PUTTING INTELLECTUAL PROPERTY IN ITS PLACE

RIGHTS DISCOURSES, CREATIVE LABOR, AND THE EVERYDAY

Laura J. Murray
S. Tina Piper
Kirsty Robertson

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Contents

Acknowledgments vii

1. *Introduction* 1

2. *Copyright over the Border: Freedom, Commons, Appropriation* 15
   Laura J. Murray, S. Tina Piper, and Kirsty Robertson

3. *No One Would Murder for a Pattern: Crafting IP in Online Knitting Communities* 41
   Kirsty Robertson

4. *Growing a Patent Culture: Plant Hormones Research and the National Research Council* 63
   S. Tina Piper

5. *Exchange Practices among Nineteenth-Century US Newspaper Editors: Cooperation in Competition* 86
   Laura J. Murray

6. *Copying and the Case of the Legal Profession* 110
   S. Tina Piper

7. *Cultural Labor in a Small City: Motivations, Rewards, and Social Dynamics* 132
   Laura J. Murray

8. The Art of the Copy: Labor, Originality, and Value in the Contemporary Art Market 158
Kirsty Robertson

9. Afterword: On Collaborative Interdisciplinary Research 181

BIBLIOGRAPHY 185

INDEX 201

1 Introduction

IN RECENT YEARS, academic and policy discussions about culture, trade, and economic growth have become quite preoccupied with the role and form of intellectual property (IP) law. At the same time, the general public has become engaged to a remarkable extent with questions and problems posed by this formerly esoteric branch of law. The range of position and tone is vast, from the polemical to the highly technical. The debates are subtended by varied understandings of what IP law does, ranging from the conventional ("it incentivizes creativity") to the critical or subaltern ("it stymies creativity and undermines the commons," or "it justifies appropriation of indigenous and local knowledge"), and from the confidently instrumental ("it creates scarcity to allow market dissemination") to the resignedly practical ("copyright is irritating, but we've got to work with it"). But there is widespread agreement on one fundamental point: IP laws have effects. In debates over reforms to IP statutes or negotiation of IP-related treaties, people often seem to assume that a change to those documents produces, for better or worse, a predictable change to behavior. This book complicates that apparently self-evident claim or presumption. Through a collection of case studies focused on art, crafts, journalism, science, and the practice of the law itself, we show that effects attributed to IP statute and case law are often, in fact, results of cultural, professional, economic, and ideological circumstances in which IP law is invoked or imagined occasionally, opportunistically, or instrumentally. We hold that IP law is nothing like an on-off switch with determinable and direct effects. Yes, some realms of corporate cultural production may be saturated enough with lawyers that statutes and case law may be an especially prominent driver of behavior. But more

generally, we contend that in seeking a full understanding of what IP law is, statutes and cases are the last thing we should look at, not the first.

When we use the term "IP law," we refer to the complex interactions between statute and case law (what lawyers would call "IP law") and the ways it is understood or mobilized as a symbol or discourse. That is, the reality of IP law in our view is not so much the day in court as the many other days IP law is experienced and imagined in the various contexts in which it is invoked. Insofar as IP has a role at the scene of creativity, it may appear as fantasy ("someday I'll be a millionaire"), rumor ("they'll take your house for that"), or threat ("pay up or I'll sue you") on the horizon of more immediate circumstances enabling or constraining creative activity. It can be hugely powerful in these roles, but not in the way that a legislative drafter or lobbyist might imagine. On other occasions, IP law may serve as a whipping boy, and as such actually fuel resistant cultures of appropriation or tinkering. When it does so, IP law is acting as a symbol of corporate power rather than as a specific set of rules. Although the above examples do show that IP can have some effect in incentivizing creative output, it serves most often as a necessity or strategy adopted to cross or police boundaries long after a work has been created or an innovation has taken place. Even in such a role, it may function more as rhetoric than as rule. The social and cultural context of any emergent dispute or ownership claim—not to mention the financial circumstances of the parties—dictates how, why, and by whom IP law is invoked. An essential fact forgotten by some legal scholars is that IP law is invoked vastly more often outside the courtroom than within it.

IP statutory provisions may be more or less appropriate or relevant to a given situation; the IP to which people refer may be an accurate or an incorrect representation of statute or case law. But we have observed in many different circumstances that while statutes and cases may be readily and freely available as primary sources of "the law," people actually *choose* to understand the law through information and opinion gathered from friends, strangers, coworkers, and the media. And they choose to share, create, negotiate, and dispute based on what seems fair, just, or necessary in the context of how their group functions in that moment, often ignoring legal mechanisms adapted for this purpose. People may also inadvertently or strategically misrepresent the "black letter" of statute. Statute and case law are simply not primary; the law is in most cases what people think it is, or can convince others it is. Thus, rather than focus on legal reform or access to the law, or pursue traditional normative legal scholarship, as we and many of our colleagues do elsewhere,[1] we define our object in this book as the everyday life of IP law—or, in some cases, its complete absence from everyday life. Julie Cohen has critiqued what she calls the "commitment to abstraction" in IP research (2007, 1175), when in fact "understanding the processes that generate artistic and intellectual change requires careful attention to the ways in which processes of cultural production and transmission are mediated by and through texts, objects, bodies, and spaces" (2007, 1177). Those processes are our focus in this book.

Our work emerges from a set of conversations between different disciplines. One of us is a literature scholar with expertise in copyright, cultural theory, indigenous studies, and American literary history; another a legal scholar who specializes in IP law, legal history, and history of science; and the third a historian of visual culture whose research focuses on creative industries and immaterial labor. As we recount in the afterword, *Putting Intellectual Property in Its Place* came together through a series of meetings designed to share and expand our areas of disciplinary expertise. Our approach attempts to stand as an example of sustained reflection, inquiry, and dialogue between disciplines.

We are informed on the legal side by the outpouring of IP research of the past twenty years, and by studies in legal realism, regulation, and indigenous IP and traditional knowledge. But we also, together and separately, bring with us a range of critiques of cultural policy, experience with the arts and activism, and a historical and ethnographic sensibility. As scholars working in Canada, we find ourselves engaged with US academic and activist discourses, and yet somewhat outside them. As settler scholars, we have been struck by the power of indigenous critiques of IP law, and the infrequency of efforts to explore their points of commonality and contrast with critiques coming from "free culture," "copyleft," and public interest positions. Furthermore, over the past few years we have become increasingly aware of gender, class, and professional dimensions of many of the issues that concern us. We hope this book will serve as a resource for legal scholars, cultural historians, communications scholars, and activists concerned with relationships between intellectual property, ideology, and creative practice.

Putting Intellectual Property in Its Place focuses on North American spaces, and on fairly mainstream ones at that, in order to estrange an environment usually understood to be unproblematically interpellated by IP law. The idea that IP law is an imposition on pre-existing or local modes of conceptualizing and regulating cultural production has been powerfully developed by those working on indigenous cultural property. As Catherine Bell and Val Napoleon point out, "the very terms 'culture,' 'property,' and 'ownership' are Western legal, social, economic, and political constructs that are imposed on First Nations" (2008, 6). Core copyright concepts such as fixation, authorship, work, and copyright term may be inappropriate or even nonsensical in indigenous contexts. This is not to say that indigenous cultures form one collective whole of shared wisdom. Many indigenous cultures, even today, have specific elaborate laws and systems for transferring custodianship or responsibility for songs, objects, stories, and knowledge within or between families, clans, or nations. Nonetheless, Boatema Boateng observes that "in the current phase of globalization, [indigenous people] have witnessed the accelerated appropriation of their cultural production—from plant knowledge to ritual and utilitarian objects—for global markets" (2011a, 21). This appropriation takes place through the mechanism of IP law, in flagrant disregard for indigenous laws and practices. In reaction, indigenous nations have worked individually and collectively not only to assert ownership over appropriated ideas and objects but to insist on the continuing power and utility of indigenous regulatory frameworks.

We contend that the respectful impulse to treat indigenous cultural property laws and practices as *sui generis* has limited their critical reach and comparative power. Kathy Bowrey is one of the few who has broached the possibility of bringing indigenous modes of knowledge custodianship into conversation with others. "Both indigenous protocols and copyleft are about promulgating and enforcing communal norms and generating broad respect for, and compliance with, such demands," she observes, and asks, "Why should they not be considered as contemporary forms of custom?" (2006, 72). In Bowrey's sense of "the lived experience and legal wisdom of the community" (72) or E. P. Thompson's sense of "a lived environment comprised of practices, inherited expectations, rules which both determine limits to usages and disclose possibilities, norms and sanctions both of law and neighbourhood pressures" (1991, 102), the idea of "custom" can apply to practices as rooted as indigenous values and as new as open-source software development. Bringing practices at the most "free" end of views about cultural circulation into the same room as those often characterized as restrictive has provoked us to consider what other modes lie in between. Neither indigenous understandings of cultural property nor sharing practices developed by open-source software programmers are closely analyzed in this book, but awareness of both has profoundly influenced our approach. Our research has confirmed that rather than being marginal or exceptional, community-based ways of regulating production and care of knowledge and culture are more typical than has been supposed.

After all, computer programmers were not the first Western creators to discover sharing: many other Euroamerican communities have maintained and developed persistent practices and beliefs around creativity and community that sit apart from, and often challenge, presumptions in law. For example, literary historian Leon Jackson has studied the gift and patronage circuits that enabled the production and circulation of nineteenth-century US literature, calling them a "multitude of distinct economies, each of which had its own rules and reciprocities, its own exchange rituals and ethical strictures, and even, sometimes, its own currencies." He notes that as the market economy became more dominant, "the disembedding of these various authorial economies was a complex and often incomplete process, no more inevitable than it was irreversible, and for that reason, some of the traits we associate with embedded authorial economies persist to the very present" (2008, 2–3). Other distinct creative economies, with specific forms of expectation, acknowledgment, and reward, can be seen among academics, artists, and musicians, who may care more about being cited than being paid for reuse of their material. Craftspeople often have highly specific ideas about their relation to tradition and community. This book attends to such local cultures, seeing them as exemplars of creative activity in which IP plays a supporting or complicating, not a driving, role. We do not mean in any way to homogenize such practices with indigenous law, or for that matter, open-source protocols. But we reject the binary view that would presume "Western" people to be entirely comfortable or hegemonized by IP law, and indigenous or nonwestern people to be alienated from it. The reality is much more complex.

This study is indebted to, and constantly in dialogue with, a growing rich intellectual tradition of scholars looking at and around IP law. Social historians, legal historians, historians of science, and historians of the book have written thick, contextualized histories of intellectual property laws and practices in different time periods and regions, thereby denaturalizing IP law as it is entrenched and contested today. For example, Mark Rose (1993) and Carla Hesse (1991) have delineated the contingencies of the eighteenth-century invention of copyright in England and France, respectively; Meredith McGill's (2003) study of the US "culture of reprinting" before the Civil War sketches an environment in which literature circulated because of lack of copyright constraint. George Parker (1985) and Eli MacLaren's (2011) historical approach to the book trade in Canada uniquely highlights the interactions of IP legislation with a growing Canadian economy and its colonial identity. Scholars of British history, including Catherine Seville (2006), Isabella Alexander (2010), Brad Sherman and Lionel Bently (1999), and Christine MacLeod (2007; 1988) have woven intricate, insightful histories that have contributed profoundly to understanding the contingency of IP law in its present forms. Anthropologists, cultural studies scholars, and legal anthropologists have also excavated and observed divergent intellectual property or collaborative practices, examining specific cultural contexts of creative production. Rosemary Coombe's *The Cultural Life of Intellectual Properties* (1998) is a foundational work of this kind, and Biella Coleman's (2012) work on the structure, values, and normative commitments of hacker communities is a recent striking and substantial contribution. Corynne McSherry (2001) has explored the complex relations between academic citation practices and IP, Mario Biagioli (2003; 2006) has studied the practices of scientific authorship and situated patents in the history of science, and Christopher Kelty (2008) has anatomized the ways open-source programmers think about knowledge production. Others have written about the awkward fit between artistic traditions and copyright case law (e.g. Jaszi 1994). Scholars, artists, curators, and activists such as Angela McRobbie (2002; 2011), Kirsten Forkert (2006), Okwui Enwezor (2006), Brian Holmes (2008), Gregory Sholette (2010), and numerous others, including philosophers and theoreticians such as Jacques Rancière (2010) and Nicolas Bourriaud (1998), have considered how artists and cultural workers have continued to push the boundaries of a "creative industry" system that occasionally appears to be all-enveloping. All this work, along with many parallel and intersecting projects to "make IP 'strange'" that will be cited elsewhere in this book (Biagioli, Jaszi, and Woodmansee 2011, 11), has inspired our own oblique approach to IP law.

Meanwhile, a small but growing body of legal scholarship is exploring creative practices explicitly excluded from IP protection or awkwardly positioned with regard to it, and anatomizing alternate norms. Creators studied include fashion designers (Raustiala and Sprigman 2006; 2009), French chefs (Fauchart and Von Hippel 2008), magicians (Loshin 2010), stand-up comedians (Oliar and Sprigman 2008), and roller derby players (Fagundes 2012). This work constitutes an important and exciting acknowledgment of the marginalization of law in selected creative communities. However, as Fagundes (2012,

1096–1098) has noted, it nonetheless tends to keep the law at the center of attention and relegate nonlegal norms and practices to specific marginal spaces.[2] Sometimes the approach is highly instrumentalist: for example, Mark Schultz's study of jamband audience communities supposes that "the social norms of the jamband community are significant because social norms are one of the keys to solving the file-sharing dilemma" (2006, 655). For Schultz (and others), understanding norms can teach useful lessons about how to persuade people to obey the law. More generally, the studies take for granted many categories and priorities of IP law, even as they study practices outside of it. Some focus on the economic potential that informal normativity can produce (Fauchart and Von Hippel 2008, 195–196); others test whether IP is in fact an incentive by exploring innovation in "low-IP" communities to show that economic value can be produced by other regulatory structures (Raustiala and Sprigman 2006); still others examine in detail how and why formal IP law is inadequate for the needs of low-IP communities (Loshin 2010, 20–21; Oliar and Sprigman 2008, 1801–1809). As a result of the focus on IP and positive law, a functionalist approach predominates that emphasizes norms with a direct counterpart in IP (Fauchart and Von Hippel 2008, 187–188), and innovation and market value as central markers of success.

The narrowness of focus is evident in the term that has emerged to describe creative environments where IP is not prominent, and has become shorthand for studies of such spaces: "IP's negative space" (Raustiala and Sprigman 2006, 1762; Rosenblatt 2011). To imagine established, and in some cases ancient, modes of regulating creativity inhabiting a "negative space" outside of "IP's domain" (Raustiala and Sprigman 2009, 1224) assumes an area of total saturation of IP in the center of the picture, and relegates nonlegal norms and practices to unexplored margins. Echoing the *terra nullius* concept from colonial discourse, these phrases provoke questions about IP's sovereignty. How did IP get its domain? Was there anything there before? How deep in fact does IP's control run? Indigenous modes of regulating cultural production and custodianship, artistic practices of pastiche, parody, and quoting, and even the academic citation system that incentivizes and regulates the writing of these very studies challenge the centrality of IP and the otherness of the "negative space."[3] We would contend in fact that *all* creative practice—not merely niches such as magic and stand-up comedy—features some sort of embodied ideas about attribution, custodianship, and fair practice. Sometimes these ideas may be, as Madison, Frischmann, and Strandburg (2010) put it, "constructed," that is pragmatically designed and codified into formal norms; more often they are in a sense indigenous, customary, implicit. When we start to perceive these dimensions of practice, we may see IP in a new light as epiphenomenal, superficial, or strategic. Whereas other scholars "emphasize the possibility that social norms can supplement, or in some cases stand in for, legal regulation and that lawmakers should consider them—their existence, their potential emergence or dissolution, their reinforcement, or their supplementing—prior to making law" (Oliar and Sprigman 2008, 1794),[4] our starting point is that local practices or norms are foundational and persistent, not ancestral or supplemental.

In claiming that IP is only ever experienced in a refracted way, we share with critical legal pluralism the view of the "nonexclusive, nonsystematic, nonunified and nonhierarchical ordering of normativity" (Kleinhans and Macdonald 1997, 34). From this perspective, "domain" becomes far too assertive a term to describe the functioning of IP in any context, and we look beyond "IP systems" with functional IP analogs that produce "products" or "works." We agree with Madison, Frischmann, and Strandburg (2010) that "the theoretical discussion of intellectual property policy has been myopically focused on extremes of exclusion and open access, ignoring a wide range of constructed commons that persist between the extremes" (707). However, our own focus is somewhat broader in that we devote attention not only to "constructed commons" but implied commons, inherited commons, and barely visible norms and practices that while operating according to nonproperty logics may not even aspire to the ideal of the commons. Madison, Frischmann, and Strandburg seek to develop anatomies of the rules and norms of "constructed cultural commons" that may operate in various professions. Our examples reveal implicit norms and only occasional explicit resistance to IP. The emphasis throughout is on multiple forms of value, multiple forms of result or product, and multiple forms and motivations for cultural circulation. In each context, we deprivilege IP law in order to highlight the *many* ways through which ideas and their material manifestations may be remembered, embodied, bought, traded, shared, derived, inherited, altered, combined, transferred, and stolen. We wish also to recognize outcomes or products beyond cultural or intellectual property, such as community relationships, consolidation of professions, quality of life, and the education of a next generation. Communities cohere through everyday micro-interactions, each of which constitutes creative improvisation (see Goffman 1959; Sawyer 2007). It seems to us that IP law's emphasis on "works" recognizes far too little about process and practice, without which works would neither emerge nor circulate.

In *Customs in Common* (1991), Thompson presents a detailed portrait of *lex loci* in eighteenth-century England, a time of enclosure of the commons and rationalization of capital when standardized property law was being imposed on the populace. Thompson claims that while "the [property] Law may punctuate the limits tolerated by the rulers, it does not, in eighteenth-century England, enter into cottages, find mention in the widow's prayers, decorate the wall with icons, or inform a view of life" (1991, 9). We make a similar claim about *intellectual* property law, hearing a resonance in our own time of capitalist intensification of intellectual property. If we look with Thompsonian glasses at our own moment, existing collective modes of practice or "habitus" can become startlingly, if perhaps fleetingly, visible; even those hailed as "new" have deep roots in professional and community histories. As we study what might be called the "culture of culture," we can also heed Thompson's warning that

> "culture" is a clumpish term, which by gathering up so many activities and attributes into one common bundle may actually confuse or disguise discriminations that should be made between them. We need to take this bundle apart, and examine

> the components with more care: rites, symbolic modes, the cultural attributes of hegemony, the inter-generational transmission of custom and custom's evolution within historically specific forms of working and social relations. (13)

"The very term 'culture,'" Thompson advises, "with its cosy invocation of consensus, may serve to distract attention from social and cultural contradictions, from the fractures and oppositions within the whole" (6). Many of the environments we investigate here are not isolated from IP law or capital, and if we call them cultural or creative communities, we do not wish to imply that they are softer or more homey and familial than the larger "society."

In other words, we do not see ourselves championing utopian spaces of sharing, gifting, tradition, and anticommodity. Along with community, culture, and creativity, commons and sharing have emerged as inspirational terms in today's challenges to expansionist IP law. Contesting Garret Hardin's (1968) "tragedy" of the commons (the idea that a commons will be depleted as no single person has an incentive to look after it while all have reason to overuse it), many have argued that a commons of immaterial goods could be an inexhaustible, and even essential, resource that could encourage and inspire future creators with its "raw materials" (Litman 1990, 968).[5] Our project draws from and builds on such affirmative commons discourses. However, for three reasons we wish to keep our distance from them, at least to a certain extent. First, they bear an unfortunate echo of imperialist resource economy discourses in which the (one-and-only) commons is presumed to belong to all, as declared and defined by the (all-powerful) State, and is presumed to be inexhaustible. Historically, this has often amounted to expropriation from local populations and reallocation to those who would "develop" the "raw material" in line with the agendas of capital (see Chander and Sunder 2004; Bowrey and Anderson 2009). The idea of the physical commons can (counterintuitively, to be sure) deny local modes of belonging: under the banner of the common good, a neighborhood or a forest might be replaced with an expressway, for example. Hailed as good for "everybody," such a move still hurts somebody. Furthermore, and this goes back to the fantasies of America that subtended Locke's theory of property, commons discourses often assume infinite resources, when in fact most natural resources have turned out to be exhaustible, with high extraction costs. The commons metaphor carries acknowledged problems in the physical domain that should be seriously considered if it is to be applied to the cultural realm. A second, related, reservation is the danger that the commons becomes mere supplement, in the Derridean sense, confirming the power of the IP system even if it may be declared an "outside." The commons and public domain can become co-opted to the justification of IP law rather than observed and understood in their own terms; they can be seen merely as resource or safety valve (Craig 2010). A third concern is that the term "commons" implies equal sharing; for example, Lewis Hyde recounts a "tale" in which "art and ideas, unlike land or houses, belong by nature to a cultural commons, open to all" (2010, 214). In fact, we contend, many non-IP spaces exist, but few of them are "commons" in this sense. They have their own logics of belonging, practice, and propriety. Not everything is freely shared.

The subtitle of this book lists three threads that run through all its chapters: rights discourses, creative labor, and the everyday. Our interest in rights discourses—as opposed to "bills of rights" or "rights law"—emerges out of our experience watching political battles over copyright law. Unlike patent and trademark, copyright has "right" embedded in it. And in the heated public rhetoric over whether there is too much or not enough copyright, this word is everywhere, whether it is understood as a quasi property-right or a natural right in Lockean or mystical terms. The fact that copyright is a tool that has been and always will be adjusted to economic and cultural priorities tends to be effaced in the binary and absolute language of rights. This is, of course, not a problem unique to copyright or even IP law more generally. Many scholars have critiqued rights discourses' individualism and lack of recognition of duties and responsibilities. Mary Ann Glendon, for example, observes that the "stark, simple rights dialect" of the United States

> puts a damper on the process of public justification, communication, and deliberation upon which the continuing vitality of a democratic regime depends. It contributes to the erosion of the habits, practices, and attitudes of respect for others that are the ultimate and surest guarantors of human rights. It impedes creative long-range thinking about our most pressing social problems. Our rights-laden public discourse easily accommodates the economic, the immediate, and the personal dimensions of a problem, while it regularly neglects the moral, the long-term, and the social implications. (171)

We think the same could be said of popular intellectual property rights discourses. But the solution is not to locate authority in some idealized realm of black-letter law or specialist expertise. Mark Goodale and Sally Engel Merry, in the introduction to their rich comparative collection on human rights discourses in situ, suggest that

> perhaps the most important consequence to reconceptualizing human rights as discourse is the fact that the *idea* of human rights is reinscribed back into all the many social practices in which it emerges. This inverts the dominant understanding, in which the idea of human rights refers to certain facts about human nature, and the normative implications of these facts, in a way that makes the practice of human rights of either secondary importance, or irrelevant. (9–10)

"Sites where human rights unfold in practice do matter," they write, "and . . . these sites are not simply nodes in a virtual network, but actual *places* in social space, places which can become law-like and coercive" (13). In a similar vein, we see IP as a discourse (or discourses), as a range of located practices: IP law in our view emerges out of other realities that preexist or coexist with it.

The second term in the subtitle, "creative labor," indicates our engagement with scholarship critical of the celebration of "creative industries" and "knowledge economies."