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Intellectual Property and Cultural Appropriation

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Boyle, James 2008. *The Public Domain: Enclosing the Commons of the Mind*. New Haven: Yale University Press.

Hilderbrand, Lucas 2009. *Inherent Vice: Bootleg Histories of Videotape and Copyright*. Durham: Duke University Press.

Johns, Adrian 2009. *Piracy: The Intellectual Property Wars from Gutenberg to Gates*. Chicago: University of Chicago Press.

Kelty, Chris 2008. *Two Bits: The Cultural Significance of Free Software*. Durham: Duke University Press.

Many recent works on intellectual property have been published that come from outside anthropology but offer context for a set of ethical and legal questions central to the discipline, subsumed by the term cultural appropriation. *These questions include concern for the circulation of ethnographic knowledge beyond source communities. Four recent works address the relationship between intellectual property and cultural appropriation. These books do not deal with iconic anthropological source communities. Rather, they offer anthropologists points of entry into debates on cultural appropriation that are of urgent interest both within and beyond anthropology.*

KEYWORDS cultural appropriation, intellectual property rights, ownership

What kinds of things spring to mind when we talk about property? The answer depends on who *we* refers to. To speak of "the concept of property among the X" is to assume that property is a valid category of cross-cultural comparison,

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that culturally specific practices for hashing out who gets to use something at a given moment can be adduced to a set of family resemblances that collectively respond to the label "property." At the same time, the present is witness to an unprecedented global diffusion of one set of facts about what property is—that associated with the culture of knowledge production that grew out of the expansion of European colonial ambitions starting around 1600 and that, since the end of the colonial era, has come to be associated with international development (Elyachar 2005; Mitchell 2005; Sassen 2006).

So, what is the iconic object of property in the legal culture that developed with European colonialism and, since around 1970, has formed the basis for an emerging global legal order? In a word: land (Heller-Roazen 2009:120–123, 163–165). Both in the common law of the British Empire and the United States (during its period of post-Independence westward expansion) and in the civil law of the Dutch and French empires, the exigencies of colonialism endowed land with a characteristic status as an object of property. The capacity of agents of the metropolitan state to create property where none had been recognized before simply by asserting that they had discovered and occupied a particular tract of land was essential to the legal plausibility of colonization (Rose 1986).

To reconcile the principle of exclusive possession of vast tracts of land or even whole continents with the principles of free trade and non-interference among states, theorists of the legal underpinnings of colonization drew a sharp distinction between land and water—open land was a fit object of property, open water was not (Armitage 2000; Dorsett and McVeigh 2002). The distinction was justified with reference to qualities held to obtain uniquely on land by virtue of its material nature. The possessor of a parcel of land could *exclude* other actors from that parcel, if necessary by main force. Moreover, it was not possible for *rival* actors to make use of a parcel of land simultaneously (at least, not if the uses in question were agricultural or extractive—other forms of land use did not rate among theorists of the law of colonization; see Hickford 2006). These conditions did not obtain on open water. In legal systems that trace their origins to the European colonial experience, the qualities of excludability and rivalrousness continue to define the ideal-typical conceptual terrain of property. In the case-oriented world of common law, when law students are taught to think about property in legal terms, the body of case law they draw on by and large concerns disputes over land (Rose 1998). Yet in the past 30 years, courts and law-making bodies have been confronted with the question of how to define property in things that are non-excludable and non-rivalrous—texts, designs, novel life forms, even the public personae of celebrities and the prized status of particular growing regions—things we have come to refer to as intellectual property.

Intellectual property is not new, but it is newly central. It is central to many of the agreements and bodies that define the emergent global legal order alluded to above, among them the Convention on Biological Diversity

and the World Trade Organization (Coombe 1998b). It is central to how developing states understand what it takes to become a global economic power (Sunder 2007). And it is central to a number of the major ethical controversies of the present day, notably those concerning the expansion of access to lifesaving drugs (Kapczynski 2008), the commodification of living things (Hayden 2003; Pottage 2007), and the suppression of private speech at the behest of corporate media interests (Coleman 2009).

The emergence of intellectual property as a defining area of concern in global law is significant for anthropologists in two ways. First, as intellectual property has become a constitutive genre of property, it has played an increasingly significant role in shaping the lives of anthropologists' interlocutors in the field, as well as the terms in which these actors make sense of their own circumstances. That is, intellectual property has become something anthropologists must contend with as an object of inquiry. Second, intellectual property has come to shape anthropologists' subject positions vis-à-vis their interlocutors and the public. That is, it has become something anthropologists must contend with as part of their professional experience.

As an object of inquiry, intellectual property has been associated, within anthropology, mainly with the work of cultural and linguistic anthropologists. It shows up in work on a range of themes, including the micropolitics of international development, the experience of disease, the transformation of agrarian environments, the emergence of ubiquitous mass-mediated advertising as a constitutive feature of urban life, and the ascendance of the online world as a distinctive domain of human sociality.

Political anthropology has taken up the topic of bioprospecting, arrangements in which pharmaceutical concerns seek to capitalize on the botanical expertise of indigenous communities to identify potential new sources of drugs and pesticides. In bioprospecting, the source community's expertise is framed as intellectual property whose use by outsiders must be licensed and compensated (Greene 2004; Hayden 2003; cf. Escobar 2008). Environmental anthropologists have contended with a pair of complementary processes. On the one hand, the past30 years have seen a concerted effort on the part of corporate seed vendors to capture intellectual property in landraces, crop varieties whose characteristics reflect informal innovation among farmers responding to geographic specificities of soil and climate (Brush 2005, 2007). On the other hand, the same seed vendors have pushed farmers to adopt patented commercial cultivars, sold with licenses that prohibit seed-saving among farmers; the effect—many would argue the seed vendors' intent—is to displace local varieties and speed the disappearance of the situated environmental expertise that goes with them (cf. Aoki 2004; Borowiak 2004; Kevles 2007; Stone 2007).

Seed patents are not the only form of intellectual property at issue in the transformation of agriculture. As patented plant varieties edge out local landraces, *terroir*, the character of the local agricultural environment, takes on

novel value as a marker of an increasingly scarce form of agricultural goodwill, spurring on the rise of geographical indications of origin as a new form of intellectual property (Paxson 2008; Sunder 2007). Geographical indications of origin form one part of the object of inquiry of the growing number of linguistic anthropologists and like-minded students of legal discourse calling attention to the attribution of trademark-like statuses to the distinctive characteristics of persons, places, and mass-mediated cultural phenomena. As Mazzarella (2010) and Manning (2007) demonstrate, nothing—from Gandhi to the Color Revolutions of the former Soviet Bloc—is immune to brand remediation. As these examples suggest, political activism has become a fertile source of symbols with commercial appeal. Anthropologists of digital culture have investigated a different aspect of the ongoing textual mediation that defines public life today, asking how the language-like character of so much of what exists and happens in the digital realm shapes how its participants understand themselves as political subjects (Coleman 2009; Coleman and Golub 2008).

Archaeologists and other students of material culture have likewise come to see intellectual property—and, more broadly, the cultivation, transmission, and coercive appropriation of distinctive bodies of technical knowledge, artistic labor, and even brand value—as part of what their work is about. Wengrow (2008) has proposed that the circulation of royal seals in post-Urban Revolution Mesopotamia (fourth millennium B.C.E.) exhibited many of the features we associate with the circulation of commercial trademarks under industrial and postindustrial capitalism. Wengrow's argument exemplifies how archaeologists have started to participate in theoretical discussions about the conditions that make intellectual property. Biological anthropologists have not, thus far, given much attention to intellectual property as an object of inquiry, but this is likely to change. As Gísli Pálsson has lately noted, "Nowadays, life itself is one of the most active zones of capitalist production" (2009:288). Pálsson is among a growing chorus of anthropologists, sociologists of science, and political theorists demanding attention to how expanding legal sanction for private control of the information embodied in the physiological matrix of animal life (gene maps, brain scans, etc.) is reshaping life in the physiological no less than the political and cultural dimensions (e.g., Bennett 2010; Cooper 2008). Yet no one working in this vein, loosely dubbed *post-humanism*, is actively engaged in the investigation of physiological life itself. For anthropologists inclined toward the biocultural paradigm propounded, *inter alia*, by Wiley (2007), which takes the co-evolution of cultural and physiological propensities as its object (as in, say, child-rearing at high altitude or the spread of a taste for cow's milk among adults), the intellectual capitalization of animal life represents an open field.

Intellectual property has not just become part of anthropology's subject matter. It has also come to shape anthropologists' negotiations with their consultants. Archaeologists and biological anthropologists have been forced

to confront the question of what conditions should limit the use and circulation of genetic data and tissue cultures obtained from dig sites or stored in lab freezers for decades (Lock 2001; Nicholas and Bannister 2004; Radin N.d.). Linguists have found themselves entangled in copyright disputes with communities with which they had enjoyed an amicable working relationship for years. Reports on the animosity and confusion occasioned when principal consultants withdrew support for publication at the last minute have become a staple of the linguistics literature on endangered language documentation (Dobrin and Berson, in press; Hill 2002; Simpson 2006). Ethnomusicologists have grappled with their own role, whether of complicity or opposition, in the unsanctioned circulation and predatory copyrighting of musical works whose mass appeal derives from audiences' demand for the exotic (Anderson and Koch 2003; Feld 2000; Goodman 2002; Seeger 2005; Taylor 2007).

Inevitably, cultural anthropologists' realization that consultants may experience the ethnographic encounter as a site of intellectual trespass (rather than or in addition to mutual understanding) loops back into fieldwork. Faced with consultants' anger over what they see as the theft of intellectual property, anthropologists find themselves compelled to "research research itself" (Elyachar 2006:416). Sometimes, the most significant thing unfolding in the field is the community's effort to repatriate knowledge anthropologists have made about them in the past (Christen 2005; cf. Goodman 2002).

The questions that have drawn anthropologists and their consultants into this circuit of reciprocal commentary have in common the fact that they deal with the conditions under which access to that which is valued in a community, but which is non-excludable and non-rivalrous, is granted to outsiders. This is the phenomenon I refer to as *cultural appropriation*. The questions raised by cultural appropriation are both normative and descriptive. Among the normative questions are: When is it acceptable for actors who do not share the social experience common to the members of a marginalized collectivity to witness, experience, adopt, or rework the scientific, artistic, productive, and religious practices characteristic of the cultural life of that collectivity? Why are anthropologists inclined to celebrate, say, indigenous Australians' adoption of hip hop while condemning settler North Americans' adoption of contemplative practices derived from First Nations (Niezen 2000; Stavrias 2005; cf. Keeler 2009)? What makes one look liberating and the other exploitative? How should anthropologists respond when those who claim the experience of marginality promote themselves as authors of the sort of pastiche that would seem irresponsible and corrosive if it originated with better-connected elements of the same society (Hill 2010)?

Among the questions of descriptive analysis and interpretation, prompted by the ethnographic incidence of tensions over access to non-excludable, culturally significant goods are: What circumstances impel actors maneuvering from a position of political and economic marginalization to

adopt the language of intellectual property (as it exists, say, in Anglophone common law or in modern instruments of the global diffusion of Anglo-American legal hegemony such as the World Trade Organization's Agreement on Trade-related Aspects of Intellectual Property Rights)? What happens when states adopt an idiom of property to protect culturally significant expressive forms from contamination while communities and individuals adopt an idiom of exchange, innovation, and re-authorship to promote the role of borrowing in keeping expressive forms vital? That is, when there is a disjuncture in how actors understand the ethical duty attached to cultural reproduction (Aragon and Leach 2008)? As this last question suggests, it is impossible to separate the normative and the descriptive questions, since the descriptive project of the anthropology of intellectual property entails finding out where the actors involved in the work of cultural transfer, including the anthropologist himself or herself, stand on the normative questions.

For this discussion, cultural appropriation is construed broadly. Three of the four books under review come from outside anthropology. These include works by a legal theorist trained as a lawyer in the American legal system and based at a law school, an historian of science, and a cinema historian. The fourth work, *Two Bits*, is by a cultural anthropologist, but in research method and subject matter it represents something of a departure from the canons of ethnographic inquiry (see Faubion and Marcus 2009). These texts may be of use to anthropologists looking for second-order critical traction—looking, that is, not for instances of cultural appropriation good and bad but rather for a framework for thinking about why the debates over appropriation have taken shape as they have.

All four books deal with how cultural appropriation has taken form in the common law (the legal cultures descended from the British Empire) and mass-mediated consumer culture. Notably, none of them discuss what might seem like more obvious cases, in particular, the appropriation of the intellectual and aesthetic traditions of indigenous communities in states formed by settlement colonization. There is no shortage of work on this topic. If anything the literature is expanding at an accelerating pace (Coombe 2009). As the field has matured, participants have grown more confident integrating the ethical and descriptive questions adumbrated above into a single research agenda. A number of anthropologists have used accounts of struggles to facilitate or inhibit the transfer of knowledge from one cultural context to another as a basis for calling into question the helpfulness of legal frameworks derived from property in land for thinking about the intellectual bricolage that characterizes postcolonial settlement society (e.g., Brown 2004). A parallel debate is underway among legal critics as to the usefulness of the property idiom in lawsuits intended to advance the cause of indigenous autonomy (Carpenter et al. 2009). Neither of these literatures situates debates over the ownership and repatriation of native culture in the broader context of the role of intellectual

property as a solvent discourse for an expanding range of contests, many of them not related, in any strict sense, to decolonization. Anthropologists would do well to be aware of how textual appropriation came to be associated both with the theft of cultural patrimony and with liberation from state and corporate hegemony. Hence the focus here on the rise of intellectual property in, as it were, its native setting.

THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND

If there is one person whose name has become associated with legal commentary on the expansion of intellectual property, it is James Boyle. His new book, *The Public Domain* (2008), represents a long-overdue follow-up to his 1996 *Shamans, Software, and Spleens*. Boyle coined the phrase "cultural environmentalism," which has come to stand for a movement among theorists of the common law in support of broad protection for the rights of participants in pervasively mediated forms of public life to appropriate and recombine existing texts to their own expressive ends. He has devoted the past two decades to articulating a legal theory of the public domain, a realm populated by intangible cultural artifacts that have been designated not susceptible to intellectual property claims. The public domain, Boyle has proposed, tongue partly in cheek, represents "the opposite of property" (Boyle 2003a, 2003b), and this is part of the problem. Lacking any doctrinal content of its own, the public domain has been defined by an absence of property, or, more specifically, of private property.

In its current manifestation in Anglo-American law the doctrine of the public domain dates to around 1970, when environmental conservation was gaining momentum as an area of concern for international policy. In the United States, there was a case law tradition, partly dormant since the start of the 20th century, of recognizing certain assets as public goods, necessary to a broad class of constituencies who could not be said to own them in a legal sense, and thus subject to a public trust. The doctrine of the public trust in turn has its origins in the Stoic category of the *res publica*, that which belongs to the state (Rose 2003). With the phrase "cultural environmentalism," Boyle and his allies invoke the public virtue of environmental conservation and imply that access to information is as critical to social justice and human flourishing today as is access to clean air and water and adequate sources of food. Cultural environmentalism is a descriptive theory of the disposition of information as a source of social value. It does, however, entail a particular stance on the legal construal of texts, designs, and ideas as things subject to arbitrary constraints on access at the behest as those recognized as the owners of those information entities. This is not to say that there is no room for disagreement among cultural environmentalists, but participants

in the movement share a sense that it is not in the public interest for human law to impose excludability and rivalrousness on things of value not endowed with these qualities by the laws of physics.

The Public Domain draws together Boyle's work on this theme from a ten-year period. Many chapters have been published previously as stand-alone articles, though some of the material, such as his remarks on synthetic biology (the growing field of molecular biology devoted to the construction of new life forms *de novo* out of purpose-built molecules rather than by genetically altering and combining pre-existing life forms) have not previously seen wide circulation. Although these remarks, which Boyle formulated jointly with fellow Duke University law professor Arti Rai, have not had wide exposure, the recent announcement of the first novel life form created solely by synthetic means lends them new significance (Sample 2010).

The writing is chatty and accessible throughout, making the book a good place for those unfamiliar with the discursive conventions of law reviews to get a sense of how lawyers think about the relationship between intellectual property and culture. This is Boyle's central aim. He wants readers *not* socialized in the legal profession to become aware of the flawed reasoning, misguided interpretation of precedent, and subservience to corporate commercial interests that have led courts and legislatures in the United States, the European Union, and elsewhere to endorse an ever more expansive ontology of intellectual property. Boyle argues that intellectual property expansionism has created a cultural environment in which principles essential to public discourse in a liberal society have been undermined. These include the protection of satire and other forms of unlicensed textual re-appropriation whose ends may not be appreciated by copyright and trademark holders. Among Boyle's principal examples of intellectual property expansionism run amok is the Digital Millennium Copyright Act (DMCA). Enacted in the United States in 1998, the DMCA was nominally intended to bring U.S. copyright law into conformance with new provisions of the World Intellectual Property Organization. The Act makes it illegal to produce or circulate software intended to circumvent digital rights management (DRM), cryptographic measures incorporated into digital media formats to prevent unsanctioned reproduction. The problem is that media vendors' definition of "unsanctioned reproduction" is significantly broader than that afforded under copyright law prior to the DMCA, and in fact there is a range of uses that do not infringe on copyright that have been outlawed by the DMCA's anti-circumvention clauses. In effect, the Act has trimmed long-standing common law, appellate law, and statutory understandings of personal use and fair use to conform to media vendors' aspirations to use DRM to dictate terms of use (Boyle 2008:85–117; cf. Coleman 2009:435).

Boyle's theory of cultural environmentalism offers a compelling account of the danger posed to the public by a property regime in which the Digital Millennium Copyright Act passes without comment. What cultural

environmentalism does not offer is a theory of the public for whose benefit the public domain must be defended. Commenting on the constitutive role in contemporary public discourse of collectivities defined not by a common sense of political purpose or cultural identity but by the shared consumption of a set of texts, literary theorist Michael Warner (2002:50) argues that "[t]he idea of *a* public, as distinct from *the* public and any bounded audience, has become part of the common repertoire of modern culture." In extensively mass-mediated societies populated by an array of overlapping, fluid, and at times ephemeral publics, we should not assume that all publics stand equal before the law. Both cultural environmentalism and particular movements on behalf of access to medicine and access to knowledge (Kapczynski 2008) have attracted criticism for fostering a "romance of the public domain" (Chander and Sunder 2004). By "romance of the public domain" or "romance of the commons" critics have in mind the view that disallowing restrictions on the free circulation of information is an unequivocally democratic move, that is, that the public domain is equally accessible to all members of a society. Proponents of this view overlook the fact that demand for an expanded public domain tends to come from those publics that are well-positioned to access it.

This critique is of special relevance to anthropologists, who often fined themselves, by intent or otherwise, mediating the transfer of knowledge from disenfranchised communities to politically dominant media publics. Are there times when expanding access is not appropriate, say, when indigenous communities should exert protectiveness toward intellectual resources not dissimilar to that of highly capitalized vendors of processed foods and entertainment media? As Kimberly Christen comments on her field collaborators, Warumungu women of the Northern Territory, Australia, "The particular concerns articulated by indigenous leaders form an odd synergy with corporate giants," notwithstanding divergent motives (Christen 2005:328). This may reflect, as Christen, citing Boyle, contends, the absence of a positive theory of the legal disposition of *materia incorporea*. Or it may reflect the failure of the law, and of most intellectual property theorists, to characterize in any but the broadest terms who is to be served by declaring some particular body of data an inappropriate object of private property claims.

TWO BITS: THE CULTURAL SIGNIFICANCE OF FREE SOFTWARE

Outside of indigenous cultural intellectual property, perhaps no phenomenon has prompted so much debate on the limits of a liberal ethic of access to information as open-source software. In *Two Bits*, Chris Kelty reflects on his time spent observing the open-source software scene starting in the late 1990s. He argues that publics are constituted not just by the production and circulation of texts comprising generically coherent discourses but

by reflexive commentary on the norms that legitimate the production and circulation of those texts. In some cases, Kelty observes, a public comes to adopt the reflexive reworking of the circumstances of its own production and reproduction as the main source of inspiration for its continuing existence. Such publics Kelty dubs *recursive*: "*vitally concerned with the material and practical maintenance and modification of the technical, legal, practical, and conceptual means of [their] own existence*" (Kelty 2008:3).

Disclosure: I participated in the public Kelty is describing. Notably, during a fleeting moment in 2000, I was responsible for managing a handful of projects at a company called CollabNet. CollabNet's "value proposition," in the lexicon of the day, was that every company whose business even remotely involved producing software needed an "open source strategy." Indeed, they had attracted a few very big companies as clients. In the ten years since, the oppositional and pluralist vision of the open-source movement has been diluted by the use of open-source licensing by Apple, Google, and other firms as a strategy to cultivate credibility with independent software developers and, by extension, to develop market share as application platform providers. Why did open source attract such cultural cachet? And what broader ramifications for control of intellectual production has the open-source moment had? These are Kelty's questions. His answers revolve around what he sees as the novel status of the recursive public as a social formation uniquely suited to stimulating collaborative creativity, an argument I take issue with below.

Anthropologists familiar with the AnthroSource controversy, in which the executive leadership of the American Anthropological Association rejected members' interest in exploring an institutional commitment to open-access publishing out of fear for the loss of journal revenue (Golub 2007; Jaschick 2007), will grasp something of what Kelty calls "the cultural significance of free software." Long before the open-access movement took hold in academic publishing, the liberating potential of publics founded on a commitment to sharing information had appealed to students of production realms with no apparent relation to software. Take apparel manufacture, for instance. Just at the moment when open-source software was gaining widespread visibility, a trio of political scientists put forward a vision of a public for mass-produced apparel defined as much by ongoing reflection on the circumstances in which, say, running shoes are produced as by the consumption of running shoes. They envisioned a cultural environment in which "firms that claim outstanding social performance [can] credibly document their accomplishments to the public in a way that compels emulation by laggards" (Sabel et al. 2000:1). That is, by getting consumers "vitally concerned with the material and practical maintenance and modification of the technical, legal, practical, and conceptual means" of the apparel industry, regulatory bodies could insert into the industry a mechanism for its recursive evolution in terms of criteria set by the clothes-buying public. Sabel et al.

(2000:26) cite software developers' concern to promote open standards, though not open-source culture specifically, as an inspiration. Ten years later, reflecting on growing consumer awareness of the sweatshop conditions under which highly sought-after mobile computing devices are assembled, the *New York Times*'s consumer culture critic made the connection explicit (Walker 2010).

Social scientists have been slow to see the relevance of the open-source analogy to their own circumstances of production (Jackson 2009; cf. Litman 2006), a fact that seems to guide Kelty's choice of coverage in the second half of *Two Bits*, when he turns from software to other forms of knowledge-making, in particular college textbooks. Toward the end, he discusses the founding of Creative Commons, a nonprofit organization that develops legally enforceable licenses to allow authors to open up access to their work, for example by allowing others to produce derivative works as long as they include an attribution of authorship to the original author and are distributed exclusively for non-commercial purposes. Creative Commons licenses represent a challenge to the structural conventions of media markets, since by offering authors a way to give up control of distribution without giving up claims of authorship, they call into question the premise that consumers should pay distributors for access to texts. Until recently, it was difficult for most participants in commercial media markets to imagine any other way that authors and distributors might be compensated. But this is changing. In June 2010, to take just one example, the Libraries of the University of California invoked open-access alternatives in a bid to force the Nature Publishing Group to lower its quote for online access to the publisher's journals (Farley et al. 2010; Salo 2010). If, as Kelty suggests, the pluralization of market forms for media goods represents an outgrowth of open-source software, this would indeed bespeak cultural significance.

Ultimately, however, I come away from Kelty's book with no clear sense of what enduring significance the open-source software movement might have for the just circulation of knowledge. The apothegm "Information wants to be free" is the product of a particular set of historical circumstances. Wanting information to be free is a political act, one that can have the effect of producing or reproducing a discursive environment in which some actors are better positioned than others to express desires about information or anything else. I wanted Kelty to do more to take apart the vision of freedom, justice, and equality engendered by open-source and open-access activism. I agree with him that free software has cultural significance. The question remains, what kind of significance, and for whom?

Kelty does an excellent job explaining arcane pseudo-debates from 1980s hacker culture in terms accessible to non-initiates. What is missing is any systematic effort to situate these narrative set pieces in the broader field of political circumstances in which hacker culture emerged. Hacker culture (at least, as it existed at the time open source entered broader public

awareness) was in no small part an outgrowth of one specific social formation, the Northern California back-to-the-land movement *circa* 1970 (Turner 2006; Johns 2009, discussed below, presents this history in capsule form). We cannot make sense of open source without considering how it relates to the do-it-yourself idealism embodied in *The Whole Earth Catalog*. We have to take into account how architect Christopher Alexander's theory of the pattern language inspired a generation of software developers (Alexander et al. 1977; Gabriel 1996).

My own view is that the significance of hacker culture for the future of property regimes in intangible expressions of collective creativity has less to do with a distinctive form of reflexivity engendered by the practices involved in constructing software than with the fact that, owing to the political surround in which it developed, North American hacker culture became a vehicle for a particular set of attitudes toward property and liberty (cf. Coleman and Golub 2008). That is, the political stance we associate with open-source software may owe less to the technical requirements of hacking than to the fact that hacking started out, ironically, as one part of a broader project of getting off the grid of U.S. consumer culture. In this respect, it would be helpful to have accounts of the professional culture of software production prior to 1990 in other places, say the Soviet Union or Japan (for steps in this direction, see Gerovitch 2002 and Traweek 1988). One hint that the open-source movement was driven by ideology first and technology second comes from episodes in which the technical ambition of open-source hackers outstrips their capacity to run a project in a way consistent with open-source ideals. The ensuing debates reflect a pattern common to modern social movements over the degree to which a movement must be *prefigurative*, that is the degree to which life within the movement must reflect the ethical and political project the movement seeks to bring into the world at large, even at the expense of operational capacity (Polletta 2002). Kelty (2008:232–236) describes one such controversy in the open-source movement, the 2002 decision by Linus Torvalds, the charismatic prime mover behind the Linux operating system, to adopt proprietary, closed-source software to manage the coordination of the many developers contributing to Linux. I would have liked to see greater attention to this sort of incident.

Kelty's notion of the "recursive public" does not, in my view, represent a more precise way of characterizing the "public" in "the public domain." Agha (2007) argues that all publics, in fact all speech communities, exhibit metapragmatic reflection, that is, a tendency on the part of speakers to treat norms of discourse as a central object of social life and to dedicate a great deal of social interaction to tinkering with those norms. This sounds like recursion, as Kelty uses the term. It is an empirical question whether some publics are so much more metapragmatically recursive than others—so much more defined by participants' inclination to intervene in the public's norms of

discourse production—as to warrant the label recursive. Arguably, some publics are more invested in the production and circulation, as opposed to the consumption, of texts than others: open-source software developers on the one hand, moviegoers on the other. Still, as demonstrated by the next two authors I consider, Johns (2009) and Hilderbrand (2009), since media publics have been taking an active role in mapping the terrain of socially acceptable forms of textual appropriation since long before the Internet era, generally to the annoyance of highly capitalized producers. Piracy, these authors argue, has shaped the discursive construction of the public that Kelty is responding to. Anthropologists' failure to recognize metapragmatic recursion as a general phenomenon of social life reflects a long-standing commitment to understanding language as beyond the grasp of introspection and free of reflexive rationalization (Briggs 2003). It may also reflect, as Johns's account in *Piracy* suggests, a want of historical context.

PIRACY: THE INTELLECTUAL PROPERTY WARS FROM GUTENBERG TO GATES

Johns's background is in the history and philosophy of science. His work reflects a thematic concern with the material practices of textual production and reception. This concern represents part of a broad and ongoing interest in "inscriptional practices" that has been influential in science studies since the late 1980s. Johns's own previous work, *The Nature of the Book* (1998), exemplifies the first wave of this "document turn." The focus on practices of document production within science studies predates that within anthropology (Feldman 2008; Riles 2000, 2006; Stoler 2009), and the anthropology of documents would benefit from more sustained dialogue with the work of Johns and his colleagues in the sociology of science (e.g., Biagioli 2006; Biagioli, Jaszi, and Woodmansee, in press).

Johns argues that, while we think of intellectual piracy as a phenomenon whose conceptual existence is contingent on that of intellectual property, historically, the reverse was the case. Intellectual property came into being as a legal category largely through the efforts of those in a position to seek rents from patents and copyrights to specify what exactly was legally abhorrent about the unsanctioned re-appropriation of inventive and authorial creativity (Johns 2009:287). The scope of Johns's work defies easy summary, but its import for anthropologists of all stripes can be stated this way: The past 40 years have witnessed the rise of an "intellectual property defense industry" (2009:498) whose influence on property law and mass media markets has shaped how everyone who lives in pervasively mediated public spaces thinks about what kind of limits should obtain on property owners' capacity to control public access to and re-appropriation of texts, designs, life forms, and brand personae. In order to appreciate how

impoverished our understanding of the necessary limits to private intellectual property have become, we need to see this intellectual property defense industry as the institutionalized realization of a pattern of anti-piracy rhetoric on the part of highly capitalized producers of media, *materia medica*, and all kinds of value-added goods stretching back more than 300 years. As an anthropologist, whether you are, say, evaluating your own responsibility to honor the legally unenforceable demands of source communities or their descendants for the repatriation of tissue samples and botanical knowledge that by dint of historical events "belong" to you, your institution, or a global pharmaceutical concern, or whether you are looking for a context for your consultants' adoption of the idiom of intellectual property to describe their relationships with other constituencies, Johns's account will strengthen your capacity to keep in mind that there is nothing natural or inevitable about the structure of contemporary intellectual property disputes.

Johns traces the modern doctrines of patent and copyright to 17th-century Britain, where printers and booksellers asserted an exclusive right to produce, warehouse, and retail copies of particular texts—above all, compendia of the common law, necessary references whose printing had been authorized by royal patent for a number of generations prior to the civil war. When, in the 1640s, royal authority ceased to carry force, enterprising printers took the opportunity to register themselves with the publishing industry's trade association as issuers of the coveted legal compendia. In the 1660s, with the monarchy restored, a struggle broke out for control of the patents, prompting a debate as to the existence, nature, and practical distribution of literary property that lasted 50 years (2009:31). The resulting *Act for the Encouragement of Learning* (1709) satisfied no one (2009:114). Printers had angled for a vision of copyright as a kind of property subject to transfer as easily as land. Title to a literary text would originate with the author, springing from the labor invested in the writing process. The authors would alienate this title to the printer, who would then own it outright. Some prominent authors, by contrast, argued that authors should have title to their works in perpetuity. The 1709 *Act*, often referred to as the Statute of Anne, was ambiguous as to whether literary property was a natural category of property with a metaphysical basis in creative labor or simply a legal contrivance. It limited publishers' initial copyright to 14 years.

In the same era, the Royal Society afforded a new venue for the circulation and reception of scientific observations and inventions. In the meetings of the Royal Society, making public the apparatus and methods by which one had arrived at a discovery and allowing one's work to be subject to inspection, critical commentary, and independent reproduction was central to the epistemic verification of scientific facts. Publication, in other words, was to be as much a part of the scientific enterprise as forming hypotheses and conducting experiments, and priority disputes were to be resolved through open, civil deliberation. Good intentions notwithstanding, the Royal Society quickly

became a forum for claims of propriety and idea theft, with Isaac Newton and Robert Hooke trading accusations over ownership of the discovery of diffraction (2009:64–71). It was in this context, Johns argues, that the first antecedent to what we would call pharmaceutical patents arose out of disputes over processes for isolating the purgative salts from the springs at Epsom (2009:83–108).

In the second half of the 18th century, Johns shifts the scene to the North American colonies and then the nascent United States. He argues that a lack of respect for metropolitan conventions of copyright and patent functioned as a badge of civic virtue in the early Republic. What publishers and manufacturers in London called piracy was often regarded, in the United States, as a patriotic duty—one that, in the extreme, might lead an ardent republican to financial ruin in the pursuit of a society founded on the free circulation of information (2009:210).

By the end of the 18th century, a consensus was emerging in North Atlantic jurisprudence "that literary authorship and invention were not radically distinct kinds of things. Both were manifestations of some common power . . . [that] gradually came to be called *creativity*" (2009:247–8). This is not to say that there was a consensus on the legal status of creativity as a basis of property, and the 19th century saw a series of debates across Western Europe on whether patents were worth the conceptual and practical trouble they caused. After 1850, a movement to abolish patent took hold in Britain, predicated in large part on an appeal to the collective, sedimented, and processual nature of invention (2009:271). Abolitionists further argued that the inevitable dominance of the patent system by metropolitan inventors and their commercial assignees and legislative allies would impede the extension of British intellectual superiority to the new colonies of the Pacific. Amid speculation as to the possibility of a global federation comprised of Britain and its settler colonies—a "Greater Britain" (Bell 2007)—this was a compelling argument, and one that led to the reform of the patent law, though not its outright abandonment (Johns 2009:279–89).

For me the most interesting section of *Piracy* is the suite of chapters treating the rise of recorded music and broadcasting as prime sites of contestation in the debates over the legal status of intellectual piracy. Johns makes his point about the value of an awareness of historical precedent clear at the outset:

> It is the beginning of a new century, and the music industry is facing a crisis. New technology, new media, and innovative business practices are challenging the copyright principles that have underpinned the industry for as long as anyone can remember. Taking advantage of a revolutionary process that allows for exact copying, "pirates" are replicating songs at a tremendous rate. The public sees nothing wrong in doing business with them. . . . They are, they claim, bringing music to a vast public otherwise entirely unserved. Many of them are not businesses

> on the traditional model at all, but homespun affairs staffed by teenagers and run out of pubs and even bedrooms. (Johns 2009:327)

He is referring to the piracy of sheet music piano scores for popular songs in the first decade of the 20th century. And like the Recording Industry Association of America in the 20-oughts, the major sheet music publishers a hundred years earlier were determined to maintain their business model at the cost of whatever shreds of public goodwill they had, even if it meant setting up a private police force to hunt down and arrest sheet music pirates, pouring profits into legislative lobbying for stronger copyright, and staging test cases against smaller competitors in the courts.

The chapter that follows discusses the origin of the British Broadcasting Corporation and the divergent conceptions of broadcast piracy that took hold in Britain (where piracy was defined mainly in terms of unlicensed reception of broadcasts, and it was radio and television *audiences* who were the prime targets of piracy legislation) and the United States (where the distribution of radio spectrum became the main concern, and the pirates were unlicensed broadcasters). At length, via a discussion of AT&T (American Telephone & Telegraph Company) and phone phreaking, the piratical appropriation of telephony, Johns arrives where Kelty begins: with the rise of hacker culture.

Among the topics notably absent from *Piracy* is biological intellectual property. There is a substantial literature devoted to biological intellectual property (e.g., Sunder Rajan 2006; Waldby and Mitchell 2006). But in an account of the making of intellectual property centered on the notion of piracy, life form patents and biopiracy merit more than passing reference. No legal phenomenon has recast debates over the nature and limits of intellectual property over the past 40 years as profoundly as life form patents (Pottage 2007; Pottage and Sherman 2007). Moreover, if we follow Johns in his argument that piracy has, since the late 17th century, been the central figure in the rhetorical apparatus of intellectual property expansionism, charges of biopiracy (coming, variously, from farmers' rights activists and opponents of cell-line patenting) represent civil society actors' appropriation of the rhetoric of Big Capital toward antithetical ends.

Nor does Johns deal with trademark. A case could be made that trademark, with its ramifications in doctrines of celebrity and ethnic persona, geographical indications of origin, pharmaceutical nomenclature, software interface "look and feel," and "spatial products" (Easterling 2005) has been the most fecund of the forms of intellectual property whose debut in international law predates the intellectual property expansion of the past 40 years. In the long run it may be trademark, not copyright, that has the more profound implications for the role of textual appropriation in the practice of liberal citizenship (Coombe 1998a; Public Knowledge 2009). Two trademark-like concepts, geographical indications of origin and ethnic

persona, have become central to debates about cultural appropriation and the status of indigenous knowledge as intellectual property (Bunten 2008; Sunder 2007).

Piracy is a big book in every sense, and strictly on technical grounds, as a work of narrative historiography, it is humbling: the range of textual genres, archives, and sources Johns had to master and keep in play over the ten years it took him to research and write this book, not to mention the arcana of broadcast electronics and telephony he had to explain, should inspire admiration from all historians and anthropologists. By Johns's own admission this is a partial account, tracing one of any number of possible itineraries through the history of intellectual property.

The chronological scope of Johns's work lends force to his indictment, in the concluding chapter, of the "intellectual property defense industry [that] began to take its current form in the 1970s" (2009:498), an industry whose operations have shaped, *inter alia*, the Motion Picture Association of America's aggressive denial of fair use and personal use exemptions for DVDs and the World Health Organization's stance on pharmaceutical counterfeiting. What is missing, what one could not ask of a book such as Johns's, is a sense of the lived experience of piracy. Is there something we could call a bootleg sensibility, or maybe multiple, medium-specific bootleg sensibilities?

INHERENT VICE: BOOTLEG HISTORIES OF VIDEOTAPE AND COPYRIGHT

In *Inherent Vice*, cinema theorist Lucas Hilderbrand addresses this question. Hilderbrand argues that bootlegging, or consumer piracy, has been as central to the rise of the intellectual property defense industry as the producer piracy that Johns focuses on. What is more, Hilderbrand stresses, bootlegging rewires the aesthetic standards associated with source genres in ways that are specific to the medium of duplication. Hilderbrand proposes that analog video offers an object lesson in what he calls the "aesthetics of access"—i.e., the value audiences attribute to marks in the text itself that attest to the central role of illicit duplication in making the text available. In both these emphases—on user reproduction and on the role of an aesthetic of access in fostering a bootleg culture—Hilderbrand's text serves as a useful complement to Johns's.

By centering his analysis on the introduction of videotape—marketed, initially, as a way for television viewers to record programs for personal use—Hilderbrand draws into focus the fact that commercial organs of media production have long portrayed limiting the circumstances of consumption, no less than production, as essential to maintaining a healthy civil society in an age of pervasive mass mediation. His discussion of the Vanderbilt University Television News Archive (VTNA) makes this clear.

Initiated in 1968 and conceived, ironically, as a way to gauge the nightly news broadcasts to see if they exhibited a liberal bias, the VTNA soon became the focal point of a debate in the United States over the status of fair-use exceptions to copyright in the broadcast era. The Nixon administration was soon using the archive to parse the news to a level of detail it was not designed to withstand. In the administration's hands, omissions and inaccuracies of a sort unavoidable in a broadcast produced the same day as the events it covered became evidence of malice. In this way, the administration succeeded in badgering the networks, CBS (Columbia Broadcasting System) in particular, to tone down reports critical of the government's actions (Hilderbrand 2009:132–133). In 1973, CBS sued Vanderbilt University, arguing that, far from serving the public interest by expanding access to the news broadcasts, the VTNA subjected the news media to a threat of surveillance that exerted a chilling effect on journalistic integrity. Hilderbrand notes that the CBS suit against Vanderbilt anticipated the Digital Millennium Copyright Act by 25 years, effectively demanding that the legal scope of intellectual property expand to fill the possibilities for controlling access afforded by the technical character of the medium of reproduction (2009:145–146).

Elsewhere in *Inherent Vice*, Hilderbrand focuses on instances of audience participation in the circulation of media texts that more directly anticipate the mash up culture associated with streaming video websites such as YouTube. It is here that his notion of aesthetics of access comes into play. The legibility of signal on analog video degrades with tape use, especially pausing, rewinding, and fast forwarding, which stretch the tape. The signal also degrades with duplication, with each generation further removed from a live recording or film-to-video transfer exhibiting more of the characteristic graininess, smearing, warping, audio degradation, and unreliable tape-speed tracking we associate with analog videotape. Tape degradation, an artifact of bootlegging, Hilderbrand argues, is an integral and iconic aspect of the video-sharing experience. Celebrity pornography (the Rob Lowe sex tapes, the Pamela Anderson and Tommy Lee sex tapes) would not look right without the material indicia of surreptitious reproduction (2009:66–72). I defy readers to identify another academic text with figure captions comparable to "Rob Lowe approaches the bed to join in a *ménage à trois*" (2009:69).

This is the case even with texts that were originally shot on film and intended for distribution as films but have been rendered illicit through intellectual property disputes. Hilderbrand's exemplary instance here is director Todd Haynes's 1987 student film *Superstar: The Karen Carpenter Story*, which uses Barbie dolls to tell the story of the rise to fame and death, in 1983, of complications from anorexia, of pop musician Karen Carpenter, known for singing the hit songs "(They Long to Be) Close to You," "Rainy Days and Mondays," and "On Top of the World." In 1989, Richard Carpenter, Karen Carpenter's brother and partner in the Carpenters' act, secured an injunction against the screening of *Superstar* on the grounds that Haynes

had not cleared the rights to use the Carpenters' music. The Carpenters' label and the Karen Carpenter Estate further contended that the film made unauthorized use of the Carpenters' personae and biography (2009:170–172; Coombe 1998a: chap. 2 discusses the emergence of celebrity persona as a genre of intellectual property at U.S. appellate law). Haynes was also under pressure from Mattel, maker of Barbie, which claimed both that the film diluted the Barbie brand by associating the doll with death and violated patents on the doll's physical form (2009:171). Hilderbrand's account of the subsequent exhibition history of *Superstar*—clandestine, overwhelmingly in nth-generation videotape dubs shown late at night, only rarely in 16 mm prints, referred to in promotional materials with code words—could fill a book on its own.

It is no surprise that Hilderbrand has great affection for his material as cinema. Yet he is just as conscientious in his presentation of the legal aspects of the story. He gives an in-depth treatment of the "Betamax case," *Sony v. Universal*,[1] in which the U.S. Supreme Court affirmed that making copies of broadcast works under copyright for personal use is protected. He goes beyond Boyle's discussion of *Sony v. Universal* to ask why the Court chose to ground its argument for the legitimacy of videotape time-shifting in the fair-use doctrine rather than personal use (2008:93–98). Furthermore, he discusses the relevance of the Betamax case to more recent cases involving peer-to-peer file-sharing networks (2008:109–113).

DISOWNING AUTHORSHIP

The audience for *Inherent Vice* may be more specialized than that for Johns's *Piracy*, but Hilderbrand's book is broadly relevant to anthropologists for the attention it gives to textual appropriation's subversive potential. This is not a new theme, but it is one that more anthropologists need to be reminded of in the context of contemporary debates over intellectual property and cultural appropriation. We do well to keep in mind the "odd synergy" pointed to by Christen between her Warumungu collaborators and, say, pharmaceutical, agricultural, and entertainment media giants. Forced to choose, on the one hand, between denying that so-called traditional knowledge can ever be construed as intellectual property as it is defined in Anglophone and international law, and, on the other hand, affirming that all traditional knowledge is, *ipso facto*, the intellectual property of well-defined communities of origin with well-defined agendas as to the disposition of that knowledge, it is no surprise anthropologists have tended toward the latter. If anthropologists were to oppose traditional knowledge to intellectual property—i.e., we have intellectual property, they have traditional knowledge—we might easily slide

[1] *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

toward incarcerating indigenous collectivities, to borrow Appadurai's (1988) term, in a temporal bubble within which culture is static and unresponsive to new demands (Kirshenblatt-Gimblett 2006; Sunder 2007). Moreover, intellectual property often seems to be the only legal idiom available to protect disenfranchised communities from the injustice of the unsanctioned re-appropriation of culturally significant texts. But assimilating all forms of representational labor to intellectual property is not without its dangers. To argue that re-appropriation is necessarily unjust whenever author-custodians are at a political disadvantage vis-à-vis appropriators is, again, to imprison ethnographic source communities, this time in a bubble of cultural sacrosanctity.

I am not proposing that the challenge file-sharing poses to major record labels bears generic comparison, say, to the challenge the reproduction of Yolngu artist Wandjuk Marika's sacred clan designs on a Dutch line of tea towels poses to Indigenous Australians (Myers 2004:7–8), or that it would be inconsistent to champion the former while condemning the latter. But anthropologists have a responsibility to question whether insisting on the right of indigenous communities to negotiate the terms of their participation in a broader economy of signs might not, at the limit, entail denying these communities a certain depth of political subjectivity. Johns's and Hilderbrand's arguments suggest that authors (construing authors broadly) losing some control over the conditions of reproduction of texts plays a role in the development of authors, no less than of consumers, as members of a public. Is it possible that, up to a point, the "bad kind" of cultural appropriation might contribute to, might even be essential to, the regeneration and reinvention of the intellectual and aesthetic apparatus of worldviews distinctly at odds with those of socially normative media publics?

Bracha (2008) has called attention to the corrosive effects of the "ideology of authorship" in U.S. appellate copyright jurisprudence. By this he means that the imputation to copyright of a moral grounding in the creative work of textual creation has served to obscure the fact that, more often than not, what is at stake in copyright disputes is not the moral integrity of a human being or community of human beings whose sense of self is bound up with the production and reproduction of expressive works, but the prerogative of a commercial entity to dictate terms for the reproduction of certain texts so as to maximize rents and cultivate its brand. This ideology was not, Bracha stresses, fully formed in the theories of literary property that the United States inherited with British common law, but has developed as case law over the course of the past two centuries. The outcome has been a tendency of courts, at least in the United States, to ascribe to all copyright holders the moral status that provides the implicit metaphysical basis for citizenship and the rights associated with natural personhood, in particular freedom of expression. The recent decision in *Citizens United*,[2] in which

[2]*Citizens United v. Federal Election Commission*, 558 U.S. (2010).

the U.S. Supreme Court struck down long-standing restrictions on the circulation of media produced by third parties on behalf of electoral campaigns in the run-up to elections, represents the logical endgame of this ideology of authorship: no longer can corporate legal persons be denied the status of authors entitled to make their voices heard in the public sphere.

In this context, perhaps part of the explanation for the "odd synergy" observed by Christen is not, or not simply, that we lack the legal vocabulary to distinguish among different kinds of authors who should be accorded different kinds of protection from appropriation, but that the concept of authorship itself is tainted, or that authorship and ownership are merging as legal concepts. Anthropologists must ask whether the decolonization of intellectual property should really boil down to a reassignment of title to different owners/authors. I would argue we would be better served in the long run by a more profound reconsideration of the sedimented forms and usages of the common law legal tradition. It was these, after all, that provided a good share of the ideological justification for colonization in the first place.

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