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Commodity Culture, Private Censorship, Branded Environments, and Global Trade Politics: Intellectual Property as a Topic of Law and Society Research

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Intellectual property has become a rich topic of interdisciplinary inquiry in the past 15 years, attracting the interest of anthropologists, communications and cultural studies scholars, economists, geographers, historians, traditional legal scholars, political scientists, sociologists, and philosophers. Not all of this scholarship addresses the role of intellectual property in actual social contexts, however, and a great deal of it is both hypothetical and abstract. Scholarship on intellectual property that represents a "law and society" approach is explored here through dominant themes in the literature. Briefly, these include the effect of intellectual property rights (IPRs) in shaping conditions of communication, the exercise of IPRs as a new form of social power, the spatial politics of branded environments, the cultural power of fame afforded to celebrities, global inequities occasioned by the emergence of trade-based intellectual property protection for informational goods, and a concern with the fate of the public domain in this new information economy.

THE COMMODIFICATION OF CULTURE: THE COMMUNICATIVE CONDITIONS OF INTELLECTUAL PROPERTY

One of the dominant themes in the interdisciplinary study of intellectual property concerns the ways copyright, trademark, and publicity rights (and to a lesser extent laws of unfair competition, design patent, and database protection) shape

communications in capitalist societies by enabling the commodification of cultural texts. Most critical scholars of intellectual property agree that the law of copyright has expanded protections for owners of artistic, literary, and musical works to the detriment of the public domain by threatening freedom of expression, inhibiting creativity, and stifling democratic dialogue. Communications scholar Siva Vaidhyanathan (2001) makes a convincing case that the history of copyright in the twentieth century is one of continually expanding, lengthening, and strengthening protections and that American copyright policy has lost sight of its original goals: "to encourage creativity, science, and democracy. Instead, the law now protects the producers and taxes consumers. It rewards works already created and limits works yet to be created. The law has lost its mission and the American people have lost control of it" (Vaidhyanathan, 2001: 4). In this prognosis, Vaidhyanathan joins a large number of legal scholars such as Keith Aoki, Yochai Benkler, James Boyle, Julie Cohen, Niva Elkin-Koren, Wendy Gordon, Peter Jaszi, David Lange, Mark Lemley, Jessica Litman, Neil Netanel, Lyman Ray Patterson, and Pamela Samuelson. I summarize his work because it is comprehensive, current, and accessible, and because, in keeping with the emphasis here upon law and society scholarship, it engages in primary as well as secondary research.

The history of the US Constitution indicates that the copyright clause was not considered a property right but a policy that balanced the interests of authors, publishers, and readers so as to provide an incentive for the creation and distribution of new works. Its framers recognized that creativity itself depended upon the use, criticism, supplementation, and consideration of prior works. Authors' exclusive rights were a necessary evil in a market economy – a limited monopoly to encourage creation for the purpose of furthering progress in the arts and sciences, the learning essential to an enlightened citizenry, and the ongoing enrichment of the public domain. This was considered a "tax" on the public (Vaidhyanathan, 2001: 21) but one that was strictly limited in time so as to ensure that works became part of the common property of the reading public. The right was also limited in scope; it protected the work's expression but not the ideas it contained. Thomas Jefferson was ambivalent about the copyright (and patent) power (Chon, 1993). He was suspicious of concentrations of power afforded by artificial monopolies and was afraid that the protection of expressions would ultimately expand to attempts to control the use of ideas by creating artificial scarcity, limiting access, fixing prices, restricting licensing, intimidating potential competitors with threats of litigation, and misrepresentations of the law. Thus Jefferson forewarned us about the "negative externalities" that characterize copyright practice today (ibid.: 24).

The original constitutional mandate for US copyright has been abandoned in the twentieth century in favor of a neoliberal vision that locates and protects "property" at all costs and sees nothing desirable in any form of "public goods." The distinction between ideas and expressions is eroding, the "limited times" of these monopolies are ever longer, and the public's fair use privileges are diminishing through technological change and international pressures. Copyright is increasingly used as a form of corporate legal intimidation. In *Owning Culture* (2001) communications theorist Kembrew McLeod also makes this point and shows that ever more areas of social life are being transformed by the expansion of IPRs. Folk music, for instance:

> ... is based on the practice of drawing on existing melodic and textual elements and recombining those elements in ways that create a song that can range from a slightly

> modified version of an older song to a wholly new piece that contains echoes of familiar melodic or lyrical themes. At the center of this mode of cultural production is intertextuality, in which texts are (re)made from other texts to create a "new" cultural text. (McLeod, 2001: 39)

These acts of production and performance are increasingly defined as copyright infringements. As a consequence, folk music itself is transformed. In attempting to avoid legal scrutiny, professional musicians produce music that has less and less relation with folk traditions. Others are deprived of rights to engage in many acts of musical creativity in performance. Historical links with culturally diverse oral traditions are thereby severed. Emphasis upon intellectual property tends to exalt originality rather than creative variation, singular authors rather than multiple interpreters, canonical works rather than social texts, and to privilege a moment of inscription over the process of ongoing appropriation even though the latter is actually the way most popular music is made.

Judges and lawyers, McLeod argues, have been predisposed to "freeze" or at least slow modes of intertextual cultural production. Certain appropriators (those with corporate backing and the power to engage lawyers) are permitted to control and contain the circulation of "their" copyright works, even when these have been taken from the public domain or from the folk traditions of peoples whose music has not been legally protected (African-American and indigenous peoples' traditions in particular). Other popular tunes – like "Happy Birthday to You" – have made their way into everyday life and ritual, after having evolved from a number of sources over the years. Nonetheless, the melody – composed by two school teachers borrowing from the public domain – was registered as a copyright in 1935. The lyrics, created by children in classrooms and parties, are nonproprietary, but every time the song is sung in public, a royalty is due to the copyright owner. The song's very popularity ensures that its value continues to grow. The copyright continues to change hands and to attract more powerful owners because managing these rights requires an ever larger and more aggressive team of lawyers. Not surprisingly, it is now controlled by AOL/Time-Warner (with the American Society of Composers, Authors, and Publishers who administers the performing rights) who ensure that restaurant owners, summer camps, daycare centers, and telegram delivery services pay the royalties due for the customary musical means of celebrating birthdays.

Copyright has become a means of rewarding the economically privileged with even further compensation and cultural control, Vaidhyanathan notes, while taxing and limiting the activities of the general public. Copyright policy, however, is not made in the public sphere but in highly specialized courts, tribunals, and hearings where those who might represent the public interest find themselves up against lawyers for Microsoft and Disney. These developments correspond to a:

> ...steady centralization and corporatization of information and access... Occasionally, technological innovations such as the Internet threaten to democratize access to and use of information. However, governments and corporations – often through the expansion of copyright law – have quickly worked to correct such trends... a healthy public sphere would depend on "thin" copyright policy. (Vaidhyanathan, 2001: 7)

This would entail protection "just strong enough to encourage and reward aspiring artists, writers, musicians, and entrepreneurs, yet porous enough to allow full and rich democratic speech and the free flow of information" (Vaidhyanathan, 2001: 5).

However, once all questions of authorship, originality, use, and access to ideas and expressions become framed in terms of property rights, discussion simply seems to end and maximum protection seems ordained; how can one argue in favor of theft (ibid: 12)? Thus, Vaidhyanathan suggests, we need to change the terms of the debate to invite the creation of an intellectual or information *policy* that takes into account the social need for expressive cultural activity and democratic dialogue.

Scholarship on trademarks illustrates similar tendencies. Legal scholars are concerned with the social and cultural implications of expanding trademark protections, the lack of a specific and certain "fair use" defense, and the widening doctrine of trademark "dilution" (liability for use of a trademark that "dilutes" its meaning or merely detracts from its positive connotations but does not confuse consumers) (Aoki, 1993, 1994, 1997; Coombe, 1991; Dreyfuss, 1990, 1996; Gordon, 1990; Lemley, 1999). The uncertain legal status of using IPR-protected texts in satires and parodies has long been an area of fascination for law students, scholars, and in the general press (Cordero, 1998; Klein, 2000; Kotler, 1999; Pearson, 1998) and it has become a new basis for corporate intimidation on the Internet (Schlosser, 2001).

In my legal ethnography *The Cultural Life of Intellectual Properties* (Coombe, 1998a) I show how intellectual properties shape and invite dialogic practices of making popular culture in which the signifying properties of intellectual property holders are reappropriated by others who simultaneously inscribe their own authorship of those works the law deems to be owned by their corporate disseminators (Coombe, 1998a: 23). With respect to trademarks the law clings to the ideological belief that "through investment, labor, and strategic dissemination the holder of a mark creates a set of unique meanings in the minds of consumers... and that this value is produced solely by the owner's efforts" (ibid: 61). The "distinction" that accrues to a mark, in short, is legally treated as a capital asset (goodwill). "Sociolinguistics and anthropological scholarship would suggest, instead, that meanings are always created in social contexts, among social agents, in social practices of communication, reproduction, transformation and struggle: in short, that cultural distinction is socially produced"(ibid). Trademarks are potentially arenas of struggle that embody the dialectic of two tendencies: the monologic (linked with authority and officialdom) and the dialogic (tendencies of those who are other to authority to transgress and transform the forms they encounter). This movement of meaning between center and periphery is a dynamic and productive one. Conditions of cultural hegemony are always at risk because they must be continually articulated and are constantly rearticulated by the agencies of others. The law promotes and protects a monologic communicative environment in which those who hold intellectual capital are permitted to make signs uniaccentual rather than acknowledge the social struggles that are inherent in signs because meanings are contested and contingent. "Intellectual properties often operate to stifle dialogic practice in the public sphere, preventing people from using the most powerful, prevalent, and accessible cultural forms to express alternative visions of social worlds" (Coombe, 1998a: 42).

Laws of copyright and trademark also appear, however, to provoke those who have an affective relation to the forms that IPRs protect into forming communities dedicated to forging alternative moral economies of value to counter those of their corporate proprietors. This is illustrated by sociologist Andrew Herman and communications scholar John Sloop (1998) in a discussion of a copyright and trademark lawsuit against a group of performance artists called Negativland. This group created music by compiling samples taken from the media landscape "to produce

what could best be described as parodic collages of various spectacles of contemporary culture" (Herman and Sloop, 1998: 4). In the "song" at issue, they pulled together samples from a single composed by the band U2, quotations from interviews with that band's members, and outakes from television shows to comment on the ways in which bands are marketed and achieve popularity in mass culture. The case generated a great deal of controversy and conversation amongst Negativland's fans. They used the Internet to comment on the propriety of using intellectual property in this fashion, the need to protect this kind of art and those who make it, and the necessity of freely appropriating cultural forms from the mass media to make authentic art in postmodern conditions. Digital communications were used to create communities of judgment upon the exercise of IPRs as a form of private censorship for corporate profit. Fans also created an alternative space for the music to be appreciated. As part of their legal settlement with the music publishers and the record company Negativland was prohibited from further distribution of the offending song, required to retrieve and to destroy all copies of it, and compelled to assign the copyright in the satire to the record company so that it could exercise control over its future use. Their satire was considered to dilute the value of the corporate investment in U2 (which the latter's lawyers argued, had acquired the status of a brand) and thus to pose a threat to consumer goodwill (a corporate asset). Nonetheless, proliferation of digital copies of the offending work among electronically linked fans made it impossible for the corporation to effectively police these demands, creating negative publicity for U2 that ironically worked to further dilute whatever goodwill the corporation felt they were protecting.

These studies are indebted to the groundbreaking book *Contested Culture* (Gaines, 1991), an early work addressing the emergence and impact of intellectual property law in contemporary consumer societies. Gaines considers intellectual property law as an object of culture and a discourse of power that restrains persons and regulates other cultural forms (1991: 4) by restricting the availability of popular signs and shaping the social production of meaning. Copyright, for example, interests her to the extent that it can "function in two opposite ways" (ibid: 9). To the extent that copyright is enforced, it puts limits around elements of culture and to the extent that copyright is not extended to a particular form, it can make those forms available to others. She refers to this as "the double movement of circulation and restriction" (ibid.). To the extent that forms are accessible, however, they are also available to be turned into new forms of intellectual property that will, at some point, return to the public domain. (Progressive extensions of the copyright term, however, make it less likely that cultural forms will return to the public sphere while they still have cultural value.)

Gaines limits her study of intellectual property, however, to its canonical texts; she examines appellate case law and legal treatises exclusively, and in this way reinforces the law's own understanding of itself as a body of authoritative texts. For most law and society scholars this is an inadequate understanding of where law exists and how it functions. Law and society scholarship is concerned with the ways in which law shapes consciousness, the ways in which it enables us to perceive the world in particular but limited ways, and the resources it provides for forging identities and communities. Nonetheless, given that Gaines's study is concerned with law as a form of ideology, the emphasis upon key appellate cases is not misplaced. These do provide important texts for exploring the categories, contradictions, and forms of argumentation characteristic to liberal legalism.

Trademark, copyright, unfair competition, patent, and publicity rights laws provide cogent instances of the ideology described as the commodity form of bourgeois law by jurist Evgeni Pashukanis in the 1920s. This law is structured around the individual (who in liberal legalism may well be a corporation) as the juridical holder of property rights including those over his or her own personality. The subject who holds rights is created by those rights. Individuated personality provides the ideological basis for this capacity for holding rights which is itself a fiction created by the needs of the commodity form; only when a subject is needed to engage in the sale of labor as an exchange value is it ideologically necessary to create the individual who has the freedom to contract. IPRs are an important area of bourgeois law in which the forms assumed by the legal subject are inscribed, as well as being the major legal site in which the extension of the commodity form to ever more areas of the social and natural world is both legitimated and contested.

Literary theorist John Frow (1995) and sociologist Celia Lury (1993) are drawn to issues of intellectual property precisely because they reveal just how fundamental this liberal category of the person is to capitalist accumulation. As Frow puts it, "the concept of the unique and self-determining person – precisely what seems most to *resist* the commodity form" (1995: 144) is used to legitimate – through such ideas as originality, invention, and the singularity of aesthetic labour – the commodification of ever more cultural forms. The application of measurable labor to raw materials to produce a work that expresses the unique character of each individual's personality and creativity – authorship – is fundamental to the means by which IPRs are justified, expanded, and denied (Boyle, 1996). The trope of authorship emerges in cases as diverse as the ownership of human cell lines, celebrity personas, plant genetic resources, folklore, and agricultural cultivation methods.

The study of celebrity provides a clear instance of the commodification of the human persona. Sociological studies address the social construction of the celebrity and the ways in which the famous become marketed as products and help to market products by investing goods with the symbolic values the public associates with the celebrity. The law enables the famous to protect their name, image, and other indicia that the public has come to associate with the celebrity persona. Law and society scholars are concerned that the enormous expansion of legal protections for publicity values, has enabled publicity rights to effect forms of private censorship, and question the ideological nature of the law's rationale for these protections (Coombe, 1994; Cordero, 1998; Frow, 1995, Gaines, 1991; Langvardt, 1997; Madow, 1993; McLeod, 2001). Many consider the peculiarities of the historical transmogrification of a right of privacy into a right of publicity in the United States. For years judges shared the public belief that the famous had chosen to live in the public eye and thus could not complain of any invasion of privacy when their image was publicly used. Eventually, the common law was "reconciled" with the advertising practice of paid use for celebrity names and imagery. The right to be left alone became a right to decide how and when to replace privacy with publicity by vesting the exclusive rights to authorize publicity. The right to assign and license rights of mass reproduction was vested in an individual whose persona was, in the process, commodified. Intellectual property law followed commercial practices by acknowledging a right to protect new areas of capital investment while claiming that the right it was protecting was based in property. As the legal realists noted, the law purported to base the protection on the economic value, when in fact the property would have no value unless it was legally protected (Gaines, 1995: 135).

As Frow (1995) and Coombe (1998a) demonstrate, the law does more than simply protect the celebrity's name and likeness. By encompassing ever more representations in the public sphere that are associated in any way with the celebrity, it encroaches upon the cultural activities of making social meaning. It enables celebrities to control social activities that draw upon their iconic status in society and places unnecessary restrictions upon cultural vocabularies available for expressive activities. Gaines, Madow, and Coombe all take note of cases in which those who controlled legal rights over popular cultural icons objected to subcultural usages of celebrity indicia; they insist upon the social significance of this work of reclaiming images in different registers of value. They argue that owners of celebrity texts can never wholly control this activity or the new contexts in which these images will circulate to accumulate new meanings. Informed by semiotic scholarship on the star image as a socially created phenomenon, these cultural analyses illustrate how social actors make meaning with the images mass culture provides them. Fans also forge identities and communities while creating new norms, values, and ethics of propriety with respect to the use of celebrity images (Coombe, 1994). In these social responses to the exercise of IPRs we see the creation of alternative moral economies of value.

Sociological studies of how intellectual property shapes communicative conditions now tend to consider particular social institutions and locations. The extension of copyright and patent appears to be transforming communicative exchange in digital environments (Lessig, 2001; Litman, 2001), in universities (McSherry, 2001; Polster, 2000), in scientific research generally (Reichman and Uhlir, 1999, 2003), and in biopharmaceutical research particularly (Rai and Eisenberg, 2003). These studies are critical of recent extensions of IPRs which appear to be inhibiting expression, research, development, and innovation.

Controlling Access: The Exercise of Intellectual Property as Social Control

In *The Age of Access* (2000), social critic Jeremy Rifkin makes global pronouncements on the social consequences of intellectual property. Although he rarely addresses the law as such, the "new economy" he explores is fundamentally dependent upon the strategic exercise of IPRs. Looking at changes in corporate investment and business strategies, he suggests that ownership and exchange of real and personal property is giving way to new relationships. "In the new era, markets are making way for networks, and ownership [of physical properties] is steadily being replaced by access [to suppliers of intangible goods]" (Rifkin, 2000: 4). IPRs become more significant as companies attempt to divest themselves of real estate, inventories, and equipment. "Concepts, ideas, images – not things – are the real items of value in the new economy... intellectual capital, it should be pointed out, is rarely exchanged. Instead, it is closely held by the suppliers and leased or licensed to other parties for their limited use" (ibid.: 5) in strategic networks that operate to concentrate power in fewer corporate hands. These relationships are dependent upon the strategic licensing and pooling of trade secrets, patents, trademarks, and copyright.

Rifkin estimates that a full 40 percent of the US economy is made up of new information-based industries and life sciences industries (2000: 52) whose major

assets are intellectual properties. If Rifkin is correct in his prognosis that every industry is becoming more knowledge-intensive and that all corporations in this knowledge-intensive industry (from software to the automotive industry) aspire to rid themselves of physical assets and employees, then an economy based on the exercise of IPRs may also ensure greater concentrations of power. This new form of power appears to be less accountable to people and communities or for the conditions of human work and habitation it enables.

The concept of "informational capital" is important to an understanding of "knowledge-intensive" industries in the new economy. Briefly, goods are informational to the extent that their value lies predominantly in their symbolic or textual components rather than their physical substrate or medium of delivery. Things like literature, music, films, software, chemical compositions, methods of manufacture, screenplays, business formats, or furniture designs are fundamentally "public goods." This means that until they are made artificially scarce by the imposition of legal restrictions on their use, they could be easily copied and transposed to new mediums. It is through IPRs that capital in informational goods is created, and as a consequence of technological advances in genetic sequencing all flora, fauna, microbes, plant germplasm, cultural knowledge, and even human cells are now, potentially, informational goods (Coombe, 2003b).

Many product life cycles have become shorter as a consequence of technological innovations in computer memory and telecommunications speeds. As "products come alive with information and animated with continual feedback, the pressure to upgrade and innovate increases" (Rifkin, 2000: 20). More investment goes into the research and development of the information components while the costs of embedding it in its material form decline. Only to the extent that this informational core is protected by intellectual property (e.g., protected against the copy of its integrated circuit topography, the reverse engineering of its technology, or shielded from unauthorized appropriation of its software or its DNA sequence) will it yield profit. Ironically, Rifkin's research reveals that most products become obsolete very quickly and R&D costs must be recouped long before the underlying protection expires (current terms for IPRs are thus obviously too extensive). It also suggests that the new economy's reliance upon intellectual property is fostering relations of industry "cooperation" that in other eras might have been considered anticompetitive:

> Shorter process and product life cycles and the increasing costs of sophisticated high-tech research and development – as well as the additional marketing costs involved in the launch of new product lines – have led many firms to come together to share strategic information as well as to pool resources and share costs as a way both to stay ahead of the game and to ensure against losses in an increasingly mercurial, volatile, and fast-paced cyberspace economy. (Rifkin, 2000: 23)

This may have less than optimal consequences from the perspective of consumers. The pooling of patents, for instance, and the conditions corporations impose upon other corporations who need access to their intellectual properties may result in a decline of research, a slowing down of innovation, and fewer and more costly products in the market. The exercise of patent rights over simple gene sequences (objectionable even under traditional legal principles) has created new obstacles to biomedical research (Heller and Eisenberg, 2000). Holders of IPRs in the products of basic research may refuse to license their technology unless they retain a veto over all

future uses of it and insist that licensees provide royalties from all products derived from the licensed use. Licensing costs may become so prohibitive that they function to limit innovation in the field. Difficulties in bargaining between "upstream" and "downstream" researchers become formidable (Rai, 1999).

Genes are the raw materials of biotechnology, one of the growth sectors of the new economy. Petrochemical industries have become life-science industries, shifting from chemical to genetic research and innovation. They have been immeasurably aided by recent changes in patent law:

> Like nonrenewables, genes exist in nature and must be extracted, distilled, purified, and processed.... When genes with potential commercial values are located, they are patented and become, in the eyes of the law, inventions. This critical distinction separates the way chemical resources were used in the industrial era from the ways genes are being used in the biotech century. When chemists discovered new chemical elements in nature in the last century, they were allowed to patent the processes they invented to extract and purify the substances, but were not allowed to patent the chemical elements themselves – patent laws in the United States and in other countries prohibit "discoveries of nature" from being considered inventions... In 1987, however, in apparent violation of its own statutes... the PTO issued a sweeping policy decree declaring that the components of living creatures – genes, chromosomes, cells and tissues – are patentable and can be treated as the intellectual property of whoever first isolates their properties, describes their functions, and finds useful applications for them in the marketplace. (Rifkin, 2000: 65–6)

Much of the world's gene pool is likely to be controlled by a handful of corporations unless other forces intervene. This will have significant implications for human well-being (Amani and Coombe, forthcoming). People's own cell lines may be owned by those medical authorities who isolate these from their tissues; those who require medical treatments based upon these lines will thus be dependent upon those authorities and the payments they demand. Research into the development of treatments that require access to several sequences may be deterred by the high transactions costs of obtaining multiple licenses. Genetic screening and diagnostic tests that use proprietary sequences are much more expensive to use and may be too costly for insurance companies to cover. Holders of these IPRs maintain close control over networks of licensees who are expected to share the profits of their own (more socially beneficial) research. Such practices operate to eliminate markets of buyers and sellers, and to restrict competition. As Seth Shulman notes, "we have yet to establish a clear sense of what anti-trust means in the knowledge economy" (1999: 190).

The "Hollywood Organizational Model" posed by Rifkin is an exemplary instance of such network-based approaches to organization (Rifkin, 2000: 24–9). Once again, the exercise of IPRs ensures its profitability. The early film industry relied upon "Fordist" mass production principles and vertical integration. The forced divesture of cinema chains under antitrust law pushed the industry to consider new methods of production that relied upon more customized production of fewer film products – the "blockbuster" whose value was built through advertising and the capitalization of merchandising rights. Such values required legal protection of ever more aspects of the expressive product (not only the film itself, but its characters, its footage, its memorable stills, its title, and other distinguishing features) as exclusive properties. Production companies realized that exercising these IPRs enabled them to control returns from a film's distribution and to "tie in" the

film into other areas of popular consumption. Control over the full range of IPRs also makes it profitable to outsource film production. Groups of companies with particular expertise (scripting, casting, set design, cinematography, sound mixing, editing, film processing, etc) are brought together for the life of the film's production but the major players are primarily distribution firms who employ few people and own few resources. More companies may be involved in film-making but they are dependent upon a few major industrial players for investment capital and they realize none of the royalties from the film's distribution and merchandising. The burdens and obligations of owning assets or employing people can simply be avoided by maintaining control over intellectual property.

Comparing the balance sheets of Microsoft with IBM is illustrative; Rifkin shows that Microsoft owns virtually no fixed assets, while IBM's are considerable (over a fifth of its market capitalization compared to less than 2 percent of Microsoft's). Under traditional accounting practices, a large difference between market value and assets was treated as an indicator that a stock was overpriced. Today the world's best performing companies have extraordinarily high ratios "but are still considered good investments because of their intangible assets, which are immeasurable but are a more accurate gauge of the company's future performance"(Rifkin, 2000: 51). Philip Morris, for example, purchased RJR Nabisco for $12.6 billion in 1988 which was six times what the company was worth on paper, largely, it seems, because of the value of the brand names it held and the goodwill these were judged to represent.

The Social Life of the Trademark

The trademark is perhaps the most significant of the legal forms that underlie the profits to be made from informational goods. The Nike success story is a case in point. It is clearly a knowledge-intensive industry:

> Nike is, for all intents and purposes, a virtual company. While the public is likely to think of the company as a manufacturer of athletic footware, in point of fact, the company is really a research and design studio with a sophisticated marketing formula and distribution mechanism. Although it is the world's leading manufacturer of athletic shoes, Nike owns no factories, machines, equipment, or real estate to speak of. Instead, it has established an extensive network of suppliers – which it calls "production partners" – in Southeast Asia who produce its hundreds of designer shoes and other gear. Nike also outsources much of its advertising and marketing operations. (Rifkin, 2002: 47)

What Nike does own and control is intellectual property – a trademark and the goodwill that has accrued to it, patents on some design features, slogans associated with the company by virtue of its advertising campaigns, and copyright in those ads themselves. It is the company's success at trademark management and its flair for branding that distinguishes it. Nike doesn't sell products so much as it uses products as marketing vehicles for the building of brand value as it does in "Nike Town" – a chain of retail outlets that sell only the company's products. The logo has migrated into ever more areas of social life. It now marks sports teams, clothing, and athletic equipment, colonizing the gymnasiums, classrooms, and washrooms of our schools and is even cut into the designs of people's hair and voluntarily branded onto the

flesh of many North Americans who have marked their own bodies with swoosh tattoos to proclaim their brand loyalty.

Journalist Naomi Klein (2000) has authored perhaps one of the most provocative and influential studies of how legal practices of protecting and promoting trademarks have shaped the social, cultural, and physical landscapes of contemporary capitalist societies. Her research investigates the phenomenal growth and extension of "branding" from the mid-1980s. Companies became convinced that success should be measured not by things owned or people employed, but by the strength of the positive images of their brands and their capacities to extend these images into new spaces. The brand is the core meaning, identity, and consciousness of the corporation (Klein, 2000: 5); advertising, sponsorship, logo licensing, and merchandising are merely vehicles for conveying that meaning. These are also activities of intellectual property management that are beginning to attract academic attention. Feminist sociologists, for example, describe how global brand management strategies "are explicitly constituted through familial, genealogical and sexual connections" (Franklin, Lury, and Stacey, 2000: 68) that naturalize culture and culturalize nature. A form of naturalized connection (family bonds) is transferred to produce an analogy for relations among products and between products and their consumers:

> Integral to the power of successful global brands, such as Ford, Nike, McDonalds and Benetton, is the creation of so-called family resemblances among products, through which commodities come to be seen as sharing essential character traits: the shared substance of their brand identities... brand work may be seen to produce a form of *commodity kinship*... producing a diacritical kinship of family resemblances through distinctive proprietary marks. (Franklin et al., 2001: 69)

These rhetorical forms of brand management, however, are fairly typical even within domestic markets; it is not clear what makes this a logic particular to globalization.

Klein, however, suggests that global branding's communicative conditions have generative social effects. Implicitly evoking the Nike swoosh, Klein has coined the term "the brand boomerang" to explain how the corporate trademark becomes a means of calling companies to account under conditions of globalization and how it has served to rally people around anticorporatism as a new brand of politics.

If logos have become the lingua franca of the global village, Klein suggests, "activists are now free to swing off this web of logos like spy/spiders – trading information about labor practices, chemical spills, animal cruelty and unethical marketing around the world... it is in these logo-forged global links that global citizens will eventually find sustainable solutions for this sold planet" (Klein, 2000: xx). As companies seek to brand more and more of our lives while censoring our communications and we feel more restrained by the lack of noncorporate space, social energies and longings become focused on the multinational brand itself as the source of restriction (ibid.: 130–1). Although such a movement is still in its infancy, Klein sees it as the beginnings of a battle to find new mechanisms to hold corporations accountable to a broader public. She provides detailed discussions of how mergers, franchising, brand synergy, corporate censorship, and employment practices have converged to create a massive assault on the social pillars of employment, civil liberties, and civic space, giving rise to an anticorporate activism that she calls "No Logo." These conditions are created by the power of corporations to employ

the ever expanding protections afforded by IPRs. However, the vulnerability of corporations to having the publicity value of these properties tarnished provides leverage for new forms of resistance. Although the outsourcing of production, for instance, can and often does lend itself to the exploitation of workers, the capacity of corporations to obscure conditions of production is limited. The same communications technologies that enable such dispersed operations also permit activists to link consumers and workers. Digital communications are key to this politics.

In digital environments, opportunities for recontextualizing trademarks and calling corporations into account have expanded and multiplied. Coombe and Herman (2000, 2001a, 2001b) show how trademark management becomes more politicized in digital environments. The world-wide web, they argue,

> ...enable[s] practices that promise to transform the nature of corporate/consumer relations by undermining the traditional capacities of companies to manage their images and control their imagery... [and] create conditions in which consumers have the ability to challenge the very forms of commodity fetishism (erasures of both conditions of production and the conditions under which symbolic value is produced) that have enabled the development of goodwill on which the corporate persona as an asset has historically relied. (2000: 597)

If consumer culture to some degree always exists in a dialogical relationship with legal power and its popular interpretation, this process of dialogue appears to have become more explicit and to have intensified in scope as corporations attempt to control their intellectual properties in cyberspace. Exploring a number of disputes over trademarks and domain names, they suggest that a system of proprietary control, dominant under modern conditions of mass marketing, is being transformed into a more dynamic negotiation of the ethics of property and propriety in the digital public sphere. The means that enable corporations to disseminate and capitalize upon brand equity in cyberspace also provides opportunities for consumers, employees, and artists to intervene in these communications to ensure that goodwill bears some relationship to public evaluations of a more comprehensive range of corporate behavior (Coombe and Herman, 2001b).

Branding has extended beyond goods and services to mark spaces and experiences. Increasingly, sociologist Mark Gottdiener asserts that "our daily life occurs within a material environment that is dependent upon and organized around overarching symbols, many of which are clearly tied to commercial enterprises" (1997: 4). Today's environmental symbolism is derived from mass media – common themes found in films, popular music, and novels are deployed to ensure that we live in themed environments. Gottdiener discusses the "signature logos" of fast food and themed restaurant chains, the aggressive merchandising of professional sports teams, and the theming of shopping experiences, family vacations, casinos, and hotels. Sociologist John Hannigan (1998) updates Gottdiener's thesis to account for the emergence of urban entertainment destinations in the late 1990s that constitute "Fantasy Cities."Aggressively branded, they are designed not only to provide entertainment but to sell licensed merchandise in standardized architectural forms that stand in economic and cultural isolation from surrounding neighborhoods (and appear oblivious to local social problems). Neither author considers the legal infrastructure that makes this new form of spatial culture possible. The liberalization of trademark law has permitted owners of marks to engage in extended marketing in

contexts increasingly distant from the goods in association with which they first acquired "secondary meaning" (associated by consumers with a singular source). The concept of "trade dress" evolved to permit rights of exclusivity over restaurant decor, store designs, and other distinctive organizations of space that had or might acquire symbolic meaning. IPRs expanded to provide greater protection for fictional characters, cartoon imagery, and logos. All of these legal developments provided new incentives for investing in the creation of distinctive environments to the degree that energies put into the creation of signifying environments produce "works" which can then be multiply licensed through franchising arrangements.

While these developments were viewed as keys to continued urban growth in the face of the limited tax base that most cities draw upon, they have encountered opposition from academics, neighborhood activists, and architectural critics on both political and aesthetic grounds. Decrying their lack of authenticity and the fact that they cater to desires for comfort, safety, and security entwined with fears of encountering social difference, critics like Hannigan fear that our urban centers are becoming "protected playgrounds for middle-class consumers" (1998: 7) without regard for issues of equity, civility, and social community needs.

Like most scholars of cultural studies, neither Gottdiener nor Hannigan recognize the power of the law in shaping the processes they explore (Coombe, 1999). IPRs are selectively deployed as a means of controlling how these mass cultural texts are appropriated in local lifeworlds, and whenever possible containing their polysemy for fear of trademark "dilution." The law enables, invites, and indeed, insists, that owners of these signs control and monitor their uses deploying a series of complex feints and fictions to legitimate what is essentially a form of corporate cultural power (Coombe, 1998a). A concern with law in society might encourage considerations of the use of intellectual property law in structuring commercial built environments, social practices of IPR management, and the law's role in regulating behavior in these spaces. To what extent, for example, do IPRs serve as a mechanism for risk management? Gottdiener sees themed environments as privatized spaces structured by practices of segregation and surveillance that have usurped the urban public sphere. I would suggest that the ways in which intellectual property laws protect investments in symbols allows those symbols to acquire meanings that shape activities within and exclusions from built environments. People may "self-segregate" in relation to particular symbolic environments; certain trademarks become signals of social safety while others may evoke forms of discomfort. Unbranded environments, like ethnic enclaves and city parks, are often considered unsafe; many municipalities have deliberately invited the presence of known coffee franchises into publicly owned spaces to make the middle classes feel more secure (and to make the homeless and the marginalized less comfortable?). Counterhegemonic spatial tactics in relation to trademark codes also need to be explored (should feminists nurse babies at Hooters franchises?). This has not been a subject of any sustained inquiry, to my knowledge, but it is one more way in which intellectual property could be addressed as law *in society*. We might think about the relationship between the globalized conditions of production for trademarked goods and their local use and interpretations in specific urban spaces, recognizing that they are encountered and engaged by peoples in different social positions, with different histories, who must interpret them with resources drawn from diverse lifeworlds (Coombe and Stoller, 1995).

Klein, for example, looks at practices in which brands are targeted in acts of resistance to these new urban landscapes. Her explanation of "brand bombing," the

"superstore" phenomena, and the emergence of community protests against "big box" retailing traces precise business strategies and the social injuries they are perceived to inflict. Throughout the world, residents, workers, farmers, and environmental and labor activists are targeting the more prominent urban locations of corporate logos with protests against the practices their owners are deemed responsible for and the social injuries these effect.

Rifkin's discussion of business franchising illustrates that the management of IPRs has become a means of exercising control over the conditions of commerce, while controlling risk and limiting accountability. Exclusive rights over patents, copyrights, trademarks, trade secrets, and relationships of trust and confidentiality are being used to forge new concentrations of economic power. "Business format franchising" is a method of doing business in which parent companies license their intellectual properties and leave the burden of holding tangible assets to their franchisees. This has fundamentally changed the social role of small businesses.

No longer administrators of autonomous and independent operations, franchisees are merely functionaries and subcontractors for larger businesses who closely control their activities and put them under continuous scrutiny and surveillance. Although they bear the risk and burden of owning property and hiring workers, they have no capacity to earn any autonomous goodwill. One consequence of this, surely (although Rifkin does not address it), is that today's so-called small businesses may be less able to adapt to local circumstances, support local causes, or respond to local conditions. Those who hold the real power, by controlling the valuable IPRs, cannot be held to account by the communities in which their franchisees are located.

The Global Information Economy: The Politics of Inclusion and Exclusion

One of the myths of the "postindustrial" society is the perception that intellectual property norms are becoming internationalized. The Eurocentric premises that characterize the dominant ideologies of intellectual property have long been the subject of critical commentary (e.g., Amani, 1999a, 1999b; Jaszi and Woodmansee, 1996). The so-called "level playing field" for trade works ideologically to obscure fundamental inequalities of bargaining power in the global arena and to ignore significant forms of creative activity. These imbalances and exclusions are now sites of struggle in emerging social movements that promise to further politicize the field of intellectual property.

The hegemony of neoliberal logic in the global governance of intellectual property may be traced to the emergence of the Agreement on Trade-Related Aspects of Intellectual Property (TRIPs) which, as legal scholar Neil Netanel (1998) usefully summarizes:

> ...came into effect on January 1, 1995, as part of the agreement that established the WTO [World Trade Organization] and substantially revamped the General Agreement on Tariffs and Trade ("GATT"). TRIPs, which now binds some 130 countries, brings minimum standards of intellectual property protection into the WTO regime of trade liberalization. Its underlying premise is that a country's failure adequately to protect the intellectual property of foreign nationals effectively constitutes a nontariff barrier to trade. (Netanel, 1998: 308)

Legal theorist Peter Drahos views the emergence of the TRIPs Agreement as a remarkable achievement: "because one country, the US, was able to persuade more than 100 other countries that they, as net importers of technological and cultural information, should pay more for the importation of that information. Assuming rational self-interest on the part of these other states, their willingness to sign off on TRIPs constitutes a real world puzzle worth studying" (Drahos, 1995: 7). Taking issue with more complicated theories of hegemony and structural determination, he suggests that theories of global regulation still need to attend to the realities of coercion, institutional entrepreneurship, and inequalities of bargaining power. The incorporation of IPRs into the trade framework was a goal aspired to by US corporate interests who were able to capitalize upon widespread social fears over deindustrialization and loss of US competitiveness.

Under the international conventions administered by the World Intellectual Property Organization (WIPO) – the USA lacked leverage and clout: it could always be outvoted by developing countries and WIPO had no enforcement mechanisms. In the trade arena, the USA had substantial power because it was so significant a market for developing country exports. The US business sector, with direct input into trade policy, began agitating for IPR enforcement and advocated the use of all levers of US power (from foreign aid to loan restructuring) to achieve this goal.

While industry associations provided the US Trade Representative's office with all of the data on "estimated losses" due to "piracy," other business alliances pushed foreign business communities to pressure their own governments to place IPRs squarely in the next round of GATT. In these negotiations the US was in a position of advantage because it could send negotiators with strong IP expertise. The GATT framework allowed deals to be traded freely so that developing countries might secure gains in some areas (like favorable terms for textile and agricultural exports) if they gave up their resistance in others (like the extension of IPRs). Clearly, developing countries felt that the related trade advantages outweighed the costs of these new measures. Political scientist Susan Sell (2003) shows that two trends have become evident in the wake of the adoption of TRIPs. Industry representatives have kept states under strict surveillance to ensure TRIPs compliance while a global civil society movement has mobilized around opposition to TRIPs, focusing on access to drugs, patents on lifeforms, farmers rights, and food security. She describes this as a "tension between the commercial and social agendas for intellectual property" (2002) that has created an increasingly politicized global policy environment.

Struggles over the interpretation of key provisions of TRIPs are legion. Developing countries, civil society organizations, and other UN intergovernmental institutions have battled to ensure that TRIPs does not take precedence over international human rights norms, environmental commitments, or development objectives. There is as yet little scholarship on these new political activities (but see McAfee, 1999).

The trade regime however, has been subject to critical scrutiny. Communications theorist Shalini Venturelli suggests that critical policy issues pertaining to the emergence of a globalized information society have been elided due to the failure to consider the communicative ramifications of a policy that determines "the conditions for innovation, ownership, production, distribution, and exploitation of cultural expression"(1998: 48). Rights of cultural self-determination, the cultural rights of creators, and state rights to adopt alternative modes of cultural and political development have all been ignored, downgraded, or prohibited by international information liberalization policies such as the TRIPs Agreement. The emerging

global information infrastructure, she believes, has a dire effect on the expressive conditions necessary to a democratic civil society. Despite increased technological capacities for democratic deliberation (through digital technology), information liberalization has actually decreased the prospects for democracy both by increasing proprietary concentration in the information sector and by transforming the state from the guarantor of public interests in conditions of expression to the guarantor of private proprietary claims. The new regimes governing IPRs may potentially limit the ability of states to determine public interests for their citizens in the arena most essential to the survival of democracy itself: namely, the structure, form, and accessibility of expression in the public sphere. Under the TRIPs framework, for example, the economic incentive model that favors expansive proprietary protections eclipses other dimensions of the copyright tradition, such as the US constitutional aim of enriching the public domain through the dissemination of knowledge and information, the public access rights of citizens, and the human rights of creative labor. New initiatives under way globally, such as the move to protect databases (and I would add, the move to increase protections for plant varieties and extend patent protections to new lifeforms) exacerbate this trend.

The adoption of copyright protections may be seen as a means of furthering democratic development (Netanel, 1998) and to advance democratic principles (particularly in the US constitutional context). Without countervailing international pressures and independent agency by individual states to tailor local regimes to enhance democratic objectives, however, the TRIPs regime will undermine the political potential that copyright might otherwise promise. John Frow, sees the TRIPs Agreement as a "planned attack on the key institutions of civil society" (2000: 176). The world market in information has been dramatically restructured by the abandonment of the New World Information and Communication Order (NWICO) – an information management model that emphasized information disclosure for development purposes – in favor of a model that puts the emphasis upon trade in informational goods as privately held commodities (ibid.: 178). Frow is ultimately equivocal about the likely social effects of the regime:

> Like any complex political formation, it has the potential for both negative and positive consequences. . . . the GATT protocols tend to favor universality and openness of access to information, and to work against both restricted cultures and cultures of secrecy. They enhance the often corrosive effects of the mass media on face-to-face cultures, and the universality they propound is, in one sense, no more than the universalized particularity of the wealthy nations. Yet, however contradictory this openness, it may serve to stimulate reactive cultural production, or cultural hybridization, or merely an uncontainable dissatisfaction with repressive political orders. At the same time, despite the rhetoric of the 'free flow of information' it is also the case that the strengthening of private property rights in information has potentially serious consequences for the protection of local cultures and for the further enclosure of the public domain. (Frow, 2000: 181)

Mary Footer and Christoph Graber (2000) believe that obligations under the new WTO regimes threaten national cultural policy objectives. Trade liberalization has created fears of cultural homogenization and desires for the protection of national identities. Conflicts between trade obligations and cultural policies are emerging. Europe and Canada, for example, have resisted the implication that film and television are the same as other marketable commodities because of their influence in

shaping cultural identities. Under the WTO, all forms of cultural policies may be subject to dispute settlement procedures for a determination of whether these create illicit trade barriers. Aspects of IPRs that tend to reflect national cultural values (Samuelson, 1999) will be subject to scrutiny.

The variety of copyright regimes in the world illustrates that artistic, literary, dramatic, and musical works are never completely commodified. Many states entertain both inalienable moral rights and collective licensing regimes that restrict owners from exercising full control over all usages of their works. The collective administration of IPRs historically worked to promote and protect national cultural activities, although this tradition appears to be threatened by industry consolidation (Wallis et al., 1999). Copyright exemptions, clearly contemplated by TRIPs as a means of furthering national policy objectives, are increasingly the subject of dispute in the WTO. The nexus of trade obligations, intellectual property provisions, and cultural policy objectives will be a source of continuing international controversy. Canada and France have proposed and UNESCO has supported the creation of an independent multilateral legal instrument for the preservation and promotion of cultural diversity to counter the hegemony of the trade regime. Such an instrument seems unlikely to gain international acceptance, but the resurgence of issues of cultural identity in all areas of international law under conditions of informational capitalism (Coombe, 2003a) combined with the growing power of NGOs (who are best positioned to represent social interests in international law) suggests that these cannot be denied and evaded by trade regimes in perpetuity.

Some scholars may overstate the social and political impact of the TRIPs Agreement, key provisions of which remain without interpretation. Some argue (e.g., Reichman, 2000; Correa, 2000; Trebilcock and Howse, 1999) that TRIPs itself provides many potential opportunities for states to craft limitations and exemptions to IPRs for consumer welfare, and economic and social development objectives as well as possibilities for compulsory licenses. The need for copyright protections to be tailored to enable expressive diversity, transformative uses, free flows of information, participation in public discourse, and public access to existing works, is evident in the history of international conventions which must be interpreted to determine TRIP's meanings.

The Fate of the Commons: The Politics of Protecting the Public Domain in Informational Economies

Many critics' concerns with the GATT system governing intellectual property focus on its failure to ensure the continuing viability of the public domain. With respect to genetic resources in the natural world, information, facts, methods of operation, language, or ideas (all areas traditionally unprotected by intellectual property laws), we have witnessed an erosion of domains of public access by virtue of the hegemony of neoliberal philosophy (Amani and Coombe, forthcoming). To the extent that the new international intellectual property regimes are committed to the commodification of culture – and it should be added, the enculturation of nature (Coombe, 2003b) – important values are put at risk. These include the desirability of debate and critique in an open public sphere and the importance of the free sharing of knowledge to further progress in the arts and sciences (Frow, 2000: 184).

Concern with the status of the public domain and alarm about the implications of its enclosure is central to many critical studies of globalization and intellectual property, but the issue is certainly not limited to control over *textual* resources – *all* resources have the capacity to become informational and thus to be *textualized* under contemporary technological and legal conditions (Coombe, 2003b; Perry, 2000). Current debates about the scope and desirability of intellectual property protections focus upon the world's crop genetic resources, the rights of farmers (Cleveland and Murray, 1997), and the rights of the rural poor to the continuing use of seed from harvested crops for the maintenance of food security. Should traditional cultivators and medicinal practitioners have rights of recognition and compensation when their knowledge and skills are appropriated, and what are the rights of the poor to continue to create biological diversity as a form of risk insurance in conditions of insecurity (Brush, 2000)?

Unfortunately many scholars have addressed these issues in dichotomous terms – arguing against private rights in favor of an implicitly singular public domain, sometimes imposing an essentialist collective communitarianism on indigenous and rural peoples (Brush, 1999; Gari, 1999), posing stark contrasts between indigenous or traditional and modern or scientific knowledge (Dove, 1996), and romanticizing the sacred dimensions of other cultural worldviews by unwarranted generalizations from specific cases. Fortunately there are now correctives to these projections, including a greater understanding of the variations of both private rights and the multiplicity of public domains (Dutfield, 1999, 2000); the complexity of different cultural means of possessing, protecting, and conveying interests in intangible assets; and the inextricably hybridized forms that contemporary knowledges, both "traditional" and "modern," tend to assume (Agrawal, 1995; Gupta, 1998). Still, it is important to acknowledge the revival of the image of the "commons" in contemporary movements of social resistance (Barnes, 2001; Goldman, 1998; Rowe, 2002) and critical scholarly aspiration with respect to informational policy (Benkler, 2001; Boyle, 2003; Lange and Lange Anderson, 2001).

Nor is the significance of the commons acknowledged only in countercultures. Although the phenomenon has not been subject to sufficient academic attention, social networks insisting upon the virtues of respecting a permanent commons in human and plant genetic material are becoming more vocal (the "no patents on life" movement, for instance) and link together hitherto unimagined coalitions of environmentalists, feminists, farmers, food and health activists, indigenous peoples, and religious groups in the articulation of alternative moral economies of value. The recognized need for a viable public domain in the area of agricultural research also motivated the negotiation of the twenty-first century's first international treaty. The International Treaty on Plant Genetic Resources, adopted by 184 states in November 2001, creates an agricultural commons and a safeguarded public domain in 35 of the worlds most important crop and forage plants (representing 70% of human dietary energy needs) (CIPR, 2001). Significantly, the Treaty provides for mandatory sharing of profits from the use of included resources with the developing world's farmers, who are also recognized as having rights to have access to, exchange, and sell seed in the covered crops, as well as rights of participation in relevant decision-making fora. Developing countries also seek to have their TRIPs obligations narrowed to permit them to recognize these farmers' rights, but the USA continues to pressure states in the hopes of eliminating them.

Global movements to recognize and protect the activities and practices of those traditionally excluded from the purview of intellectual property regimes have put the issue of IPRs and the consequences of their exercise into a broader realm of international policy making and legal obligation (Correa, 2001). Debates about IPRs are now inextricably intertwined with international human rights norms (Amani and Coombe, forthcoming; Chapman, 1998; Coombe, 1998b, 2001), environmental politics (Martinez-Alier, 1997; McAfee, 1999), assertions of cultural and territorial rights (Escobar, 1998), rights to health (Sell, 2003), and international struggles over indigenous self-definition and self-determination. Given the growing politicization of IPRs, the study of intellectual property in society promises to be a rich field of inquiry for years to come.

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