be misused instead of used, progress in the arts and sciences is not the product, territorial boundaries are. Concerns about property protection do nothing to enhance the free exchange of ideas.

As a result of the deep suspicions that surround the “theft” of “intellectual property,” we have reached new heights in the protection of copyrighted and patented works. Congress has reacted to these changes in the innovative landscape by passing legislation that attempts to provide even stronger protective measures for copyright and patent owners. At the behest of the entertainment industries, copyright has been especially targeted. Additional length has been added to copyright terms and the Digital Millennium Copyright Act (DMCA) was Congress’ attempt at updating the copyright law for the digital age. At best, however, it could be said that the DMCA balances the rights of one industry with the rights of another. For example, the DMCA provides the entertainment and publishing industries with enormous power to pursue copyright violations over the Internet. However, it also has provided “safe harbor” provisions for Internet Service Providers who lobbied heavily for such protection. While each industry sought protection of their individual interests, nobody was voicing concern for the public interest or asked critical questions about why copyright owners needed so much more power in the first place. The DMCA clearly illustrates that the law is not a neutral body of abstract principles, but is instead the codified will of those with economic and political power.

Now more than ever, companies are using intellectual property law as a club to retain monopoly control over an industry or technology. They have hired scores of web crawlers to troll the web looking for

potential violations. Cease and desist letters go out indiscriminately to web sites hosting illegally copied MP3s and to 13 year old girls hosting Harry Potter Fan Sites. Arrests have been made when computer programmers attempt to describe their work and threats of arrest are given when academics seek to publish their research on circumvention devices. Only negative publicity serves as a restraint on the aggression of corporations, as illustrated in the Harry Potter case and belatedly in the Adobe case. Copyright law has turned protection for civil liberties upside down. Free speech exists only to the extent it doesn't violate the desires of a copyright owner.

The world of patent law is no better. As the human genome project evolves, so do the numerous patents on gene sequences. The genetic gold rush will have the vast majority of the human genetic structure privately owned before accurate knowledge of what each gene does is fully known. In addition to the negative consequences of patenting the inventions derived from the human body, pharmaceutical companies have placed profits before lives as they aggressively litigate to halt the illegal production of drugs used to fight HIV and AIDS. Only when global public opinion focused on the issue was a compromise with the South African government reached. As biotechnology brings us transgenic animals and hybrid foods, the patent laws become even more complex and exploitative.

With each new law, however, the process of acclimatizing to new levels of property ownership moves forward. The language of "theft" and "piracy" are commonly accepted as the bedrock for new legislation that gives industry even more power to pursue possible copyright infringements. Even more importantly, however, this adaptation to a heightened sense of importance for intellectual property has been globalized. The globalization of intellectual property has taken on legal form in the World Trade Organization (WTO). The Trade Related Aspects of Intellectual Property Law agreement (TRIPs) ensures that all countries party to the WTO must establish a minimum level of intellectual property protection or face trade sanctions under the rules set forth by the WTO. While countries in the global south were given additional time to implement the TRIPs agreement, it still represents an enormous cost to most of the developing world. These countries must not only develop appropriate laws, but also methods for enforcing the laws and punishing violators.

The process of globalizing intellectual property rights does little to help the global south pursue an agenda of development. Rather, these laws (the lack of which are called trade barriers by developed

countries) act as a tax on the global south by richer countries. Of course, as with globalization generally, the process of acclimatizing the world to a specific business ideology is more successful at the elite level of society. Governments throughout the world pursuing a neo-liberal trade model can be persuaded to sign TRIPs even as many of their citizens develop the language of biocolonialism to describe the process.

The facet of globalization that allows for some members of society to benefit more than others means that there will be individuals in the global south who benefit monetarily from stronger intellectual property regimes. However, as with globalization more generally, the benefits are not distributed equally, nor do these benefits successfully address the larger issues of poverty and unsustainable development. Basically, by making the world safe for Disneyland and Microsoft, TRIPs does little to really assess the needs of the vast majority of the world's population for access to affordable food and medication. Instead, it makes it much easier for those who wish to appropriate the knowledge of many and translate it into the patentable property of a few to do so. It is no coincidence that intellectual property laws have been resisted by the global south with accusations of biopiracy and biocolonialism. For those who have any sense of history, there is a chilling sense of familiarity to modern treaty negotiations. I can only hope that the activists mounting a challenge to the current globalization of everything will be successful. Globalization, in itself, is not a bad thing. However, globalization that does not actively facilitate reciprocal relationships in which the good of the larger world is held as its highest goal will only result in a world flattened of its richness and depth.

What is perhaps most frustrating about the globalization of intellectual property rights is the complete resistance on the part of the US and its negotiating partners to look at alternatives to protecting knowledge resources that don't translate them into private property. It is possible for the US to actually learn from other countries on how to facilitate the protection of knowledge for the benefit of all. Numerous countries and indigenous groups could teach the world that there are multiple ways of protecting knowledge and providing incentives to create. TRIPs is shortsighted in that it only assumes creation stems from the chance of monetary rewards. Instead of taking advantage of the enormous opportunity to learn about alternatives to intellectual property, TRIPs, and the US generally, ensures that these alternatives will be quickly killed and replaced with respect for private property rights. As the idea of money and property

enter realms where they have not yet tread, those realms are changed forever and we lose our chance to seek out alternatives.

Seeking out alternatives, I think, is a crucial avenue of investigation at the current moment. I cannot help but think something has been lost when the world embraces the idea of private property as the dominant paradigm to control all aspects of our creative lives. Part of the interpretive battle for alternatives should take place within the copyright and patent law, opening these laws up as much as possible for the exchange of ideas. However, alternatives must also be sought outside the law – types of property systems that are non-Western; the articulation of rights that transcend property rights; perhaps even the possibility of no ownership at all.

Having taken the journey towards understanding intellectual property as a system, I still try to resist it whenever possible. I try to keep my own sense of ownership over intellectual work to a minimum and instead attempt to focus on the intellectual rivers that make my own work possible. I am not alone in trying to resist the expansion of property rights. Movement towards a more balanced idea of what ought to be protected is developing. Small and large resistances to our current intellectual property path are emerging every day. Resistance ranges from academic scholars who advocate minor repairs to the copyright code to transnational activists engaged in a reconstructive narrative of human rights that could lead to massive and paradigmatic shifts in the way we create and protect work. These alternatives, through their very existence, debunk the intellectual property ideology that so loudly asserts we need strong intellectual property laws to ensure people create. The existence of resistance points to methods of protecting creative work without assuming everyone puts profits before art or people. Slowly, resistance to the expanding idea of property is developing as people begin to reimagine cultural work outside the language of property and rights. This reimagining is crucial, I would argue, to the development of culture that is not corporate culture and the protection of people who may not have access to the benefits of a neo-liberal economic model.

It is very important to not only preserve alternatives to intellectual property that still might exist around the globe, but to actively participate in envisioning new ways to think and act towards what we now call intellectual property. The language of property is a powerful one, especially when it is combined with

the language of rights. However, it is necessary to step outside the boundaries of this language in order to assess the best possible future for the way we create and exchange knowledge.

A speculative historian might look at the past and wonder what the world would look like if we had chosen a different path of development. Nothing is inevitable in the choices we make, though at times it seems as if there is only one possible path to choose. Anyone who studies history knows that at any given point there were numerous possible paths of development, but the choice of a specific path closed off the alternatives. Closing off alternative choices is a function of power. Those with the power to do so control the way in which choices are defined and offered. This is in part a narrative process where a governing ideology is created to render possible alternatives as “idealistic,” unworkable, or impossible. By closing off alternative paths, even given the evidence that these paths are viable, the interests of those who have defined the discourse are served. However, it is important to assess who wins and who loses with every ideological system and I would argue there are some systems that are better than others.

Just as one can look to the past and suggest that a different decision could have changed the world, I think we must now look towards the future and understand the numerous choices that are available to us as we enter the digital age. Certainly, the power to define the ideological conditions under which we will enter the digital age has been given (or taken) by the major corporate players. They have already decided the type of future property model that should be used. Corporate entities, with their monopolistic control over content and increasingly over the vehicles through which that content is provided, are the ones creating the vision of the future. In their world, all possible futures where sharing and exchange of information outside the framework of profit is possible are “utopian.” However, and this is essential, there are thousands of people around the world who have developed their own ways of dealing with what we call intellectual property. These parallel systems, alternative paradigms, and small resistances prove that we do have a choice in how the future develops. We have a choice in what type of framework we want to establish for the next century and these choices are far more diverse than the corporate vision of the future.

This book wishes to excavate the choices and alternatives to intellectual property available to us in order to understand that the future is not an inevitable path towards more centralized ownership of innovations and ideas. The narrative project before us will focus on reimagining the extent to which copyright and patent law will govern creative and innovative work. Calling the following chapters take up

different ways in which people resist and envision alternatives to intellectual property. Speaking of alternatives makes it easier to discuss the issues, but not all these “alternatives” assume that copyright and patent law should cease to exist. The resistance tends to exist, but in many cases the alternatives have not been articulated, or if they have been, they are simply a more complex rendering of the status quo. While it may be important to develop a way of thinking that bypasses the idea of property altogether (and some chapters will certainly take up this issue), simply pointing to the spaces within the already existing law can also be a radical step. By describing the types of systems that have already begun to develop and contrasting them to the current trajectory of copyright and patent law taken by the American Congress, the WTO, and the major corporate players in the world, we can begin to develop the possibilities of diverse alternatives. Each chapter will evaluate a different aspect of the alternative vision and illustrate that there are numerous choices from which the future can evolve.

Chapter One begins with the neglected and increasingly circumscribed part of the already existing copyright law – the public domain. The original intent of the copyright act was to ensure that creative work entered the public domain so that it could be used as a creative pool from which to draw new ideas. This chapter will examine how we came to understand the idea of the public domain and how its early conceptualization was woven into an understanding of copyright law. By theorizing about the public domain we can better articulate what is important about the idea of a “public” as contrasted to the special and private interests of individuals acting to assert their personal will over the legislative process. Perhaps by rejuvenating our understanding of the public we can retain much of what the original copyright law was designed to do and thus provide for alternatives within the already existing law of copyright.

Chapter Two focuses on use of shrink-wrap licensing agreements and the effort to codify these licensing agreements through UCITA. Copyright law is a public law designed to protect copyright owners, but also to provide access to the public. However, and increasingly with digital products, companies use restrictive licensing agreements to provide themselves with more protection than what is given them under the copyright law and to deprive consumers of their rights under the copyright law. Most importantly, the intent of these licenses is to transform the relationship of the copyright owner to the content consumer from one of sale of a product to licensing of a product. Shrink-wrap licenses have been upheld as legitimate contracts in several legal decisions even though there is still controversy surrounding their use. Given the

possibility that the courts may become sympathetic to consumers, industry lobbyists are attempting to enact UCITA to provide them with the licensing protection they want. This chapter will evaluate the implications of UCITA in the context of copyright law and then turn to perhaps one of the most successful (so far) resistances to the expansion of copyright within the world of computer technology. Richard Stallman's copyleft model and General Public License (GPL) was conceived as an alternative to the excessive protection granted software writers under the copyright act. His GPL has been used by other groups seeking similar protection and has developed into the open source movement. The open source movement is a paradigmatic alternative to intellectual property in the digital age. The open source movement is revolutionary, not only for the product that has emerged as a result of the work, but as a viable alternative to the restrictive proprietary system currently understood as copyright law. Open source fundamentally challenges the assertions regarding creativity and quality that accompany copyright. The open source movement also illustrates with great clarity how those with the power to define the narrative operate to close off possible alternative models before they even have the opportunity to develop. Ultimately, this chapter seeks to understand the differences between the public interest and special interests and how these types of interests might be best protected by different licensing agreements.

Chapter Three will evaluate the peer-to-peer movement, MP3s and file sharing. The recent controversy over Napster and its many sister programs illustrates the threat felt by the music industry, and increasingly by the entertainment industry as a whole as the world begins to have access to digital materials. What model ought to govern the future of entertainment? Despite the demonization of Napster by the industry, it has clearly been a model with vast consumer appeal. Additionally, numerous recording artists have recognized the power of a file-sharing network and have used the emergence of Napster and MP3s to publicly criticize the manner in which the industry treats artists. Thus, the Napster case and its surrounding controversy highlights many of the important dimensions of how copyright intersects with artistic activity. Additionally, it highlights that copyright owners are rarely the same as creative artists and that the law needs to take this division into consideration when providing protection. Finally, this chapter discusses the power of disintermediation and the threat to traditional music and entertainment industry representatives.

Chapter Four will shift gears to evaluate the discourse of morality surrounding the patent fights over access to affordable HIV/AIDS drugs. The debate over access to life-saving medication highlights that in some cases what is needed is a new paradigm from which to discuss rights more generally. Prior to the controversy over access to medications to control HIV, drug companies had been very clever at monopolizing the discourse on morality. They successfully labeled anyone making drugs that violated patent rights as “pirates” and “thieves” and utilized the international system of trade sanctions to punish possible infringers. The AIDS crisis in South Africa was an event that made it possible to challenge the discourse of morality created by the pharmaceutical industry. When the South African government was sued by a conglomeration of international pharmaceutical interests for trying to provide affordable access to AIDS medication, the morality of access to life-saving medicines became a central issue. The emergence of a transnational activist network dedicated to resisting the pharmaceutical narrative of property over lives successfully changed the nature of the debate. The moral discourse shifted in favor of the pirates and the drug companies became the evil other. In this chapter I will trace the process of creating a viable discourse of health care as a human right to help highlight what narrative strategies are necessary in shifting the discourse towards the public interest.

Chapter Five also evaluates the world of patent law, focusing specifically on the human body. Biotechnology research, the Human Genome Project and the Human Genome Diversity Project have all focused upon understanding what constitutes a human being at the genetic level. Since the early 1980’s in the United States it was understood that life could be patented and the patenting of life has moved from bioengineered organisms to human genetic material. The quest for scientific understanding is linked to the lucrative possibility of monopolizing ownership of important genetic information. There has been a rush to patent human genetic material that raises important concerns over the ethical nature of this process. The race to own the human body is perhaps one of the more sinister expansions of property rights made possible by the classical Lockean language of property as the product of labor. This chapter attempts to uncover the theoretical assumptions in patent law that become dangerous when applied to humans and human body parts. Critiquing the underlying theoretical assumptions of intellectual property law is an essential part of building resistance and developing alternatives. This chapter offers such a critique and posits an alternative paradigm through which to view scientific research focused on the human body. By

better understanding the way in which we describe a body part as private property, we may be able to develop alternative metaphors that avoid the dehumanizing impact of owning the body.

Chapter Six will investigate the harms of biopiracy and biocolonialism and the possibilities of traditional knowledge systems to construct alternatives to the prevailing international system of intellectual property. Biopiracy has emerged as a serious threat to those living in the global south whose knowledge has become a raw material for Western exploitation. The availability of marketable products that can be appropriated by Westerners from the global south illustrates that there are viable innovative strategies, some of which have existed for centuries that can serve as alternatives to the Western paradigm of intellectual property. Unfortunately, these systems are being exploited by those who embrace the property regimes of the west. Additionally, the global rush to develop TRIPS as the only viable protective model of intellectual property protection arrogantly assumes that the intellectual property models developed by Europe and the United States are the best and only method by which to protect creative work. This chapter will focus on existing systems for protecting traditional knowledge. It is important to evaluate and understand these other orientations towards knowledge and the politics of assuming one way of using knowledge is better than another.

Throughout this book it is important to keep in mind that I use the concept of “intellectual property” very tentatively. I agree, for the most part, with Richard Stallman that the concept of intellectual property is not appropriate. In part, this is true because it tends to lump very different types of legal regimes under the same category and thus obscure the differences between copyright, patent, trademark, and trade secret law. However, the idea of intellectual property also conveys a much more powerful meaning upon the works protected by copyright and patents. It gives copyright and patent law, it would seem, more conceptual power than would otherwise be conveyed by using the words copyright and/or patent. Intellectual property conveys the sense of moral absolute property rights whereas copyright and patent seem to convey the notion of complex legal regimes. Property is too often interpreted as being an absolute right (even though it is certainly not), at thus to use the term at all already skews the debate away from the complexity of balanced rights.

Perhaps the most disturbing thing about having to use the idea of intellectual property is that there is no viable alternative word to use to describe creative and innovative work besides describing it as

someone's property. To discuss this topic it is inevitable that one uses the language of rights and property and this, I would argue, is part of the problem. Thus, while I am very critical of the idea of intellectual property and would like to seek alternatives, I find myself using it because alternatives are scarce and it is easy to use intellectual property to lump together very disparate things. However, as will become clear throughout this book, even the words we choose need to be examined and perhaps rethought.

All told, this book takes the study of intellectual property into a new direction. For me, it is part of a struggle to escape from the law that has now bounded my reality. It is my attempt to move beyond the law into spaces that can be possible without recourse to "rights" or "property." I am not alone in my criticism of these types of laws. There is a growing network of critical intellectual property scholars who are worried about the future of intellectual property law. Most people who fall into this camp understand that there are some valuable benefits from the law, but that it has generally gotten out of hand. There are also people who feel we should do away with intellectual property altogether. These voices are helping to create alternatives and need to be heard. The worst possible future will be achieved if only corporate voices are heard. I hope this book will help develop the public interest and help the future be more sensitive to what might be in that interest. Ultimately, it is important to realize as the Zapatista slogan points out, that another world is possible.