

M.A. MAJOR RESEARCH PAPER

**CREATIVE EXPLOITATION:
INTELLECTUAL PROPERTY AS A FORM OF NEOLIBERAL CULTURAL POLICY**

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May the future offer you access to your dreams.

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I

INTRODUCTION

Until relatively recently, intellectual property (IP) has largely gone unnoticed as a subject deserving of widespread public interest and scrutiny. In the past twenty-years, it has garnered increasing attention from a growing number of academics across a range of disciplines and from an ever-growing number of stake-holders in society. Several interrelated factors have contributed to this spark in interest in IP. The rise of digital technologies and the internet through the 1990's created a "networked society" (Castells 1996) that has brought greater attention to the exchange and control of knowledge and culture in a range of human activities.¹ The push towards global

¹ An excellent survey of various definitions of "knowledge economy," "information society," and similar terms can be found in the appendix of the Carlaw et al. (2007) book chapter "Beyond the Hype: Intellectual Property and the Knowledge Society/Knowledge Economy." Carlaw finds that "quantifiable, non-circular" definitions are frustratingly absent" but that "'knowledge' and the resultant role of IP creation and protection are a key component in all the cited authors' discussions." As Sorlin and Vessuri (2007:1) state, "[k]nowledge economy' and 'knowledge society' are concepts that reflect the growing importance of knowledge in our contemporary world. They underscore that whether we speak of the economy, or indeed society as a whole, the knowledge

neoliberalism, reflected in the creation of the World Trade Organization (WTO) and its control of the Trade-Related Aspects of Intellectual Property Rights (TRIPS), has resulted in a phenomenon that Toby Miller (1996) dubbed the “new international division of cultural labour” (NICL), which is marked by the shift towards the production of intangible or informational goods as a key driver of industrialized economies. Also, the increasing overlap between culture and the economy in postmodern society, in what Frederic Jameson calls “the cultural turn” (1998) focused attention on the commodification and consumption of culture in everyday life.

These interrelated developments have all contributed to an increased interest in, and a greater awareness of the importance of issues surrounding IP and the ownership of intangible property it enables. Despite the moral and utilitarian justifications traditionally used to justify IP, there is ample evidence that the practice of enforcing IP actually serves to undermine these, while also jeopardizing many of the principles of free, democratic, and plural societies, including free speech, cultural vibrancy, and human rights. As IP has risen to the centre of industrialized economies, so have the stakes of its impact and consequence. The more IP is regarded as an area of economic and trade policy, the more important it is to assert IP as a policy area with other important human implications. While IP is certainly an economic issue (as are formulations of property in general), its naturalization as *primarily* or fundamentally an economic issue is politically and ideologically charged. At a time when digital technologies have created new possibilities for the exchange of information, knowledge, and culture, IP has inhibited many of the opportunities for democratizing the flow of culture and knowledge they afford. This raises several important questions about the nature and intent of IP: Does copyright support or restrict creativity? Does patent law benefit society or does it undermine social goods? Does IP

component is so crucial that it can be made to characterize both.”

concentrate or distribute power?

I argue that IP has become a form of neoliberal cultural policy. According to David Harvey (2007a: 21), “[N]eoliberalism is a theory of political economic practices proposing that human well-being can best be advanced by the maximization of entrepreneurial freedoms within an institutional framework characterized by private property rights, individual liberty, unencumbered markets, and free trade,” and that “The role of the state is to create and preserve an institutional framework appropriate to such practices.” Despite the centrality of commercial interests in the creation of IP from its earliest historical beginnings, IP rights have traditionally been the result of a negotiation between private and public interests oriented towards the social good. With the rise of IP to the centre of industrialized economies, this social orientation seems to have been replaced by an exclusive focus on private rights, particularly the right to profit. I will argue that IP's original character as a cultural and social policy to promote learning and creativity with the aim of producing tangible benefits for society by empowering creators has been replaced with the tendency to view IP as economic and trade policy centred on increasing private wealth, where the primary stakeholders in issues surrounding IP are private parties committed primarily if not exclusively to the accumulation of capital. This shift in focus has stripped IP of its social dimensions, drawing attention away from its cultural and social consequences. Just as neoliberalism adopts classical liberal theories while ignoring their fundamental moral characteristics (W. Brown 2003), IP has been adopted as a tool while being voided of its substantive social and cultural objectives. It is these goals – creativity, education, cultural diversity, social vibrancy – that suffer as a consequence of IP's reorientation as policy directed towards economic objectives rather than social or cultural ones. The current practice of IP results in: undue restrictions on free speech and creativity (Amani forthcoming 2013; Gordon

1993; Netanel 2008; Vaver 1990); the expansion of markets into all spheres of cultural life (Coombe 1998; Jameson 1998); the reorganization and fragmentation of global labour (Gill & Pratt 2008; McGuigan 2004, 2009; Miller 1996, 2010; Ross 2008, 2009; Rossiter 2003); the destruction of biodiversity (Prudham 2007), unequal access to technology, knowledge, and medicine (Draho 2003; Halbert 2005); the concentration of economic and cultural resources (Harvey 2002; May 2002) leading to a widening gap in social power between corporations and citizens (Bettig 1996; Halbert 2006); and the increased marginalization of already marginalized groups (Coombe 2003; Amani & Coombe 2005). To many, these developments present significant cause for alarm.

The convergence of the internet, the symbolic economy of knowledge and culture, and the globalization of IP has created a perfect storm for global capitalism (Foster & McChesney 2011). While the internet was once attributed with utopian and emancipatory features, it now seems that its decentralized structure inevitably leads to a much more ambivalent entity. It is frequently used by different groups for conflicting purposes, at once serving the aims of hypercapitalism and capitalist resistance. Despite its abstract nature, the internet has produced concrete changes in society, from the ways human beings interact socially and culturally, to the ways we work and consume, and the ways these activities have become increasingly interconnected, overlapped and subsumed by the economy. These developments have reanimated discussions of “the social factory” where “work processes have shifted from the factory to society” (Terranova, 2000:1), and surplus value is extracted from everyday activity. This is not to say that factory production is now defunct, rather it is to point out that the logic of the factory has spread to the rest of society.

In the shift in industrialized economies towards a focus on immaterial production, with

policy attention turning to “the creative class” and “creative cities” (Florida 2000; Hartley 2005) as the new engines of the economic growth, perceptions of autonomous “free labour” have been glamorized (Dyer-Witheford & de Peuter 2006). With the rise of a decentralized and unorganized labour force in creative industries, the gains in workers' rights made by previous generations of labourers are now being reclaimed by capital on both sides of the NICL. IP, which was initially established on the premise that it was to offer an incentive for innovation and to protect individual creators, has been turned on its head in the digital economy, such that it has become a vehicle for the dispossession of the products of creative labour. Without real-world gains in quality of life related to access to medicine and technology, self-expression, self-determination, identity construction and recognition, whatever economic gains might be claimed socially are rendered moot. There needs to be a reinscription of the “human element” into IP for it to retain its legitimacy as *public* policy.

II

THE COMMODITY FICTIONS OF INTELLECTUAL PROPERTY

Despite the initial goals of copyright and patent law to empower and reward authors and inventors, to enrich the cultural and intellectual spheres of society, and to encourage learning and technological advancement (Hettinger 1997; Vaidhyanithan 2001), IP in contemporary practice tends to undermine these objectives. Although the common justifications for IP rely on John Locke's theory of labour, Romantic ideas of authorship and originality, and other Enlightenment ideals of progress, over the course of the twentieth century legislators and judiciaries in the West have increasingly ignored the social orientation that lies at the heart of its initial adoption. Rather than serving as a policy tool to meet social and cultural aims, IP appears now to be justified more by its capacity to protect investment and ground capital accumulation than by its ability to promote social goods.

Lockean Copyright

Perhaps the most common way of justifying intellectual property rights is to refer to John Locke's theory of labour and property. There are two slightly different arguments derived from Locke that are used to support intellectual property rights. The first suggests individuals improve upon nature with their labour. People civilize nature through their efforts, and deserve the fruits of their labour as reward since civilizing nature is of benefit to society. The second suggests that individuals extend their sovereign right over themselves to objects that they transform from a natural state with their labour. Individuals gain property rights by mixing their labour with things in nature or "the commons."

Although Locke's discussion in chapter five of the *Second Treatise on Government* focuses on labour's relationship with physical materials, the same arguments have been taken to apply to the relationship between creativity or intellectual activity and what results from them.² The suggestion is that one is entitled to that which one transforms from its natural state through one's mental and creative capabilities – the ability to take ideas from nature and transform them into something new and useful (Hughes 1997). Hettinger (1997: 24) points out, however, that a right to the use of one's intellectual products is different than the right to prevent others from using them. What is often overlooked is that Locke quite clearly sets limits to possession: "As much as any one can make use of to any advantage of life before it spoils... Whatever is beyond this, is more than his fair share, and belongs to others" (Locke in May, 2000: 25). According to Locke there must be "enough and as good left in common for others" (Locke in Hettinger, 1997:

²Lior Zemer (2006) suggests that Locke's views on IP, found in his writings on epistemology and culture, are quite different from those attributed to him through the extension of his property theory to intangible property, and actually preclude the possibility of the private ownership of knowledge and culture.

27).³

Locke's theory of labour as the root of property provide the foundations for British and American IP law. Although this suggests that property is a natural right derived through one's labour, British and American copyright systems instead bestow IP as a limited monopoly privilege awarded by the state as a reward for the social good derived from creative and innovative activities. The name for the statute that established copyright in Great Britain, The Statute of Anne, is a short-hand for the actual title of the statute, "An Act for the Encouragement of Learning" (Rose 1988). In the United States, Article 1, Section 8 of the American Constitution states that Congress "has the power 'to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their Respective Writings and Discoveries'" (in Vaidhyathan 2001). Legislators in both cases placed emphasis on the social utility of IP as the purpose for its creation, although it was acknowledged that a compromise was fundamental to it. Thomas Jefferson (in Barlow 1997: 349) recognized that ideas were "less susceptible than all other things of exclusive property" to ownership, and suggested that "Inventions then cannot, in nature, be a subject of property." Rather, he thought that "ideas..should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been benevolently designed by nature." Despite this tendency of ideas to flow freely, exclusive control over works of the mind was awarded because it was thought to promote the good of society.

³ Almost immediately after putting forth this proviso, Locke sets out to sidestep it by suggesting that the creation of non-perishable currency allows for the accumulate of wealth without spoilage, thereby legitimizing unequal wealth distribution (Macpherson 2011). While ideas are not perishable in the same sense as material (particularly organic) goods are, there is a sense in which ideas do "spoil" or "go to waste" when the limits of their ownership are set too broadly. The phrase "tragedy of the anticommons" (Heller 1998) has been used to describe situations where too much private ownership results in the kind of waste Locke thinks ought to be avoided, and this kind of waste seems to be symptomatic of intellectual property (Shapiro 2001). This discussion will be revisited in the section "IP and Innovation: Anticommons and Patent Thickets."

While the negotiation of IP was typically one between private and public interests, the focus of attention shifted over time to the more abstract notions of “authors' rights” and “the work.” Authors' rights were first deployed as a rhetorical device to support the interests of the Stationers' Company in their attempt to solidify control over the printing industry in Britain through perpetual copyrights (Rose 1988). The notion of authors' rights was further developed by writers and philosophers who thought of creative works as the most personal type of property, and was enshrined in European copyright systems.

Author's Rights

A focus on “authors' rights” provides the basis for the main distinction between the Anglo and European copyright systems. The European system of copyright emerged during the eighteenth century from ideas that came out of the self- reflection of writers and thinkers in Britain and the European continent who developed the modern concept of “the author” (Woodmansee 1984). The continental notion of IP that emerged from these authors and philosophers (Edward Young, Johann Wolfgang von Goethe, Denis Diderot, Immanuel Kant, Gotthold Ephraim Lessing, Johann Gottlieb Fichte, and Georg Wilhelm Freidrich Hegel amongst them (Woodmansee 1984; Hesse 2002; Kretschmer & Kahwol 2004)), resulted in a rather different notion of IP than the one that emerged from Locke's theory of property. The view that formed the basis of copyright in the civil law was that an author's right over their creative work came from the bond between an author and their work as an expression of their personality. Until the eighteenth century, writers had been considered as craftsmen, or as divinely inspired (Woodmansee 1984; Hesse 2002). Writers became considered less craftsmen, and more inspired, while increasingly the perceived source of their inspiration came from within. This internal

inspiration became what is known as “authorial genius,” and gave writers ideological grounds upon which to make property claims over their work. This concept of copyright places the emphasis of protection on the author rather than on the work (Ouma 2005), awarding moral rights to the author to preserve their reputations through control over the integrity of the intangible things they create as they circulate in public life.

The first copyright statutes based upon the rights of the author come from the French Revolutionary Acts of 1791 and 1793, which replaced the privilege-based printing system in France first establishing protection for literary works, and soon after extended copyright to theatrical performances, and later to artistic works (Barron 2006; Kretschmer & Kawhol 2004). They were also the first Acts to extend copyright beyond the life of the author, first by five, and then by ten years. Although these Acts were founded upon notions of authors' rights, the intent behind the Acts remains unclear. Hesse (1991: 103) and Barron (2006: 279) suggest that the republican roots of the French Revolution provided the initial intent of the Acts, which, similar to the Statute of Anne, were meant to encourage learning and literacy. Kretschmer and Kawhol (2004: 34, quoted in Davies 2002: 137) present another possibility, citing Le Chepalier's speech introducing the Act: “The most sacred, the most legislate, the most unassailable . . . the most personal of properties, is a work which is the fruit of the imagination of a writer.” In this interpretation the Acts were meant as recognition of the author's moral rights over their creative works. In any case, the latter interpretation is the one that has largely prevailed.

Although the notion of authors' rights once represented a significant departure between the Anglo and European copyright systems, the two systems have since moved closer together. Early in the twentieth century, American copyright was extended beyond the life of the author, and emphasis has gradually shifted to favour the rights of IP owners over the public interest,

albeit largely as an economic rather than a moral right of an author in capitalist markets. Harmonization of IP systems through the TRIPS has allowed for some differences in national and regional copyright systems, but has largely led to the homogenization of IP, such that an economic model now predominates globally that leaves little room for differentiation based on differing national interests. As Jeff Harrod (2006: 23) mentions, “The state often granted ... monopolies, but at certain points those in control of the state came into conflict with those in control of corporations, and until recently the conflict was always resolved in favour of the state. The historical discontinuity that developed in the last quarter of the twentieth century stands in contrast to the historical shifts of the past.”

IP, Authors & Industry

In spite of the increasing focus on the natural rights of authors, IP is used to alienate authors and inventors from the products of their creativity. IP seems in many ways to make authors and inventors more vulnerable. From early on in their history, patents and copyrights have been used to take-away the products of creative labour from their creators. The Statute of Anne, which formally awarded copyright to authors, changed little for them, with publishers maintaining their positions as gatekeepers over the industry, able to set the terms for the transfer of rights for all but a few “star” authors. William Patry (2009: 116) notes that for most of history, authors were considered little more than labourers who were paid a one-time fee, “just as industrial workers sold their labour for producing widgets for impoverished wages.” David Vaver (1990: 105) mentions the case of Edward Lear, “who sold the copyrights of his *Book of Nonsense* for £125, and saw it go to nineteen editions in his lifetime without his getting a single penny more in royalties.”

In spite of the fundamental links between IP in its early history and the social good, commercial interests have played an instrumental role in the creation and expansion of IP over time. In fifteenth century Venice, guilds sought to counteract printing press and dissemination of guild secrets by way of legislative protection (May & Sell 2006). Much like with knowledge and cultural goods today (Harvey 2002; Hettinger 1997; May 2006), the Venetian guilds saw a need to artificially impose scarcity on information in order to inflate its value. The guilds brought their patent formula to the authorities, which set the foundation for the formalized law:

“from its legislative origins... was a city/government-derived strategy for the development of competitive advantage and effective economic organization... the central ideas of intellectual property rights were developed by the guilds, the private sector, and adopted by the juridical authorities... [the creation of intellectual property rights] was driven by a logic developed not by the legislators but by those who would gain from a formal ownership regime in knowledge.” (May & Sell 2006:71)

However, the Venetian authorities recognized the potential of patent protection to attract inventors, craftsmen and artisans from across Europe, who would enrich Venetian society by bringing their technologies with them.

This trend seems to have continued through much of the history of IP, with commercial interests working to encourage the creation of state-sanctioned monopolies, and states responding to commercial demands by creating monopolies in support of the state's social objectives, with little attention paid to the plight of most authors and inventors. In Great Britain, the Stationers' Company that had enjoyed a state-sanctioned monopoly under the Licencing Act lobbied for copyright laws to help maintain control over the industry once the Act was allowed to

expire (Rose 1988; May & Sell 2006). The Crown responded with the Statute of Anne, which above all was meant to promote learning and literacy. Stina Teilmann (2006: 74) argues that the French revolutionary Acts that established a form of copyright based on authorial rights were “as much devices of the market economy as they were idealistic celebrations of the author-genius.” While the US's copyright system aimed specifically at avoiding the same sort of industry centralization that had occurred in Great Britain, commercial interests became involved in extending copyright soon after the Copyright Act was ratified as part of the Constitution (Vaidhyanithan 2001). “Star” creators like Diderot, Charles Dickens, Victor Hugo, and Sam Clemens, were all champions of copyright in their own ways (Mosco 2009; Teilmann 2006; Vaidhyanithan 2001; Vaver 1990; Wirten 2004) providing moral support for the sanctity of authors' rights and copyright.

The history of IP indicates that it was created in response to commercial demands, as long as they were in accord with the interests of governmental authorities. While the intent of copyright laws are for the most part interpreted as balancing the social good with the private interests of authors and inventors, the practice of IP has not been particularly effective at promoting either (Boyle 2006; May 2006; Patry 2009; M. Rose 1988). Jason Toynbee (2004: 124-5) suggests that “the right of the author serves as a pretext for corporate control of music, a way of legitimating the whole system of intellectual property.” The invocation of author's and inventors rights as the basis for IP uses their plight as the central device in a story meant to legitimize the existence of intangible property. Floyd Vaughan (quoted in Noble 1977: 98) suggests similarly that “As the obstacles of the inventor have grown, patents, to an increasing extent, have stimulated him through delusion rather than reward.” The story of “desert” and “reward” for authors in supporting IP is no more than a fiction used to support particular

ideological positions that legitimize the existence and continuing exacerbation of economic and social inequalities. Thus, the notions of IP that have dominated discourse in recent times have been those which most support ideologies of neoliberal capitalism, and which favour private market interests over public social goods.

Gatekeepers

Three-hundred years after the Statute of Anne, big businesses have for the most part maintained their place as gatekeepers of creative industries. Just as the Stationers were the gatekeepers of the British literary industry, record labels and music publishers occupy a similar place within the music industry. "For a work to get "published," in a broad sense, actual creators must transfer their rights of ownership in their work to those who have the means of disseminating it" (Bettig 1996: 35). As Jason Toynbee (2004: 124) points out, "industry control over the means of exploiting music leads to a situation where most writers and composers are forced to sell their copyright. No-one can make it without a publishing deal, something which always involves the assignment of rights" (Toynbee 2004: 124). George Yudice notes that "the rights of authorship are increasingly in the hands of producers and distributors, the major entertainment conglomerates that have gradually achieved the terms by which intellectual property is possessed, such that "creators" are now little more than "content providers"" (Yudice, 2003: 18). This renders the initial award of IP to creators an empty promise because creators are rarely in a position to benefit from it.

Large corporations, the gatekeepers in most creative industries, get to set the terms of contracts in their favour. As Greenfield and Osbourne (2002: 73) suggest, "the ultra-competitive ethos of the record industry, where many agreements are underpinned by a take it or leave it

philosophy, means that few artists have strong leverage.” This has created a situation where “most artists do not own their licencing masters” (Muzzatti 2011: 196), the original high-quality studio recordings protected by copyright which are used to make commercial reproductions. In this way, IP acts as a way of alienating artists from their work, rather than protecting the authorial personality. Counter-intuitively, by *creating* rights, IP makes the transfer of rights possible, and in this case (as in many other markets for creative work), this transfer becomes a necessity for a successful career. In effect, because there is a legal vehicle to divorce artists from their work, they are put into a situation where they are coerced into doing so. Noble (1977) also describes how inventors have been relegated to the position of “employee,” and are subject to the same circumstances of systemic dispossession of their patent rights by their employer-corporations. The marginalization of creators due to “professionalization” can also be seen across other creative industries (Dyer-Witheford & de Peuter 2006; Ross 2008, 2009; Rossiter 2003).

Bouton (2010) raises questions about the legitimacy of recording contracts due to the possibility of their being legally “unconscionable,” but the argument certainly applies to other areas of IP. In California, the law states that “A contract is procedurally unconscionable if the negotiation process that produced it is defective. An agreement is substantively unconscionable when its terms are inherently unfair or oppressive” (Bouton, 2010: 314). There is a strong case to be made against recording contracts on both counts. The concentrated structure of the industry means that there is virtually no substantive negotiation on the part of artists – the structure of recording deals are set by the industry with only minor issues up for negotiation. Furthermore, contracts are often unfair to artists considering the hours of training that go into learning the craft before a deal is ever signed, not to mention the work that goes into creating an album (Toynbee 2004), or touring and playing live shows. Recording contracts can in many cases be described as

oppressive. For instance, artists are often required to adhere to their label's requests concerning creative decision-making (Maloley 2010) suppressing individual creativity, a phenomenon acutely evident in the age of reality television-made pop-stars.

The conditions for profiting from one's IP are biased towards “star” authors and performers who make lots of money, but skew the overall figures that suggest what the typical musician earns in a year (Toynbee 2004), and who provide the “kernel of truth” that give IP myths credibility (Vaver 1990). However, statistics on creative workers suggest that they earn less than average income, and often support their creative endeavours by other means (Golmitzer & Murray 2008). One author (Teller quoted in Vaver 1990) claims that in 1976 there were only 300 authors in the US who supported themselves entirely by writing books, and Vaver does not believe the number has grown significantly since then. Ned Rossiter's (2003) micro-scale on-line survey of creative workers (through the fibreculture journal discussion page), found that IP was not a primary source of income for any of the 7 respondents. Patry (2009: 118) states that “Efforts to treat non-employees as employees for copyright purposes – but not as employees for benefits such as insurance, health benefits and vacations – is not limited to the recording industry, and are in fact quite common,” echoing the trends others have identified with respect to rising levels of “precarity” in creative industries (Dyer-Witheford & de Peuter 2006; Gill & Scott 2008; Golmitzer & Murray 2008; Ross 2008, 2009; Rossiter 2003).

The Author's Incentive?

In addition to the moral arguments interpolated in Locke's *Second Treatise* for the justification of IP, and the concepts of authorial personality and author's rights developed in the writings of Kant, Hegel, and others, there is a series of utilitarian arguments which are also used

to justify IP in terms of the functions it is meant to perform. Different from the moral claims that authors *should* be rewarded, that they *deserve* the fruits of their labour, or that individuals *ought* to have protection for the products of their personality, is the suggestion that the incentive of a reward (in the form of IP) is necessary for individuals to engage in creative activities deemed worthy of social merit. This suggests that the incentive provided by monopoly privilege encourages the development and production of knowledge, and that such products of benefit to society would otherwise not be developed or made available for public consumption. There are, however, a number of issues with this claim.

While many artists may create only for economic reward, many artists do not, and often take on jobs to support their creative passions (Golmitzer & Murray 2008), suggesting that the economic reward conferred by IP is not a necessary incentive to create. Perhaps particularly for artistic creation and other forms of emotionally-charged, personal, and affective types of labour, passion, recognition and achievement provide sufficient motivation, and economic reward is not a necessary motivator. There are many forms of expression – graffiti, remixing, fanvidding, and blogging, to name a few – where authors generally do not expect economic compensation; although these expectations seem to be changing. This notion is supported by the high levels of volunteerism, “free” and “immaterial” labour, in on-line and other creative or public spaces where people contribute to the cultural experiences of others (Terranova 2000; Grimes 2006; Cote & Pybus 2007; Ross 2009).

As David Vaver (1990: 100) notes, “much creative and inventive work is carried out by employees, who are motivated to work by incentives other than patents or copyrights,” meaning that the existence of IP often does not serve as a factor for authors and inventors. The willingness of individuals to engage in creative activities under conditions of extreme exploitation is

something that is actively capitalized upon by limited companies in capitalist societies, particularly in so-called “creative industries,” which underpay and overwork artists and other types of “creative” and “affective” labourers (Dyer-Witheford & de Peuter 2006). In many cases, the professionalization of creative work has ensured that employers retain the IP of their employees (Rossiter 2003), just as legislation has historically guaranteed employers any IP created by their employees in more mundane industrial contexts (such as chemical and manufacturing companies, for instance). While this is sometimes presented as a compromise between creative people trading their IP for job stability (Dyer-Witheford & De Peuter 2006; Noble 1977), or creative workers trading instability in exchange for autonomy (Florida 2001; Hartley 2005), the structure of corporate-controlled creative industries is such that these circumstances are imposed, and not a matter of choice. Again, this seems to nullify the purpose of copyright and patents since they generally benefit corporations, and do not factor into the realities of individuals who engage in creative work.

Intellectual Property & Free Speech

Another myth suggests that IP encourages creativity, but in many cases it does not, and even places limits on it. Copyright is touted as an incentive to create artistic works, but many of the works now protected by copyright, including databases, software code, and contracts, have no artistic quality to them (Vaver 1990; Benkler 2006). Similarly, while patents are claimed to encourage useful invention, this no longer seems to be a prerequisite for acquiring a patent, as patents are awarded to trivial “inventions” and “discoveries” which do not obviously contribute to the social good (Amani forthcoming 2013; Amani & Coombe 2005; Vaver 1990).

In fact, copyright often acts to censor free-speech (Vaver 1990; Netanel 2008; Gordon

1993). If the intention of IP were to create as much content and invention as possible, one would likely do away with IP altogether. The initial regulation of printing through *privilegi* in fifteenth century Venice and the creation of the Stationers' company in sixteenth century Great Britain that in many ways built the foundation for formalized copyright law were specifically oriented towards censorship and the control of the printed word (Hesse 2002). In more recent times, copyright, and in some rare circumstances, the invocation of the moral rights of authors over the use of their creative works, have been used as forms of censorship. Vaver (1990) cites a number of examples where copyright has been used to limit free-expression. Claims of authors' rights too, although less frequently, have been used to prevent the publication of a number of fictional works. The publication of *The Wind Done Gone*, a retelling of *Gone With the Wind* (1936) that tells the story from the perspective of African-American characters marginalized in the original, was challenged by the trustee of the Margaret Mitchell estate (Vaver 1990; Wirten 2004). The publication of *Cosette*, a sequel to *Les Miserables*, was prevented despite *Les Miserables* having entered the "public domain" after the expiration of its copyright protection through the invocation of moral rights by some of his distant heirs (Wirten 2004). More recently, the assertion of copyright has been used to prevent other re-interpretations of texts and characters in the creation of "fan-fiction" (Chander & Sunder 2007).

There are other troubling cases where copyright and authors' rights have been used to prevent the publishing of non-fictional works. A biographer was granted access to William Lyon Mackenzie's heirs papers by his heirs in order to write a biography, but was in the end prevented from disseminating his work because the estate did not agree with the way King was portrayed by the author, and claimed that had they known the author's intent, he never would have been granted access (Vaver 1990). Similarly, the Church of Scientology has appealed to copyright to

prevent the publication of literature critical of it (Gordon 1993). Perhaps more troubling are cases where states have used copyright claims over public documents to prevent the disclosure of matters of the public interest (Vaver 1990). For instance, the Canadian government prohibited the commercial publication of a report on the state of competition in the Canadian oil industry because the publisher failed to request permission to reprint official documents "authored" by the federal government. Copyright gave the Canadian government a "legitimate" claim to suppress the publication of the report despite the reprinted documents therein being a matter of public record, and the financial consequences being projected as minimal. In this instance, as in others, "[A]rguments about the public interest and freedom of expression under the much-lauded Charter of Rights and Freedom were brushed aside" (Vaver 1990: 110).

Copyright and trademark have also been used as forms of indirect censorship, by limiting free speech through the ownership of the cultural symbols that pervade post-modern life (Coombe 1998a) thereby designating types of expression "legitimate" or "illegitimate." Because so much of culture has been privately enclosed with IP, particularly by large corporations, it has become more difficult to express one's creativity using the common language of culture without breaking the law and risking litigation. Since early in the twentieth century, and for the first time in history, the majority of the stories that circulate in society are told by a small number of people within the large corporations that dominate an increasingly concentrated media industry (Gerbner 1999) who fervently protect their copyright. This power dynamic restricts the ability of artists and members of society, participants in culture, to express themselves using the literature, music, and images that speak to them and shape their cultural lives. IP is meant to provide an incentive for creativity and artistic expression, but as it becomes interpreted more broadly by copyright holders and judiciaries, it places greater limits on creative activities, seemingly in

direct opposition to this supposed objective (McLeod 2005).

George Gerbner's (1999) discussion of centralized media control focuses primarily on the effect of mass communication industries, which tend towards centralized control because of the nature of the technology. Digital technology is substantially different from the print and broadcast media that dominated for most of the twentieth century. The Internet was created as a decentralized system not meant to be controlled from any central point, and digital technologies have democratized different forms of media production and dissemination. It has presented the opportunity for the consumers of culture to become active participants in it, able to produce cultural products, and to access and interact with them digitally from disparate locations (Benkler 2006). However, IP attempts to transplant the centralized paradigm of print and broadcast media to digital media, imposing centralized control through law, which in many ways limits and restricts the possibilities offered by new technologies (Coombe, Wershler & Zeilinger forthcoming 2013). Tony Sherman (2005: 86) notes that intellectual property is "used to sew up the media environment, restricting the two-way flow of information by preventing reciprocity of manipulation (i.e., talking back to the media using the actual media environment as the subject and substance of discourse)."

While IP is claimed to protect authors and their expressions, it also unduly restricts freedom of expression, and places limits on creativity (Benkler 2006; Boyle 2006; Coombe 1998; Gordon 1993; Lessig 2001, 2004; Toynbee 2010). IP illegalizes different kinds of creativity, like remixing, prohibiting certain forms of creative expression (McLeod 2005). Wendy Gordon (1993) argues that IP poses undue limitations to freedom of speech, suggesting the suitability of a First Amendment defence in the US, or Charter Defence in Canada.⁴ She argues

⁴ Also see Amani's (Forthcoming 2013) discussion on fair-dealing in the context of Canadian copyright law. Fair dealing is typically presented as an exception to the rule of copyright and the norm of public exclusion from the

that Locke's theory of labour used to justify IP is premised on a fundamental natural law for the avoidance of harm. The "harm principle" (Mill 1978 [1859]) also forms the theoretical foundation of law in liberal-democracies. Individuals deserve the fruit of their labour because to dispossess them of it would cause harm to them, but also suggests that individuals' right to the fruits of their labour is contingent on their not causing harm to others. According to Locke's proviso, that there should be "as much and as good" left in the commons for others, one's property claim should not restrict others use of the commons. In this way, there is support for preventing others from profiting from one's work, but not for the restriction of others' recreational and otherwise non-profit oriented creative use of it. As Yochai Benkler (2006), James Boyle (2006), Peter Drahos (2003), Wendy Gordon (1993), Lawrence Lessig (2001, 2004), and David Vaver (1990), amongst many others, have argued, the expansion of IP is leading to the private enclosure of the "public domain" of knowledge and culture, which presents an undue restriction upon freedom of expression and access to knowledge, causing harm in a variety of more and less tangible ways. Without free access to a public domain of knowledge and culture one's ability to build on the past in any meaningful way is severely undermined. The maintenance of a vibrant, current, and culturally-relevant public domain was certainly a major objective of the Western IP system, but is now fundamentally undermined by it.

Revisiting "Authorship"

Roland Barthes (1979) critiques the prevalent Western constructions of the author as

use of cultural works, whereas Amani suggests that the issue should be looked at from the reverse angle, that considerations of whether copyright infringes upon Section 1 of the Canadian Charter and the public's right to fair dealing out to come first. She argues that "the broad definition of freedom of expression in the Charter would significantly change the dynamics of copyright balance by facilitating a potential finding of breach of expressive freedom, whether such expression was considered a work or play, and shift the balance of proof to the copyright owner to justify copyright's limits upon such constitutionally prior protected rights."

individual, and the “text” as a distinct and stable discursive entity, raising questions about the understandings of these which are fundamental to the legal construction of IP. Analysis of “the text” as porous and open-ended precludes the concept of “the work” as the product of one individual, bringing attention to the social and collaborative nature of knowledge and culture, and also to the interpretive work engaged-in by the receivers of texts, alluding to the instability of signs, texts, and meanings. Foucault (1980) highlights the concept of “the author” as being based on historical and cultural contingencies. He discusses the discursive role that the concept of “the author” plays as an organization principle within socially constructed traditions of knowledge. Asking fundamental questions about “the author” and “the text” helps to destabilize their naturalized positions in the social imaginary, which constructs them as distinct units of creation and ownership. IP relies on a similar conceptual construction. As Christopher May (2006: 35) mentions, “The reification of IPRs into natural rights of individual innovators and creators denies this historical shift [from the recognition of IPRs as limited monopolies, to their recognition as private property rights], and obscures the interests served by the protection and enforcement of patents, copyrights, trademarks and other forms of intellectual property.”

Intellectual Property and Innovation: Anticommons and Patent Thickets

While IP causes harm by allowing for the private appropriation of copyrighted materials, depleting the public domain of culture and placing undue limits on freedom of expression, patents are used to similar effect. One justification of IP is that it encourages the dissemination of knowledge and works of authorship, but it does not adequately meet this purpose. Patent-based strategies are often used to monopolize industries, and close-off areas of research and knowledge to others (Noble 1977). Although IP is meant to encourage and support innovation and progress,

there is a strong case to suggest that it does the opposite. Ashton (in Carlaw 2007: 150) suggests that there is historical evidence of IP hindering progress, stating that “if Watts' Fire Engine Act had not extended the life of the steam engine patent we would have had a railway system earlier,” suggesting that a patent extension may have delayed the industrial revolution. The fact that the Industrial Revolution took more than 150 years to appear after the establishment of the British patent system suggests that there is no necessary causal link between patents and technological development in any case (Moser 2005; Vaver 1990).

There are however many less dramatic, but equally significant examples of corporations using IP to restrict the spread of technology. John B. Foster and Robert McChesney (2011) mention that the Internet itself is the result of public and private sector collaboration. The absence of IP enforcement is recognized as a major factor in the historical success of Silicon Valley as the global centre of innovation in software and information technology. Yochai Benkler (2006) discusses various ways that IP hinders innovation by preventing the dissemination of information, and by delegitimizing forms of community collaboration, inter-firm cooperation, and social production that were at the root of early software and computer development (also see Coombe 2004).

Although patents are meant to promote innovation, patent-based corporations focus on competition and profit rather than technological advancement in support of the social good. While proponents of IP have declared that private ownership prevents a “tragedy of the commons,” a situation where too much access to the commons for too many people leads to overuse, neglect, and renders it unusable by anyone (Boyle 2006), Michael Heller (1998) coined the phrase “tragedy of the anticommons” to describe a situation where “multiple owners each have a right to exclude others from a scarce resource and no one has an effective privilege of

use” (Heller & Eisenberg 1998: 698), which results in a similar outcome. Essentially, too much exclusive ownership leads to under-use, or no use at all. The patent system has led to the growth of “patent thickets” in a number of innovation-driven industries, referring to “an overlapping set of patent rights requiring that those seeking to commercialize new technology obtain licenses from multiple patentees” (Shapiro 2001). Patent thickets prevent innovation by entangling research in webs of patents that form boundaries to innovation and the creation of useful technological applications (Heller 2008; Heller & Eisenberg 1998).

In the 1920's, the radio-patent pool agreements between AT&T, Westinghouse, GE, RCA, United Fruit, American Marconi and Westinghouse resulted in the creation of modern broadcast industries (Brock 2003), demonstrating that collaboration may work more effectively than a competitive model based upon the exercise of exclusionary proprietary rights. However, these patent-pool agreements were also used to orchestrate industry dominance by member corporations in telephony, electricity, and radio as they assigned each other exclusive licences to patents held within the group (Noble 1977: 93, 94). This effectively limited competition and stifled innovation, and similar strategies are increasingly prevalent in other areas, like biotechnology and agrichemical industries (Coombe 2004; Coombe & Amani 2005). More importantly, as Michael Heller (2008) points out, is that patent thickets stand in the way of life-saving research. Through the patent system, the “process of science” has been given priority over the social effects of scientific practice and discovery (Amani & Coombe 2005). And while anti-trust laws were established to prevent this type of corporate collusion and patent-based monopoly, Venturelli (2005: 394) suggests that today more than ever “anti-trust laws are ill-equipped to deal with the prospect of rapid acceleration in the monopolization of knowledge and ideas” that has given way to patent thickets and anti-competitive IP strategies. Indeed, to the

extent that most forms of IP are essentially state granted monopolies, the solution to these problems arguably rests in IP reform rather than in reforming anti-trust laws to keep-up with the latest IP-based anti-competitive strategies employed by corporations.

Patents are meant to make scientific knowledge available and accessible to the public, requiring the disclosure of detailed information, but corporations have found numerous ways around full and meaningful disclosure (Devlin 2010; Noble 1977; Vaver 1990). Many corporations conceal valuable knowledge by using vague language or providing incomplete information on patent applications, through non-disclosure contracts, and trade secrets protection, as well as by making such knowledge economically inaccessible to most of society. IP has become a significant barrier to the technology transfer needed to raise standards of living throughout a large part of the world (Drahos 2003). Furthermore, corporations can obtain trade secret protection, but only if they deliberately withhold information (Hettinger 1997; Vaver 1990), which directly contradicts the social aim of knowledge dissemination (Heller 1998; Heller & Eisenberg 1998; Heller 2008; Shapiro 2001) that justifies the existence of patents (Devlin 2010) in the first instance.

Commodity Non-Fiction

The dispelling of IP myths leaves one searching for an explanation for IP's. The common narratives that are used as justifications for intellectual property rights discussed above (desert, author's rights, promotion of creativity, innovation, the social good) might best be described as "commodity fictions" (Polyani 2001[1944]) or "property stories" (C. Rose 1994). As the terms suggest, they are ahistorical accounts of property's genesis or "raison d'etre" which naturalize notions of property in the social consciousness; in this case they function to legitimize the

existence of intangible property. Furthermore, when histories are presented, they are often teleological, treating “the notion of literary property” and other forms of IP, “as a reflection of the natural progressiveness of human beings” (Bettig 1992: 131). These accounts present the justifications for property as being so matter-of-fact that they need no further substantiation. Joanna Gibson (2006: 20) links the common discourse of IP to Jean-Francois Lyotard's idea of a “grand narrative.” As democracy is the grand narrative of emancipation, IP is the grand narrative of creativity and innovation, and the individualistic discourses that accompany them. Thus the focus of many debates surrounding IP becomes ideological, a matter of philosophy, rather than one about the material, cultural, and social circumstances that the contemporary practices of IP cultivate in society. However, it is important not to lose sight of the material and cultural circumstances of everyday human lives created by the ideological articulations of discourse and policy.

III

INTELLECTUAL PROPERTY AS NEOLIBERAL CULTURAL POLICY

The discourse surrounding IP has increasingly shifted towards the protection of private property rights rather than social goods. This most markedly became the case in the last twenty-five years of the twentieth century which were characterized by a general shift towards neoliberalism in various spheres of public policy. Expansion and extension of IP made use of the authors' rights discourse and Enlightenment ideas of originality and inventiveness as justifications to extend private ownership and markets through patents to DNA, human cells, and living organisms (Boyle 2006 ; Coombe 2008; Everett 2005; Halbert 2005; Prudham 2007), while extending copyright to fifty years (or more) beyond the life of the author, or 90 years for existing copyrights, resulting in a severely depleted public domain while compromising public

participation in culture (Boyle 2006; Drahos 2003; Lessig 2001; May 2000; Vaidhyanathan 2001). The TRIPS agreement formalized the neoliberalization of IP, presenting it as a global trade issue (Coombe 2004), with no room for the national social and cultural objectives of individual states which were historically at the heart of IP policies (Samuelson 2004).

The failure of IP to live-up to its originally intended purposes has meant that the creation of property rights in knowledge and culture has replaced its social and cultural justifications. Following from neoliberal arguments about the “invisible hand,” “rational self-interest,” and the “free-market” as the best ways to promote the social good, IP as a device to expand the purview and possibilities of markets and private ownership becomes its own justification. IP's legitimacy becomes independent from discussions of social goods that legal monopolies and free-markets are meant to bring about. Much like Adam Smith's economic theory, IP has been transplanted from its classical liberal origins which emphasize a harmonic balance of individual and social interests, and has thus been hollowed of its substantive social orientation.

IP has resulted in significant changes to the conventional structures of capitalism and extends the possibilities for capitalist accumulation (Bettig 1996; Drahos 2003; Harvey 2007a; May 2006; Rifkin 2000). In so doing, it has also contributed to the reorientation of the human relationships to work, leisure, and cultural life (Coombe 1998, 2004; Cote & Pybus 2007; Dyer-Witheford & De Peuter 2006; Grimes 2005, 2009; Miller 1996, 2010; Ross 2008, 2009; Terranova 2000). An important step to changing the trajectory of IP is to re-inscribe it as a form of policy that has substantive social and cultural objectives and measurable social outcomes. IP as a neoliberal policy places emphasis on the economic aspects of knowledge and culture, but looking at IP as a form of cultural policy highlights its effects upon the human world, and refocuses it upon cultural and social objectives.

Intellectual Property as Neoliberal Policy

The push towards the globalization of IP through the TRIPS agreement is clearly linked to neoliberal ideologies (Coombe 2004), and the overall shift towards neoliberalism in public policy since the 1970's (Harvey 2007a). TRIPS places IP as part of global trade policy, ignoring the detrimental social and cultural consequences of the global enforcement of IP for many people. When IP is constructed as "property" for the creation of markets in intangible goods, while neglecting the social benefits intended to result from this commodification, it becomes a form of neoliberal policy. By losing touch with the social and cultural focus of IP, and the cultural nature of the things it turns into property, it supplants the inherent value of knowledge and culture with purely economic value. Knowledge and culture are no longer valuable in themselves, or through the way they relate to individuals and groups in society, but valuable only insofar as they can create economic benefits for their owners.

IP is never presented as a reward in itself, but rather, as a reward insofar as its protections serve to accumulate exchange-value for a work's producers or those who invest in it. Thus, the incentive to create and innovate is presented primarily as an economic one, an incentive provided in exchange for the assumed socially beneficial value of the intangible products of creative activities. In its current formulation IP might best be thought of primarily as a way to turn intangibles into property, and to allow them to be exchanged in markets (or hoarded), enabling them to accrue economic value for authors and inventors that create useful creative works. The creation of monopoly rights that commodify knowledge and culture is presented as a necessary step for reaping the social benefits of creativity and inventiveness. But as I have suggested, IP is not a necessary incentive for creative activity, and there are many cases where IP undermines the

objectives it is meant to support. Furthermore, the benefits meant to be derived from IP do not seem to “trickle-down” to society in the way that was once intended.

Underlying the justifications for property rights in culture and knowledge—the promotion of creativity, innovation, dissemination, literacy, and the social good in general -- is an implicit assumption of the “trickle-down effect” often used to justify tax cuts to corporations and the wealthy (Patry 2009), and neoliberal policies more generally. This argument suggests that tax cuts for corporations and the wealthy will trickle-down to society's lower ranks in the form of jobs and economic growth, which promotes the economic prosperity and overall well-being of society. In short, the strengthening of private rights and the “invisible hand” of the “free market” are the best ways to ensure the efficient use of resources, and to promote the good of society.

A similar case is made with IP, suggesting that private ownership in intangible goods is the best way to promote the social good, ensuring that benefits of research and cultural creation “trickle-down” throughout society's ranks, eventually becoming part of the public domain. As many critics assert, however, IP frequently serves the opposite purpose, ensuring that culture, knowledge, technology, and the benefits derived from them remain exclusive (Lessig 2001; Drahos 2003; Boyle 1996, 2006; Rifkin 2001). Similarly, the way IP is constructed and administered ensures that the capacity to assert IP rights is not uniformly distributed across all individuals and groups (M.Brown 2003; Boyle 2006; Coombe 1998, 2004; Mgbeoji 2006; Oguamanam 2005). While free markets are often claimed to be the most efficient system for the use of resources, communist writers have identified a number of crucial inefficiencies, most notably the unpredictable cycles of booms and busts that lead to repeated crises (Luxemburg 2003 [1913]; Wolff 1996). Moreover, markets centred around IP are particularly efficient at

concentrating power and wealth, thereby exacerbating social inequalities (Coombe 2004; May 2002; Harvey 2007a).

Neoliberal Ethics?

Despite the fact that neoliberal theorists use Adam Smith's economic theory to support policies centred on individualism, self-interest, and the private good, Smith's theory, like IP in its earlier historical incarnations, was also primarily focused on the public good. The "invisible hand," the most famous of Smith's ideas, and the focal point of neoliberal theory (Sutherland 1998), was based on the idea that if everyone acted in their own rational self-interest, society would benefit: "Intending only to his own gain", the individual is led "to promote an end which was no part his intention, the good of society" (Bronowski & Mazlish 1975: 352). However as Joseph Stiglitz (1991: 7) suggests, "Adam Smith's invisible hand may be invisible because, like the Emperor's new clothes, it simply isn't there." The "absence of regulation" promoted by neoliberalism is just a way to legitimize the exertion of power amongst vastly unequal individuals and groups in society, and as Harvey (2007) argues, a way to restore class-dominance that waned for a good part of the twentieth century under Keynesian economics and the welfare state.

While his economic theory is what has come to define his thought, Smith was first a moral philosopher who thought that individuals' moral sense would temper their selfishness. Smith originally gave a detailed account of his theory of self-interest in his book *Theory of Moral Sentiments* and "assumed that readers of *Wealth of Nations* would not think that he considered self-interests as the only or even main motive, or virtue, of humanity" (Bronowski & Mazlish, 1975: 351). As Small notes, "nineteenth century economic philosophy was at bottom an

attempt to discover principles for honourable prudence, not to codify a policy of predatory greed” (in Bronowski & Mazlish, 1975: 345, n.16). Neoliberalism has selected a particular part of Smith's theory which justifies greed, selfishness, accumulation and a host of policy reforms since the 1980's that have undermined social goods, ignoring the moral substance of Smith's thought which would preclude them. As Keynes (quoted in Patry 2009: 99) notes, “The world is not so governed that private and social interests always coincide. It is not a correct deduction from the Principles of Economics that enlightened self-interest always operates in the public interests. Nor is it true to say that self-interest generally is enlightened; more often individuals acting separately to promote their own ends are too ignorant or too weak to attain even these.”

Wendy Brown (2003) is quite right when she points out the fissure between classical liberal theory and neoliberalism. Neoliberalism latches onto classical liberal theory, but hollows it of its moral content. It ignores the notion that classical liberalism was a response to the concentration of political and economic power located, at the time, in the hands of monarchies and aristocracies. Liberal theorists like John Stuart Mill (1978 [1859]) promoted democracy not to hand power back to tyrannous leaders and aristocracies, but to put power in the hands of an educated public who would promote the greater good of society (Donner 2007). While Smith is considered to have created the foundation for a distinct branch of study in economics, he included his political-economy within the realm of moral philosophy. This is important because neoliberalism is based on a sense of economics which is divorced from morality, but its proponents nonetheless makes use of the moralistic discourse of human rights to justify neoliberal policies and institutions (Harvey 2007b). Apart from the discourse, everything is considered through a lens of economic (ir)rationality, and put into sterile economic terms. The moral terms of intrinsic, social, and cultural value, which are not easily quantifiable, are left off

the books, yet it is the human terms of cultural diversity and vibrancy, and quality of life that are the most important in considering future policy directions for IP (Venturelli 2005).

The meteoric rise in power and importance of corporations over the course of the twentieth century, in large part due to the monopolies awarded through IP (Bettig 1996; Drahos 2003; Noble 1977; Rifkin 2000) has created a situation different from any historical precedent. “The problem we face today ... is that, in an era that increasingly lives by science and technology, business control over science and its application to human needs, gives private business effective control over all the institutions of democracy, including the state itself” (Lynd in Noble 1977: 109). Drahos (2003) makes a similar point when suggesting that the boundaries of the state have been eroded by market liberalization, and thus that states are unable to protect their citizens from the deleterious effects of globalization and the corporate control of IP. If, as Marx and Engels (2006 [1968]: 26) claimed, “the ideas of the ruling class are in all ages the ruling ideas” the developments in IP at the end of the twentieth century become clear. “Civil society” has been increasingly taken-over by “consumer society,” and as a corollary, corporations have increasingly been in a position to compete with governments, or act through them, annexing the democratic power of citizens. The consequences of these developments in IP, though instituted as economic policies, have had equally profound implications for the social and cultural dimensions of industrialized, “post-industrial,” and less-industrialized societies, alike.

Intellectual Property as Cultural Policy

Although it is presented through the TRIPS agreement as economic and trade policy, at its core, IP is a form of cultural policy. It is meant to promote particular types of expressive and innovative activities in the arts and sciences that are meant to result in tangible social objectives.

However, under a neoliberal paradigm the objectives of cultural policies become increasingly economic, while ignoring the potential (non-economic) benefits that might arise from investments in culture (Gray 2009). In the current policy environment, “the only way to convince government and business leaders that it is worth supporting cultural activity is to argue that it will reduce social conflicts and lead to economic development” (Yudice, 2003: 1). The instrumentalization of cultural policy has mostly to do with “how those secondary effects,” the corollary (particularly economic) benefits of cultural vibrancy, “are actually used” (Gray, 2001: 205), than with notions of “art for art's sake,” or the intrinsic value of culture as fundamental and enriching part of the human experience.

As McGuigan (2009: 295) rightly points out, “cultural-policy... turns into a branch... of economic policy.” But conceiving of cultural goods as means to economic ends is more significant than simply the commodification of cultural products: “it is the lynchpin of a new epistemic framework in which ideology and ... disciplinary society ... are absorbed into an economic or ecological rationality” (Yudice, 2003: 1). Yudice's point is that the neoliberal policy shift involves the re-orientation of the way that culture and policy are conceived. It is not simply a matter of culture being converted to exchange-value, but exchange-value and economic instrumentality emerging as the fundamental elements of policy consideration, becoming universal structural elements in human society in unprecedented ways. Citizens are increasingly considered shareholders and consumers, rather than members of a society who share a public sphere. Gray mentions that in the sphere of cultural policy, there has been “a shift in the focus ... away from some generalized conception of the public good” (2007: 211). Throsby recognizes that “policy in pursuit of neoliberal objectives must have cultural ramifications,” making economic policy implicitly cultural because “it seeks (covertly) to impose acceptance of the neo-

liberal ideology and all its cultural baggage,” which includes “cultural values concerning what constitutes a just society” (2009: 181). At issue here is not only the “Culture” imbued in tangible products of creative activities, but also at stake is the “culture” which reflects the structures, patterns, relationships, and behaviours that shape everyday human life (Coombe 1998a).

Legal Monopolies and Cultural Reifications

Among the changes that have resulted from the expansion of IP and the shift towards “cultural capitalism” (Rifkin 2001), is the character of economic relationships. While Jeremy Rifkin (2001: 137) suggests that the economy of knowledge and culture creates a “new form of capitalism,” Drahos (2003) suggests that it can no longer truly be called capitalist. May makes similar observations concerning shifts in the new economic system focused around IP, noting that although “capitalism still revolves around markets and profit, economic organization is presented as fundamentally different” (2000: 4). The exchange of goods in the material economy is based around supply and demand, but the artificial scarcity created by IP provides for monopoly conditions where the provider can set their own terms of access, contradicting the principle of free competition which is, ironically, the ideological foundation of free-markets and neoliberalism itself (Harvey 2002).

In the new economy, access relationships are replacing property relationships for consumers, and “seller-buyer markets” and “broadly-distributed ownership” shift towards “supplier-user networks” and “short-term access” relationships (Rifkin 2001: 71-72). Property exchange is being replaced by rental relationships, with profit coming from the simple extraction of monopoly rents (Rifkin, 2001; Harvey 2002). Access comes with “contractual obligations,” re-orienting the traditional relationship between buyers and sellers, and fundamentally changing

the nature of the economy (Drahos, 2003: 201). Although the power of the capitalist class remains linked to the ownership of property in an IP-based economy (May 2002), today users may never own the products they pay for. With IP-protected goods, although one can “purchase” music, posters, dvd's, and software, one is never free to do as one might wish with them as one is with physical property itself. Although one might think that one is paying for music, one pays only for the right to listen to it privately. Similarly, although one pays for software, user agreements often stipulate the ways in which one may or may not use it.

A monopoly entails holding exclusive control over a unique resource which allows for the extraction of rent. However, with cultural and knowledge-based goods, this uniqueness is discursively and legally constructed (Harvey 2002). Monopoly claims, we can conclude, are as much “an effect of discourse” and an outcome of struggle as they are a reflection of the qualities of the product” (Harvey 2002: 100); the legitimization of monopoly-rent extraction in knowledge and culture is in part based on a feedback loop whereby the discursive construction of uniqueness affords IP protection, and this legal protection solidifies the character of something as unique. This further legitimizes the treatment of “culture-as-resource” (Yudice 2001), and perpetuates the colonialist perception that persists in the industrialized world that reifies peoples and cultures as distinct, stable, and homogenous entities (Amani & Coombe 2005; Coombe 2008).

The discursive construction and reification of cultures as unique enables them to be constructed as resources in tourism and the marketing of cultural products and experiences (Harvey 2002). While some (Hartley 2005; Throsby 2009) have considered the use of culture as a potential source of economic development in the less-industrialized world, there are significant dangers posed by such a strategy. If culture is valued primarily on an economic basis, the value

of many cultures is then based on their ability to exploit themselves for a market constituted by an external and monied population. This inevitably creates new inequalities and privileges some cultures over others, as those who are able to mobilize their culture towards consumption and profit will receive more material support from their governments. The result in some cases is the exploitation of marginalized groups' cultures by dominant ones, such as the use of rastafarianism to promote tourism in Jamaica (Edmonds 2003), or the use of Aboriginal cultures more generally (M. Brown 2003). It may also mean relying on foreign marketing agencies to produce ad campaigns that re-inflect cultures with colonialist histories, exoticizing and "othering" them for marketing to the people of industrialized or "post-industrial" world. This scenario is emblematic of the reorganization of the global economy around IP that has been linked to neo-colonialism (Aioki 1996; Drahos 2003; Halbert 2005; Mgbeoji 2006; Oddi 1996) and a "new international division of cultural labour" (Miller 1996, 2008).

The NICL: Neo-Labouralism?

IP has been fundamental to the shifts in global economic organization over the past twenty years. TRIPS was instrumental to the neoliberal vision of the new global economy that has created what Toby Miller has dubbed the "new international division of cultural labour" (Miller 1996, 2008; Yudice 2003). It describes a global economy in which industrialized countries become "post-industrial," as primarily the sites for the creation of knowledge and cultural goods which underpin the economy of material goods (McGuigan 2004). Meanwhile, manufacturing and material processes of production, which had been performed by the industrialized world are outsourced to industrializing countries as sources of cheap and unorganized labour, creating products for consumption primarily in the now "post-industrial"

world. Globalizing the industrialized world's IP paradigm through TRIPS has created new possibilities for the capitalist exploitation of labour at home and abroad. The results of this new economic order are evident across IP-based industries including film (Miller 1996, 2005), clothing (Ross 1997), software, video-games, and consumer technologies (Dyer-Witthford & de Peuter 2006).

Trade liberalization and global IP has put downward pressure on labour on both sides of the NICL, in creative, service, and manufacturing sectors of the cultural economy. Manufacturing jobs have been outsourced to cheaper labour markets, allowing less-industrialized countries to bear the burdens of chemical production and reduced safety standards (Draho 2003; Dyer-Witthford & de Peuter 2006; Ross 1997, 2009a, 2009b), while “the rise of the creative class” (Florida 2001; Hartley 2005) has not in fact materialized as promised for the majority of workers in the creative industries (Gill & Pratt 2008; Golmitzer & Murray 2008; McGuigan 2009).

The job security and relative stability provided by Fordism for the industrialized world for much of the twentieth century (McGuigan 2004; Neilson & Rossiter 2008) has vanished. Particularly in creative industries, “precarious” work conditions have taken over, characterized by:

“a preponderance of temporary, intermittent and precarious jobs; long hours and bulimic patterns of working; the collapse or erasure of the boundaries between work and play; poor pay; high levels of mobility; passionate attachment to the work and to the identity of creative labourer (e.g. web designer, artist, fashion designer); an attitudinal mindset that is a blend of bohemianism and entrepreneurialism; informal work environments and

distinctive forms of sociality; and profound experiences of insecurity and anxiety about finding work, earning enough money and 'keeping up' in rapidly changing fields...

Structurally, research has also pointed to the preponderance of youthful, able-bodied people in these fields, marked gender inequalities, high levels of educational achievement, complex entanglements of class, nationality and ethnicity, and to the relative lack of caring responsibilities undertaken by people involved in this kind of creative work (in ways that might lend support to... arguments about individualization as a 'compulsion', the drive in capitalism towards a moment in which subjects can work unfettered by relationships or family)." (Gill & Pratt 2008: 15)

These conditions, created by the new international division of cultural labour, IP, and the shift towards neoliberal policies internationally and domestically, have replaced the stability once offered by Keynesian economics and public support for "the arts." "[P]olicies that argue for a radical expansion of [creative] industries under present conditions, without attention to the conditions of creative labour, risk fuelling labour markets marked by irregular, insecure and unprotected work" (Hesmondalgh 2003: 61). While a drive to develop creative industries is the focus of much recent policy discussion, little attention has been given to the long-term consequences of these shifting patterns of social and cultural life. It becomes clear that IP not only affects how cultural products are owned or produced; It also affects how culture is lived, circulated, and reproduced.

While the hype around the "creative class" glamorized the notion of autonomy in the workplace, discussions of "free labour" have led to different interpretations of what the term means, which is telling in its own right. Dyer-Witheford & De Peuter (2006) discuss "free labour" as work freed from the bureaucracy of traditional work environments, while Terranova

(2000) uses the term to describe “unwaged” and immaterial labour on-line. The interesting thing is that there happens to be a significant overlap between the way the concept is used in these instances, in that unwaged labour is generally free from workplace bureaucracy, and autonomous labour is often unwaged; both kinds of “free labour” establish conditions for extreme exploitation. Autonomous labour frequently spills-over into other spheres of one's life, effectively erasing the boundaries between work and life (Dyer-Witheford & de Peuter 2006). Similarly with Terranova's “free labour,” the lines between leisure and labour are effaced with users' activities contributing to the creation of capital. Users are increasingly becoming the producers of cultural goods, leading to the emergence of “prosumers” (Ross 2009b). This conflation of has created a resurgence of discussions surrounding what Autonomist Marxists have called “the social factory” (Gill & Pratt 2009; Terranova 2000). The “social factory” describes a situation where capitalism has permeated all aspects of social life, where all human activity is subsumed as part of the productive process of capitalism. On-line user activity, for example, becomes the source of a vast amount of surplus value for digital enterprise.

Cote and Pybus (2007) discuss how the social networking site MySpace depends on the activity of users in generating content to create value for the organization. They contrast Dallas Smythe's idea of “audience commodity” and “producibility” in broadcast media with one of user “productivity” in social networks (Cote & Pybus 2007). In this reformulation of the audience commodity, it is the audience that creates the content with which advertising is sold, and displayed back to them. The information and activity on social networks provides better information for companies to hit their target markets with advertising, and content provided by users creates the impetus for others in one's social network to log-on and load web-pages bordered by advertisements tailored for them. As Ross (2009b) points out, “the outcome is a

virtually wage-free proposition.” To put this in contrast, the Wall Street Journal estimates that a Facebook initial public offering later this year could set the company's value at \$100 billion.⁵ Google Inc., whose greatest assets include its search engine algorithm which is constantly improved based on information accrued through its use, and YouTube, which now receives 60 hours of user-upload video every minute, has a stock market value over \$188 billion. What has turned these internet upstarts into the new global giants is their ability to capture the value of user activity through the ownership of algorithms, computer code, and trademarks. The IP that underlies the products and services offered by corporations absorbs the “good-will” generated by the creative activities of users, so that when a video posted on youtube gets 10 million views, Google Inc. cashes-in. It is the control of the underlying IP that users inadvertently contribute their creativity to through the creation of the “goodwill” that make these companies profitable (Coombe, Herman and Kaye 2005).

Ironically, the participatory ethos which predominated in the development and administration of the Internet's early stages made it, and the people involved in it, easy prey for commercial exploitation. In its early years, the Internet was envisioned by many as a decidedly anti-commercial space, where collaboration, non-marketized exchanges, and gift economies would predominate. It was seen as a utopia of democratic and participatory potential which would undermine the increasingly concentrated corporate control of media industries. The World Wide Web's conversion into a capitalist enterprise was championed on the basis that it would help to unseat monopolistic “dinosaur corporations” (Foster & McChesney 2011: 5). While the internet has in some ways created a decentralization of power, democratizing means of production and distribution, it has also given rise to new giants who have come up with strategies

⁵ Rayce, Shayndi (2011, November 29) Facebook Targets Huge IPO. *The Wall Street Journal*. Retrieved from: <http://online.wsj.com/article/SB10001424052970203935604577066773790883672.html>

to concentrate the power that this new technology had diffused. As Lazzarato (quoted in Cote & Pybus 2007: 99) states, capital “is obliged ([in] a life-and-death necessity for the capitalist) not to ‘redistribute’ the power that the new quality of labour and organization imply” (Lazzarato, quoted in Cote, 2007: 99).

People's early willingness to participate freely in on-line communities while simultaneously becoming a part of the “on-line experience” of others, made it easy for corporations to make use of the “free-labour” ethos to support the ends of corporate profit-making (Terranova 2000). “NetSlaves” were frequently used as site administrators for a number of service providers, like America On-line (Terranova 2000). Other activities, like on-line gaming and open-source programming (Benkler 2006; Grimes 2006), have become capital-producing activities through the commercial internet. No physical object needs to be taken in order for the objects of one's immaterial labour to be appropriated. It is the ownership of the underlying IP that encapsulates users' “free labour” and makes it possible to ignore the creative rights of on-line participants and contributors. In this way, IP acts as the main tool and driving force for the dispossession of immaterial labour in the digital and cultural economies.

A related irony of the digital age is that although the Internet offers the possibility for greater organization between workers to respond to situations of mass exploitation, in many respects, it more readily promotes their alienation from each other and competition between them. Ross points out that through the narrative of “the starving artist,” “[s]acrificial labour and self-exploitation are the orders of the day... this mentality has become further institutionalized in the social networking frenzy of the Web 2.0 era, where users have unlimited access but no rights over their content” (Ross 2009: 137). Furthermore, he suggests that widespread “amateurism” in on-line labour, and other areas of creative work puts downward pressure on wages, and

contributes to “precarious” work arrangements in what has been called a “race to the bottom.” Contrary to suggestions that the bonds created through affective labour, and the growing numbers of people involved in forms of affective labour present the possibility for organized social movement (Hardt & Negri 2000), the fact that creative labour often takes place digitally, and in disparate locations, reduces the likelihood of the kind of social organization and worker mobilization that took place in a factory setting. For many workers, there no longer exists a physical workplace within which and against which to organize. Speaking about workers in creative industries, Ned Rossiter suggests that “[t]he extent to which workers are able to mobilise their potential power in an effective manner (i.e., in a way that protects and secures their interests whilst inventing new political information architectures) depends . . . on their capacity to organize themselves as a sociopolitical force” (2003:6). This phenomenon of seemingly limitless exploitation and “precariousness” due to a lack of cohesion or organization amongst creative workers seems now to be the status quo.

Free Culture: Under Pressure

An ongoing story featured on the websites of the Montreal Gazette⁶ and the Montreal Mirror⁷ supports Rossiter's (2003) suggestion by providing a case study of the role that social organization (or a lack thereof) can play in copyright disputes. In a recent advertising campaign called “Mixed and Mastered,” Cosette, the company Chevrolet hired to create the campaign, used a number of images of street art from the Montreal street-scape. Specifically, they used

⁶ Burnett, Richard (2011, November 9) Under Pressure wants Chevrolet to compensate its artists for using their images in ad campaign. *Montreal Gazette*. Retrieved from: <http://blogs.montrealgazette.com/2011/11/09/under-pressure-wants-chevrolet-to-compensate-its-artists-for-using-their-images-in-ad-campaign/>

⁷ Lejtenyi, Patrick (2012, January 19) Nice work if you can get it: Under Pressure and En Masse would really like ad agencies to stop using their art for free. *Montreal Mirror*. Retrieved from: <http://www.montrealmirror.com/wp/2012/01/19/nice-work-if-you-can-get-it/>

images of murals that had been painted as part of a well-established graffiti festival, Under Pressure. The festival organizers and some of the artists have come forward to claim that their art was unlawfully appropriated for use in the ad campaign by Chevrolet, and want financial compensation. Although the festival organizers claim that this is the largest national ad campaign that has centred itself on images of urban art, it is certainly not the first time that images of graffiti have been appropriated to sell commercial products, and may only indicate that graffiti as an art-form is becoming more commodified and mainstream, with the counter-cultural ethos of graffiti being re-packaged for consumerism.

As one of the artists' agents suggests, it did not cross the minds of Cosette or Chevrolet that the images were protected by copyright, suggesting that no company would use music without seeking prior permission. He argues that similar considerations are not generally given to visual artists because its "not in the culture." Perhaps it is "not in the culture" because the music industry has been under the centralized control of large corporations, whereas visual artists, for better or for worse, are not subject to a similarly centralized industry structure with powerful corporations who rabidly protect their copyrights. Arguably, the reason this case has drawn attention is that Under Pressure is itself a well-established organization, and some of the affected artists are "legitimate" artists with representation. As Coombe notes, "The law's impact may [also] be felt where it is least evident and where those affected may have few resources to recognize or pursue their rights in institutional fora" (Coombe 1998b: 473). There are certainly many people whose work and culture has been appropriated in similar ways without any disputes over ownership, rights, or compensation ever arising.

For a festival that relies heavily on private donations, a case like this may help secure their future; it may also push-ahead the commodification and commercialization of a subversive

art form that has been a vehicle of expression for marginalized people and transgressive political messages, not least, a critique of private property. As Gastman and Neelon state, “No other art movement in human history has so thoroughly confounded the ... concepts of public and private property” (2010: 21). Chevrolet has since removed a number of the offending images from its advertisements, and is seeking an agreement with Under Pressure and the offended artists. They have since pursued an “above-board,” branding strategy by sponsoring a graffiti competition featuring well-known graffiti artists in new commercials, and modifying cars with paint guns and robotic arms for painting on walls.⁸ The festival organizers, however, are keen to go to court, wanting to set a legal precedent which will protect the rights of artists. This case raises interesting questions about the intersections of public space and the culture that circulates in it. Although the recognition of artists’ rights in this case may be a good thing in that it would secure artists’ abilities to benefit from the products of their creative work, it may also create a troubling precedent further legitimizing the enclosure of public spaces – the material “public domain” where expressive action takes place – by corporate symbols and other “private property.” The case is evidence, I will now argue, of the continual process of capitalist subsumption.

“Creative Destruction” or “Creative” Destruction?

The ability, or rather, the necessity of the capitalist marketplace to expand into non-market zones is one of Rosa Luxemburg's areas of focus in her *magnum opus*, *The Accumulation of Capital* (2003 [1913]). Her ideas come primarily from seeking an explanation to a gap she sees in Marx's theory of capitalist accumulation. She seeks to account for capitalism's persistence

⁸ Kee, Edwin (2012, April 27) Chevrolet Sonic does graffiti. [Web log message] Retrieved from: <http://www.ubergizmo.com/2012/04/chevy-sonic-graffiti/> ; Stacey (2012, March 17) Chevrolet Sonic presents Secret Walls at SXSW. [Web log message] Retrieved from: <http://sxsx.com/node/10845>

in the face of what she thinks is an impending crisis of under-consumption. "Luxemburg argues that workers in the advanced capitalist nations, who are paid less than the value of what they produce, leads to a crisis of under-consumption. Therefore capitalists need to expand into non-capitalist market areas in search of new markets and investment possibilities, which inevitably leads to the collapse of non-capitalist social forms" (Leblanc & Scott 2010: 22). Capitalism's dependence on non-capitalist production inevitably leads to the subsumption of non-capitalist production into the capitalist economy. In her own words, "[T]he accumulation of capital is a kind of metabolism between capitalist economy and pre-capitalist methods of production without which it cannot go on and which, in this light it corrodes and assimilates. Thus capitalism cannot accumulate without the aid of non-capitalist organizations, nor, on the other hand, can it tolerate their continued existence side by side with itself; Only the continuous and progressive disintegration of non-capitalist organizations makes accumulation of capital possible" (Luxemburg, 2003 [1913]: 397).

In a sense, capitalism has a parasitic relationship with non-capitalist forms. It requires them for its continued expansion, but inevitably leads to their destruction. This happens because once a pre-capitalist economy is penetrated by "force or by guile, cheap, mass-produced consumption goods displace the old hand production of the family or village communities, so that a market is provided for ever-increasing outputs from the industries... in old centres of capitalism," without raising the living standards of the workers who consume the produced commodities (Robinson 2003: xxxv). Luxemburg sees capitalist expansion as primarily a relationship between industrialized and non-industrialized economies through imperial conquest and colonialism. She argues that capitalism's continual expansion has been realized by its continued dependence on forms of primitive accumulation similar to those Marx describes in his

account of the origins of capitalism – conquest, enclosure, expansion, and usurpation. However, her theory is criticized for providing a uni-dimensional view of how accumulation occurs, not imagining other ways that the system could orchestrate its renewal.

Despite criticisms that her theory of capitalist accumulation is short-sighted or deficient, Luxemburg's ideas are prescient and quite germane to contemporary discussions surrounding IP. Although Luxembourg was primarily focused on explaining capitalist accumulation through the relationship between capitalism and imperialism, capitalism's reliance on pre-capitalist forms of production goes well beyond her limited explanation. Writing in 1913, she likely could not have foreseen the extent to which capitalist expansion through intangible products would offer the escape capitalism needed from the limits presented by the material economy. The undefined borders of IP provide a gateway to expanding the undefined borders of capitalism.

IP has been used as a tool to expand the capitalist marketplace beyond its traditional boundaries. As Bettig mentions (1996 :34) the “expansionary logic of capitalism infiltrates the vast ranges of human labour and activity, including intellectual and artistic creativity. Thus, when it comes to domains of information and culture, the logic of capital drives an unending appropriation” of whatever forms of creativity can be claimed as IP. Luxemburg argues that the wealth of the developed world has for a large part been based upon primitive accumulation through imperialism, simultaneously acquiring a source of cheap labour while creating an ever-greater market for mass-produced goods. But in the late-capitalism we see the shift to knowledge-based economies focused on the ownership of IP, which itself has created new possibilities for capitalist expansion. IP legitimizes appropriation and dispossession through forms of primitive accumulation, which as Harvey (2003) points out, not only occur at capitalism's origins, but continually recur throughout the history of capitalism as part of the

system's self-renewal. Counter-intuitively, IP allows for the dispossession of the products of creative labour by providing a legal mechanism for taking the "stuff" that IP is meant to protect away from the person or people who made it.

Echoing Luxemburg's vision of capitalist accumulation, Horkheimer and Adorno (1993 [1944]) characterize the culture industries as part of the ideological machinery of capitalism, constantly feeding off of non-commercial culture for its renewal. Coombe (1998) notes a similar phenomenon in a Black-Label beer marketing campaign that exploited the images of alternative and anti-commercial youth culture, representative of members from the burgeoning youth subculture along Queen Street West in Toronto. Despite the fact that they had flocked to the brand because of its un-commercialized and working-class image, Carling used their cultural markers to establish its new commercial image. The example of Chevrolt's appropriation of graffiti suggests a similar phenomenon. There are also many examples through the history of popular music of counter-hegemonic music like punk and hip-hop being re-purposed to support ideologies of consumerism, which also has the effect of neutralizing their subversive social messages and origins (Muzzatti 2011). Part of the significance of this commercialization and pacification is that in past eras, revolutionary politics have often come out of artist movements (Harvey 2002).

Creative Resistance

It might seem then that there is no hope of escaping the forces of capitalism that subsume, commercialize, and destroy all that lies in its path in the process of accumulation. Yet, the IP economy of symbolic goods, digital networks, and creativity also present real potential for overcoming neoliberal hegemony. Harvey (2002) points out that the rent-seeking of monopoly

capitalism is contradictory, requiring uniqueness, while at the same time homogenizing difference. The more culture is commodified and commercialized, the less it is special or unique, and therefore, the less it is valuable as a resource by which to extract monopoly rents. The constant search for uniqueness in the face of its own destruction spurs the development of local movements that are ever-more resistant to commercialization, and that prove fertile grounds for resistance to the march of global capital (Harvey 2002; Hardt & Negri 2000). As Coombe (2004) discusses, while the symbolic economy of corporate trademarks and pop-culture images attempts to control the cultural processes of meaning-making, they also provide potent symbols against which to orient and mobilize resistance to corporate capitalism. While IP attempts to stabilize the meaning of signs, texts, and images, the social character of meaning-making processes makes them inherently unstable and open to reinterpretation and re-inscription.

Furthermore, IP and the NICL have created grounds for resistance to neoliberalism. IP is an area that unites disparate members of the global human population, cutting across socio-economic and territorial boundaries. It affects farmers and IT workers, artists and researchers, but also users of software and social networks, medicine and pop-culture. While growing numbers of marginalized workers in the industrialized, post-industrial, and less-industrialized worlds provide a valuable source for potential organization and resistance, the intolerance for unions in less-industrialized countries, the individuation of labour in creative industries, and the lack for the most part, of a physical workplace around which to organize pre-empts the types of labour organization seen in the era of industrial capitalism. But in the social factory, the whole of society becomes implicated in the economic ordering of capitalism (Gill & Scott 2008; Terranova 2000).

The way that global IP operates in the cultural lives of human beings around the world

(1998a) suggests that a broader social resistance is in order. The digital networks that have enabled the commodification, subsumption, and exploitation of cultural life that give rise to the social factory and individuate creative and service sector workers also provide the tools for civil society to organize autonomously and fractally on local and global scales. "[A]s the idea of intellectual property becomes more widely understood so does resistance to that idea" (Halbert 2005: 165). Rather than focusing on workers' rights, although these are important, a human rights focus in the struggle against IP and neoliberalism might potentially harmonize the voices of worker movements, arts activists, civil society organizations, social movements and marginalized groups. One danger is that human rights discourse also figures prominently in the rhetoric of the neoliberalism, not least in the first paragraph of the WTO Agreement (Harvey 2007b), and so can be mobilized to support interests and broaden consensus for things that may undermine an egalitarian vision of human rights. As Howard Zinn (2008: 73) points out, "inspirational language to create a secure consensus is still used, in our time, to cover up serious conflicts of interest in that consensus, and to cover up, also, the omission of large parts of the human race." Thus, in resistance to neoliberalism and the expansion of IP, there must be a more clear focus on human rights, not strictly as individual rights, but as civil, democratic, and cultural rights. There must also be a more careful analysis of the ways in which human rights discourse is deployed, supporting Rosemary Coombe's (2010) call for a "critical cultural study of human rights." The neoliberalization of IP that reduces the value of culture, knowledge, and human activity to economic value unites humanity in a strange way. By undermining the cultural and social aspects of life that give it texture, human beings are all affected by its dehumanizing properties. In an increasingly fractured and individualistic neoliberal world order, solidarity is the key to resistance.

IV

CONCLUSION

The narratives of IP are commodity fictions, and are themselves a part of the cultural landscape. They tell stories about IP that legitimize the creation of a new form of property based on assumed beliefs that correspond to fundamental social values. It is important not to lose sight of IP's origins as a form of public policy with particular social intentions. Although they serve to obscure public perceptions of how IP functions in society, they also reveal the normative criteria of what such laws and policies *should* be doing. In a sense, the commodity fictions of IP provide a good starting point for discursively deconstructing it as "property" and revealing it as a form of policy, and for reorienting the policy that shapes the production and dissemination of cultural works, and the lives of participants in the cultural worlds in which they live. The myths that are used to legitimize IP work because they suggest IP supports legitimate and desirable social ends.

It is hard to argue that artists and inventors do not deserve rewards for the fruits of their labour, or that the dissemination of knowledge, development of literacy, encouragement of creativity and free-speech, useful and socially-beneficial innovation, and the empowerment of people to self-express, self-actualize, and self-determine are not desirable. But to pursue these goals through the creation of property is problematic, and clearly ineffective. IP needs to be reunited with the normative moral values that are routinely appealed to in order to justify it.

Thus, it is important to recognize the way that IP as a neoliberal cultural policy undermines systems of normative valuation. It focuses on the economic exploitation of culture as a resource and private benefits, ignoring the negative effects this treatment of culture has on the structures and textures of human life. As the focus of economic strategies, it changes the nature of the economy and economic relationships, creating legal monopolies, and allowing for unprecedented concentration of private power and wealth, undermining the distributive social objectives of IP. The discursive and legal construction of IP makes it a tool of domination and exclusion. It has contributed to the reorientation of the division of labour in the global economy, dismantling the gains made by the labour movement over the past hundred years, enabling new forms of exploitation, and changing balances of work and life, blurring boundaries between them. It helped turn the internet into a tool of capitalist accumulation, making it possible for corporations to dispossess “free labourers” of the products of their creation through the ownership of underlying IP. While it is important to document and discuss occasions where IP is recognized, it is also important not to overlook the implications of the lack of recognition as seen in the case of “free labour,” but that also commonly occurs with respect to “traditional culture,” and the articulation between them. In many ways, IP functions as a form of primitive accumulation that subsumes non-capitalist forms through appropriation and dispossession, and

extends the boundaries of material capitalism indefinitely. By necessity, it subsumes that which threatens its continued dominance. However, just as capitalism co-opts subversive elements in the process of accumulation, there remains the possibility of co-opting elements of symbolic capitalism for the ends of subverting it, leading potentially to the re-inscription of policies oriented towards substantive social and cultural goals, rather than the economic ones that have unnecessarily assumed hegemony.

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