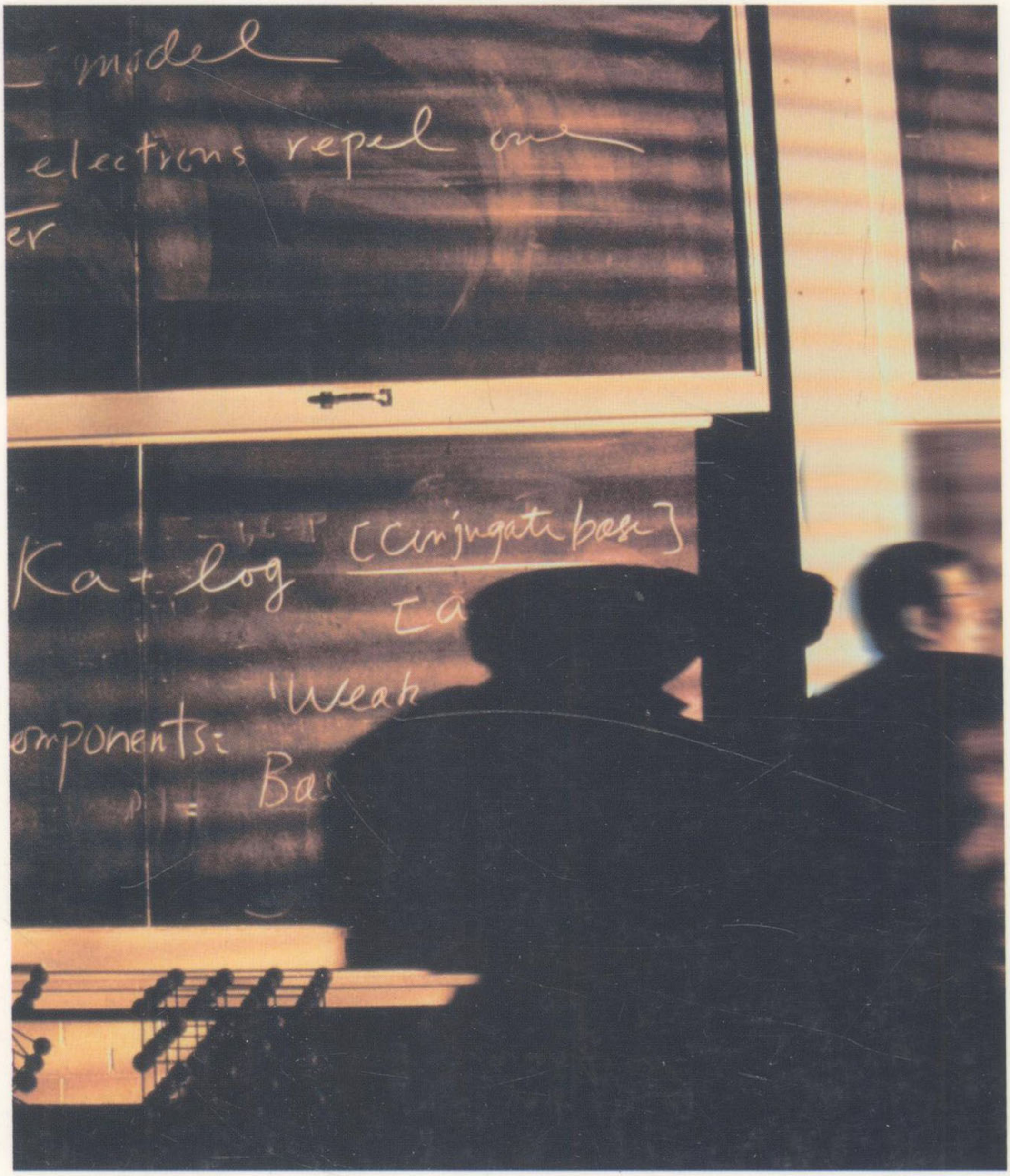
WHO OWNS ACADEMIC WORK

BATTLING FOR CONTROL OF INTELLECTUAL PROPERTY



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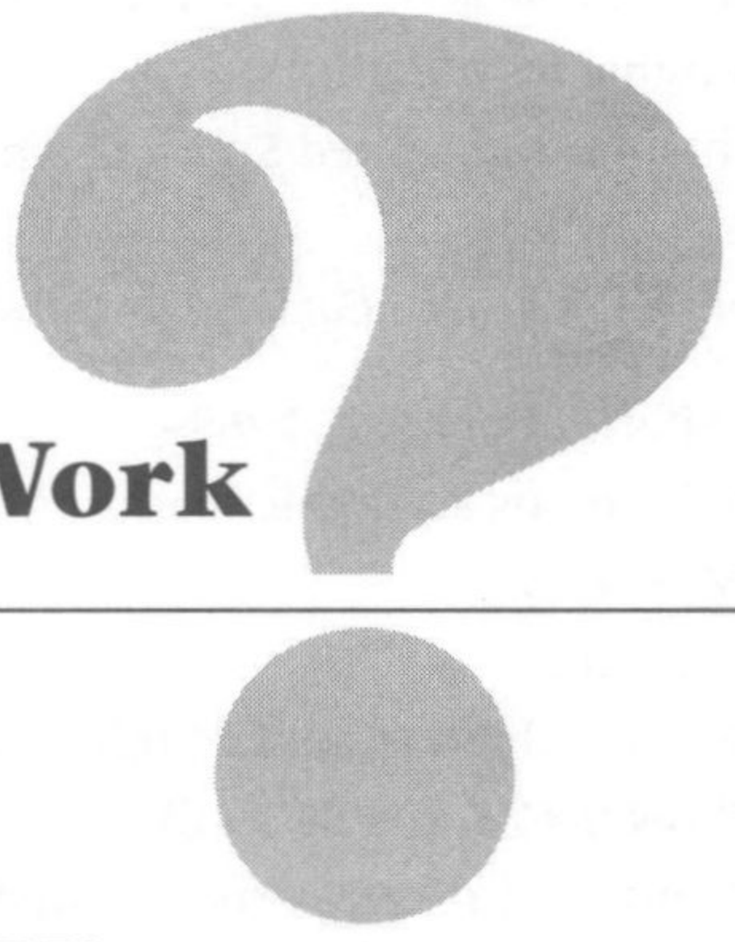

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Who Owns Academic Work?

Thomas J. Wilson Prize

The Board of Syndics of Harvard University Press has awarded this book the thirty-first annual Thomas J. Wilson Prize, honoring the late director of the Press. The Prize is awarded to the book chosen by the Syndics as the best first book accepted by the Press during the calendar year.

To my mother

ACRONYMS

AAUP	American Association of University Professors
AUTM	Association of University Technology Managers
COI	Conflict of Interest (Committee)
CP	Cognitive Property
IP	Intellectual Property
NSF	National Science Foundation
TTA	Technology Transfer Associate
TTO	Technology Transfer Office
UW	University of the West

Who Owns Academic Work?

CONTENTS

Introduction

On May 5, 1993, Dr. Joseph Kraut, a senior biochemist at the University of California, San Diego (UCSD), received a disturbing phone call. Kraut's collaborator, Dr. Sam Wilson of the National Institutes of Health (NIH), had just learned that Agouron Pharmaceuticals was quietly working on the same project that had occupied Kraut and Wilson's attention for several years. Wilson feared that, given its substantial financial and intellectual resources, Agouron might obtain and publish results ahead of the NIH-UCSD team. Kraut shared that fear, but he wasn't especially alarmed on his own behalf. He was reaching the end of a successful career, and being "first" was no longer as crucial to his professional life as it once had been. But he had long since handed over the project—the growth of a three-dimensional crystal of a protein, polymerase beta (pol ß), that had been linked to cell repair of DNA—to a young postdoctoral researcher, Huguette Pelletier, and pol ß was supposed to be her ticket to scientific success.

Kraut grew more alarmed when he learned that Agouron's research was being managed by Jay Davies, who was married to one of Kraut's former graduate students, Michele McTigue. Pelletier, McTigue, and Davies had all received their doctorates in Kraut's lab. McTigue had a key to the lab, access to the pol ß data, and an open dislike for Pelletier. Certain that McTigue was channeling information to her husband, Kraut and Pelletier took McTigue's key away and filed protests with the UCSD

Academic Senate and the chief executive officer of Agouron. With all cards now on the table, the game was on.

Ten months later Agouron's researchers published a paper reporting substantial results in *Cell,* the leading journal in the field. Pelletier had been scooped. She could still publish her results—and did, in *Science*—but she would never be "first." Pelletier's only logical course, it seemed, was to cut her losses, start a new research project, and hope for better luck next time. She chose instead to sue Agouron for misappropriation of trade secrets.

Misappropriation of trade secrets? A trade secret is "a process or device for continuous use in the operation of business," the dissemination of which is carefully guarded by that business.[1] The formula for Coca-Cola is a trade secret, as are aspects of the construction of a Colt M-16 rifle. But surely there is a difference between scientific data produced in a public university and the formula for Coca-Cola? If so, that distinction was not clear to the San Diego jury that heard the case. In 1998, much to Agouron's surprise, Pelletier won her lawsuit.

The jury's inability to discern a qualitative difference between academic biochemical research and commercial recipes is emblematic of the rapidly changing configuration of the production of academic knowledge. In 1967 the many theorists concerned with the research university gave short shrift to issues of intellectual property (IP) (Barzun, 1968; Stadtman, 1970; Kerr, 1963/1995). In 1997 a former Stanford University president identified ethical management of intellectual property—patents, copyrights, trademarks, publicity rights, and perhaps even trade secrets—as one of the principal duties of the academy (Kennedy, 1997). The university's traditional service mission, once construed as an obligation to provide tools for public decisionmaking, has been substantially redefined to mean the transfer of university research from academia to the market via patenting and licensing.

This redefinition has not gone unquestioned. As university-industry partnerships proliferate, naturalizing metaphors for those partnerships such as "ecosystems," "incubators," and "infant technologies" are being met by fervent invocations of professorial autonomy and academic freedom. Ironically, though, academic freedom is increasingly treated as commensurate with ownership of intellectual property.[2] For example, faculty members, administrators, librarians, and students are mobilizing on several fronts in a war over control of academic copyrights, a war that

is, in essence, a struggle over which knowledge workers can continue to position themselves as autonomous knowledge owners.

In this book I investigate the social production of academic intellectual property, or the bundle of rights the academy asserts with respect to intangible things. I explore how this property is formed and deployed, where, with what consequences, and for whom, and the border skirmishes attendant upon that productive process. In particular, I assess the stakes, for the law and the academy, of using intellectual property regimes to define and defend academic work. It is no longer surprising that a wronged postdoc would turn to intellectual property law to protect her investment of time and training. But the Pelletier case also bespeaks the cultural gyrations involved in using intellectual property categories as shields. To make her experience "count" in legal terms, Pelletier had to reconstruct the techniques and products of technoscience—experimental procedures, charts, data—as proprietary.[3] Indeed, she had to persuade the court that the entire pol ß project was "hers"—that her mentor had "given" it to her when he (or, more precisely, the University of California) hired her to work on it. She had to argue that the data were not simply facts but also the products of her "creative inspiration." She had to convince a jury that the labor, inspiration, and financial investment of assistants, a scientific community, her mentor, her university, and funding agencies did not make those entities joint proprietors of those products. Finally, she had to present scientific work as a trade, the practice of which involved secrecy, intrigue, confidentiality, and verbal contract. Accurate or not, this vision of scientific work is a far cry from the open, ethical community of scholarship in which many scholars prefer to imagine they participate. And nothing less than this vision would suffice if Pelletier wanted the courts to recognize that a wrong had been done.

In short, Pelletier had to tell a persuasive "property story," a term the legal theorist Carol Rose (1994) uses to describe narratives that offer to explain the origins of property institutions.[4] Property tales, Rose suggests, both speak to and constitute moral communities by setting up shared principles and assumptions that make origin stories seem like common sense. For this common sense to be maintained, property stories must be continually retold, and that retelling must assume and construct an audience. Further, ownership is a communicative act. To stake a proprietary claim, one must be skilled in the use of codes meaningful to an audience of persons interested in the object in question.[5] Property,

then, depends on and continually re-creates a shared discursive field, a formation of statements, terms, categories, and beliefs.

More accurately, as the Pelletier case demonstrates, property depends on and re-creates *multiple* discursive fields, for heterogeneous discourses "appeal to one another's 'truths' for authority and legitimation" (Scott, 1988, 35). For example, Pelletier called on, even as she arguably subverted, the discourse of academic freedom to justify her property claim. By university tradition and policy, researchers are assigned most property rights in unpatentable works of scholarship in order to ensure that they are "free to publish" without interference from the administration. Pelletier argued that this policy extended to research results as well. Thus, following her university's own conflation of freedom with property rights, Pelletier was able to portray the propertization of scientific facts as consonant with academic tradition.[6] At the same time, the discursive fields of academic freedom and private property must remain distinct for scientific facts to retain their cultural weight. The discourse of academic freedom, after all, is based on the assumption that the university is a special site of disinterested inquiry, not a market for the exchange of intellectual property. Indeed, even as she analogized academic science with industrial production, Pelletier was careful to position herself as a scholar and a professional who had been cruelly misused by greedy commercial entities.

Because it involves the judicious and often complicated retelling of multiple narratives, property formation requires the simultaneous delineation of borderlines between those narratives. Legal theorists have long since observed that property marks, instantiates, and traverses borders, especially the "troubled boundary between individual man and the state" (Reich, 1964/1978, 179). I am interested in a slightly different set of troubled boundaries: between academic and legal discourses, between gift and market economies, and between public and private domains of knowledge. Borrowing an analytical tool from science and technology studies, I track the production of "boundary objects," concepts that carry different meanings for different audiences but are imbued with enough shared meaning to establish a common discursive territory (Star and Griesemer, 1989; Fujimura, 1992). I draw on legal, historical, and qualitative research to explore the cultural work involved in making and containing boundary objects at the intersection of legal, corporate, scientific, and technological discourses, and the consequences of that work for the

subjects and objects of academic knowledge production. What decisions go into turning academic intellectual products into legal property, and what is the history of that process in university settings? What are the conditions that make it possible for the fruits of academic research, which are often understood by their producers as well as those who fund that production as fundamentally "public," to be treated as private property? What contests for meaning arise when academics position themselves as knowledge owners, and how are these contests resolved?

The stakes of these interrogatories seem particularly high in a society rapidly reorganizing around an informational mode of development (Castells, 1996; 1998). While an exploration of the nature of information and the information society as such lies far beyond the scope of this book, these shifting categories inform the epistemic regime with which we will be concerned. Information is crucial to the operation of any society, but it is now placed front and center as a political, economic, and ontological category. "I think," declares the sociologist Manuel Castells, "therefore I produce" (1998, 379). "Information society" designates a system of social relations oriented—economically, politically, legally, and culturally—toward the production, commodification, circulation, and manipulation of information (Boyle, 1997). Today, popular and academic literatures divide countries and communities into the "information-rich" and the "information-poor." The global labor force is also divided, between a generic, eminently replaceable, class of unskilled workers and a highly individualized class of educated and self-educable skilled "professionals." The "invisible goods" these workers and professionals produce are overtaking physical goods as a proportion of world trade and manufacture. It is not surprising, in this context, that intellectual property disputes have become central forums for debates over freedom of speech and the meaning of personhood (Barber, 1997; Coombe, 1996; Rabinow, 1996). If, as Castells argues, the action of knowledge upon knowledge (as opposed to the action of knowledge on machine) has become the main source of productivity, it follows that the ownership of knowledge denotes control of a central means of production. And that control depends, in large part, on both the circulation of property stories and the ongoing boundary work those stories occasion.

I seek to deepen our understanding of that boundary work by critically examining one set of property narratives on the much touted "knowledge frontier" (Faulkner and Senker, 1995). Taking as a starting point

the curious fact that both IP law and the university currently are represented as "in crisis," in Chapter 1 I consider whether and how the "crises" of these two systems of knowledge management might be related. Tracing the historical emergence of IP law and the modern research university reveals that intellectual property is defined in contradistinction to a conceptual space—namely, the public domain—largely if not exclusively governed in the United States by the university. Put simply, intellectual property law polices the knowledge that can be owned, the realm of artifact, while the university polices the knowledge that cannot be owned, the realm of fact and universal truth.

In subsequent chapters I explore the controversies and negotiations that are shaping the articulation of academic intellectual property and the operation of boundary objects to manage the destabilizing effects of that articulation. In Chapter 5 I return to the Pelletier case and the propertization of scientific facts. In this case, special characteristics and norms of the university—rooted in principles of disinterested rationality, communal obligations, and trust—secure and are secured by individual property rights. Considered against the background of cases and activities described in earlier chapters, *Pelletier* suggests that the academy's own foundational terms—autonomy, freedom, integrity, collaboration, trust—implicate a discourse in which "the claim to describe man becomes the practice of the owner" (Edelman, 1979, 25). As in other arenas, property rights discourse offers to preserve and protect a "balance" between private property and the commons, even as the invocation of that discourse assists in a fundamental reconfiguration of that balance.

The production of IP is an ongoing process of enlistment and subversion that involves users as well as producers, and academics are involved in every stage of that activity. My focus here, however, is on problems of ownership by a particular set of creators, not on an analysis of the productive work of academics as "consumers" of IP. Fortunately, others have taken up various aspects of that analysis (see, for example, Crews, 1993; Coombe, 1994; 1996; Okerson, 1996).

My goal is to map the processes in and through which university research is reconfigured as property and scholars are repositioned as owners. Knowledge workers and knowledge owners are engaged, willing or unwilling, in a complex political battle fought on uncertain terrain. This battle is too often framed in utopic/dystopic terms that obscure the cul-

tural, historical, and social dimensions of what has been called a "second academic revolution" (Etzkowitz, 1997). By making the many facets and tensions of academic property stories explicit, I hope to bring some of those dimensions into sharper relief, and thereby lay the groundwork for an empirically engaged politics of intellectual property.

In this book I demonstrate how IP is produced in the university and offer a snapshot of the university and IP law in a moment of dramatic change. I hope I also do rather more. With due respect to the many thoughtful critiques of "academic capitalism," my central concern is not whether it is good or bad to think of academic knowledge as intellectual property, but rather what it means to conceptualize academic knowledge that way and how that conceptualization is accomplished. If we look closely at property formation in the university, the very activity that would seem to be the most direct vehicle of privatization, we see a massive effort of boundary marking, the object of which is to ensure that the academy can continue to be represented as the realm of truth, of the gift, of nonproperty. How and where is that boundary continually redrawn, and what cultural work is performed in the process?

The concept of boundary objects provides a useful way into these questions because it places contingency front and center. Joan Fujimura (1992) observes that while boundary objects may indeed assist in "getting the work done," one has always to inquire "whose work?" and "which work?" In the case at hand, the work is the ongoing reinstantiation of the discursive fields of law and academic science, a process that affirms the central productive tensions of an epistemic regime. Because boundary objects are, as Fujimura notes, "often ill-structured, that is, inconsistent, ambiguous, and even 'illogical,'" they are well suited to this layered work. Boundary markers promote translation, but because their efficacy rests on the multiple meanings ascribed to them, they also "allow others to resist translation and to construct other facts" (175). Their openness to a range of interpretations supports collective action and tends to work against the long-term enlistment of allies behind a coherent set of facts and beliefs. The continuing force of the epistemic regime that intellectual property law and the university jointly compose relies precisely on the maintenance of ambiguity—it is crucial, in other words, that multiple social worlds be able to construct "other facts" and treat the propertization of academic work as impermanent and contingent. In-

deed, it was this very ambiguity that allowed Huguette Pelletier to use a persuasive property story to defend her claim to status in the putative realm of nonproperty.

METHODS

This project brings into conversation three bodies of cultural studies: of law, of science, and of the university. Cultural studies, Michael Menser and Stanley Aronowitz (1996) argue, "begins in the middle [as] an intercession interfering with the relations among persons, places, and things," in order to obtain "an intimate experience of boundaries" (17–18). Each of these literatures raises questions, explicitly or implicitly, about boundaries, and border disputes, and the kinds of property stories it is possible to tell in the borderland of knowledge production.

The Law

"The law wishes to have a formal existence," observes Stanley Fish, meaning that the law does not wish to be "about" something else, such as politics, interpretation, or even morality (1991, 159). The law usually succeeds in this task, Fish argues, by resorting to formalism. Resolution depends upon putting the question at hand into its proper form, and thereby generating its solution. Thorny legal problems can be answered through invoking the correct precedent, examining the intentions of lawmakers, and determining how a given case fits into a legal tradition. As Robin West puts it, most jurists treat "law itself . . . [as] the basis for judgment" (1991, 123). Yet law's success is always a political and rhetorical achievement, a product of the cultural and political common sense law is supposed to reject in favor of "reason." This activity, Fish maintains, can be characterized as the articulation of a "persuasively told story" (1991, 172).

The persuasiveness of this story rests on the law's privileged claim to objectivity, a claim the Critical Legal Studies (CLS) movement has been at pains to debunk. For CLS scholars such as Gerald Frug, the law is a political strategy for the enforcement and naturalization of liberalism.[7] By organizing its analyses around liberal binaries (public/private, state/individual, rational/irrational, market/family) and treating the results of that analytical strategy as "common sense," law helps legitimate those

dualities. "Whenever the legal process is adopted as the mode of analysis," comments Frug, "it fuels the notion that the results of application are natural, apolitical, and deductive" (1980, 1077).[8] In much of the work in this critical tradition, law is represented as following the real action. Its role under capitalism is to legitimate particular social and economic relations, and as those relations change, so too does the law.[9]

In contrast to mainstream CLS, poststructural critical legal scholars represent law as productive. They start by looking at the languages people use to conceive the world around them and situate themselves within it, paying close attention to how meanings change over time. The study of language offers a point of entry, in turn, for understanding the operation of discourses, or "historically, socially, and institutionally specific structures of statements, terms, categories and beliefs," as Joan Scott has usefully defined the term (1988, 35). Because from this perspective law, or, more precisely, legal discourse, is part of the real action, its analysis can help us understand how social relations are produced and reproduced over time. That understanding requires as well the study of the multiple strategies and apparatuses that shape and are shaped by the elaboration of legal discourse, including organizations, institutions, and social relationships. By attending to these strategies and locating them within specific cultural and temporal conditions, Scott argues, poststructural legal scholars can try to avoid "imposing simplified models . . . foreclosing new interpretive possibilities in favor of conventional understandings" (35).

Scott, like other poststructural legal scholars in a range of disciplines, is influenced by the work of Michel Foucault, who sees law as "an instrument of power which is at once complex and partial" (Foucault, 1980, 141). Legal discourses serve to fix the legitimacy of power, he suggests, by grounding the discourse of legal rights in a "grid of disciplinary coercions" (106). Poststructuralist legal scholarship endeavors to deconstruct the discursive terms that operate to maintain this grid and to expose the political contingency of foundational claims. So, for example, rather than asking how law is a form of domination which supports other forms of domination, poststructuralist approaches to law begin by asking what social bodies and relations legal apparatuses produce and normalize.

Scholars attached to "law and cultural studies" take up one thread of this poststructural project by tracing the construction of the "author-subject" in legal and cultural discourse (Gaines, 1991; Jaszi, 1994; Wood-