17. Critical copyright law and the politics of "IP"

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1. INTRODUCTION: MAKING "THINGS"

The conceptual task of intellectual property law is to construct commercially valuable intangibles into propertylike "things" that can be legally recognized as the proper subject matter of private rights, commodification, and commercial exchange. If the law always depends on the functional embrace of legal fictions for its operation and legitimacy,[1] perhaps nowhere is this more obvious than in the realm of intellectual property law, which thrives on a combination of metaphor, analogy, abstraction, and universalization in the invention of its subjects and objects. The shifting and ephemeral nature of intellectual property law's object—"IP"—is under ever more strain to sustain its façade of "thingness" as it becomes a central focus of our technological age, and a prime locus of wealth creation in our information economy. Regarded critically, the law is irretrievably wedded to power. When the law ascribes rights and protects privileges in relation to valuable resources, it plays a key role in both allocating power and controlling its flow. IP law performs this role by granting rights and regulating behavior in relation to what many consider to be today's most valuable resource—information itself—whether residing in technological innovations (the subject of patent law), trade source signifiers (the subject of trademark law), or original authored expression (the subject of copyright law). IP law writes legal fictions that naturalize the private capture and control of information, communications, and cultural content. Perhaps it is not surprising, then, that it has emerged as a vibrant site for critical legal theorizing. Indeed, some have even suggested that IP scholarship has effectively generated a resurgence or "second wave" of critical legal studies (CLS) critique and activism, at least in substance if not in name.[2]

From today's vantage point, it seems clear that the field of IP scholarship, as it now exists, was born out of a sudden need, in the latter decades of the twentieth century, for a radical critique of the rapidly expanding protections offered to commercially valuable intangibles. As such, the field blossomed from the beginning on a foundation of critical legal realism and rights skepticism. While the CLS intervention in the late 1970s and

[1] cf Lon L. Fuller, *Legal Fictions* (Stanford University Press 1967) 1; cited by Craig Allen Nard, "Legal Fictions and the Role of Information in Patent Law" (2016) 69 Vand. L. Rev. 1517, 1521.

[2] See Victoria Smith Ekstrand, Andrew Famiglietti, and Cynthia Nicole, "The Intensification of Copyright: Critical Legal Activism in the Age of Digital Copyright" (2013) 53 IDEA 291, 291. See also Sonia K. Katyal and Peter Goodrich, "Commentary, Critical Legal Theory in Intellectual Property and Information Law Scholarship" (2013) 31 Cardozo Arts & Ent. L.J. 597, 599.

1980s had been directed mostly at the stalled civil rights movement, from the mid-1990s onward the CLS position was channeled, perhaps most effectively, toward IP law and the new realm of internet regulation.[3] Many of the most prominent IP scholars in US legal scholarship during this period either were critical legal scholars or were clearly influenced by CLS methodologies.[4] Moreover, many leading IP scholars became remarkably active participants in the public debate around IP through test cases, advocacy, public education, and political engagement.[5] For critical legal theorists, the partition between law and politics is falsely erected—axiomatically, law *is* politics. In the field of IP, the partition between legal scholarship and political action has always been porous, to good effect. IP scholars bringing a critical lens to the law have been instrumental in giving voice to public interests in the political arena.

The aim of this chapter is to give the reader a sense of how the field of IP law scholarship has been influenced and shaped, over four decades or so, by the currents of critical legal theory, while also pointing to what particular critical approaches—from deconstructionism and CLS to feminism and critical race theory—can reveal about the nature (and ongoing nurture) of modern IP systems. There is no attempt made here to offer a unifying definition of critical legal theory or critical perspectives, and nor is there any pretense at offering a comprehensive account of the myriad critical contributions to legal scholarship in the vast field of IP law. I am not approaching the task of writing about critical approaches to IP law as an exercise in mapping a body of scholarship (though others have made important efforts to do so),[6] or even as an exercise in identifying familial resemblances between various critical strands of IP scholarship.[7] Rather, I approach it as an opportunity to probe particular dimensions of the critical IP project to demonstrate how some of the basic insights of critical legal theory have been brought to bear to radically upset some of the core assumptions—and to reveal some of the central contradictions—upon which this body of law is built.

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[3] cf Sonia Katyal in Sonia Katyal, Peter Goodrich, and Rebecca Tushnet, "Critical Legal Studies in Intellectual Property and Information Law Scholarship (Symposium)" (2013) Cardozo Arts & Ent. L.J. 601, 614.

[4] While by no means a comprehensive list (and no doubt a contestable one), I am thinking here of figures such as Jack Balkin, James Boyle, Yochai Benkler, Margaret Chon, Julie Cohen, Rosemary Coombe, Peter Drahos, Niva Elkin-Koren, Peter Jaszi, David Lange, Lawrence Lessig, and Carol Rose.

[5] Prominent examples include, for example, Michael Carrol, Michael Geist, Peter Jaszi, Lawrence Lessig, and Pamela Samuelson.

[6] See Margaret Chon, "IP and Critical Theories" in Irene Calboli and Lillà Montagnani (eds), *Handbook on Intellectual Property Research* (Edward Elgar, forthcoming 2019); K.J. Greene, "Intellectual Property at the Intersection of Race and Gender: Lady Sings the Blues" (2008) 16 Am. U.J. Gender Soc. Pol'y & L. 365; Kara Swanson, "Intellectual Property and Gender: Reflections on Accomplishments and Methodology" (2016) 24 Am. U.J. Gender Soc. Pol'y & L. 175; John Tehranian, "Towards a Critical IP Theory: Copyright, Consecration, and Control" (2012) 4 BYU L. Rev. 1233; Anjali Vats and Deirdré Keller, "Critical Race IP" (2018) 36 Cardozo Arts & Ent. L.J. 735. See generally, Sonia K. Katyal and Peter Goodrich, "Symposium: Commentary, Critical Legal Theory in Intellectual Property and Information Law Scholarship" (2013) 31 Cardozo Arts & Ent. L.J. 601.

[7] cf Brenna Bhandar, "Critical Legal Studies and the Politics of Property" (2014) 3 Prop. L. Rev 186, 188.

Section 2 will offer a brief account of some of these basic insights and their evolution within the dynamic school of critical legal thought, identifying particular themes that resurface throughout the chapter. Then, as a point of entry for thinking specifically about critical theories of IP, I will take up what is perhaps the most obvious, but also the most foundational, abstract legal concept at play in the field: the idea of "intellectual property" as such, around which all concepts of ownership, rights, and exploitation necessarily gravitate. Section 3 begins this process with a backward glance to legal realism and the use of legal categories to naturalize intellectual propertization. Focusing on copyright law, section 4 then pivots to explore the political construction of the public domain—copyright's "other"—in the production and perpetuation of value, privilege, and subordination among particular actors and expressive activities as seen through the critical lenses of race and colonialism, sex and gender. The chapter concludes by identifying the many other points of entry at which critical legal perspectives have made inroads into copyright structures, breaking down false binaries, and creating space for radical reimaginings. Ultimately it is suggested that only critical legal theories have the transformative and emancipatory potential required to effectively resist the power-legitimizing logic of IP law.

2. COMMON CHARACTERISTICS OF CRITICAL LEGAL THEORY

While there is no single encompassing definition that can embrace the many versions and variations of critical legal theory, there are certain common characteristics that, alone or in some combination, can serve to help identify and distinguish critical approaches to law. This chapter proceeds with four broadly defined characteristics in view.[8] First, a critical theory of law recognizes and resists law's *reification*, by which is meant not only the "making real" of law, but also law's power to reify its constructions, its fictions and presumptions. As Jack Balkin observes, "[l]aw proliferates power by making itself true in the world."[9] Second, a related critique targets legal *rhetoric*, with its capacity (by design) to both mystify and legitimize the operation of law. Connected to this is a third common theme in critical theorizing: an insistence upon law's inherent *indeterminacy*, or at least its open texture and inevitable plasticity, which allow for it to be molded in service of powerful interests while legal conclusions are presented as necessary or "correct." Fourth, an overarching and arguably defining characteristic of critical legal theories is the claim that law is therefore *political* and so complicit in the self-interested perpetuation of privilege, subordination, and injustice. Law is an instrument wielded in service of power, albeit concealed behind legal processes, claimed impartiality, and perceived neutrality.

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[8] See Jack M. Balkin, "Critical Legal Theory Today" in Francis J. Mootz III (ed.), *On Philosophy in American Law* (Cambridge University Press 2009) 64–72.

[9] ibid 64. See also Jack M. Balkin, "The Proliferation of Legal Truth" (2003) 26 Harv. J.L. & Pub. Pol'y 5.

In combination, these characteristics of critical legal theory can produce what Balkin calls a "pejorative" conception of law.[10] It is this vision of law as fundamentally and irretrievably defective that is commonly associated with the critical legal studies movement as such. And it is this CLS version of critical theory that many, particularly in North America, seem now to regard as a failed intellectual movement—a radical, nihilistic effort to deconstruct legal institutions and legal rationality, which ultimately had no compelling alternative to offer. Balkin reminds us, however, that the CLS conception of law was not purely pejorative; in some variations, at least, the law was viewed more ambivalently. If law is a method for legitimating the exercise of power in society, then it poses both threat and promise: "Even if law is a supple tool of power, law also serves as a discourse of ideas and ideals that can limit, channel, and transform the interests of the powerful."[11] For some critical theorists—critical race and feminist theorists, in particular—legal discourse was therefore recognized as both oppressive and potentially emancipatory. When it is understood that law is not autonomous from politics, and that legal culture, institutions, and discourse serve political values, law is revealed to be a way of "doing politics"—a way of exercising, shaping, and restraining power.

Balkin's insights paint a picture of the evolution of CLS rather than a story of its demise. Critical movements are necessarily products of their time, and their targets will change as different elements of law become newly salient.[12] This in itself reflects a critical process of deconstruction and reconstruction. Along similar lines, Peter Goodrich muses that, if CLS was killed, it was thereby immortalized; if it failed, its failure was productive, sowing the seeds for other political, theoretical, and social justice movements to carry forward its methodological DNA.[13] (CLS is dead! Long live CLS!) This allows us to perceive the influence of critical theorizing, over the course of its evolution, in the IP scholarship that emerged and blossomed over the same place and time: the foundational CLS-infused critique of IP law that took root in the 1980s and 1990s (targeting IP law's reification, indeterminacy, mystification, and legitimation), which sowed the seeds, in this century, for a flourishing body of feminist, critical race, and postcolonial critique (emphasizing IP law's complicity in social inequality and injustice, as well as exploring its potential promise as a tool of agency and empowerment).

IP scholarship has long been a field rich with critical theoretical insights. Critical legal theory has consistently offered an essential counterbalance and alternative (some might say antidote) to rights- and utility-based critiques of IP law, and it appears once again to be resurgent. What follows, I hope, offers a sense of why this should be—and why it matters.

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10 Balkin (n 8) 68.
11 ibid 67.
12 ibid 71.
13 Peter Goodrich in Katyal, Goodrich, and Tushnet (n 3) 601–2.

3. (DE)CONSTRUCTING "INTELLECTUAL PROPERTY"

3.1 Legal Realism and Transcendental Nonsense

Building on the intellectual legacy of legal realism, a core concern of CLS is the constitutive and inherently political nature of legal categories, with their capacity to import unexamined values and precipitous conclusions—a capacity on full display in the realm of IP law. In his foundational attack on legal formalism as "transcendental nonsense," Felix Cohen, a central figure in the American legal realist movement, identified this phenomenon at work in respect of the ever expanding protections offered to trade names. Exposing the logical fallacy inherent in the justifications for these new powers, Cohen described a "vicious circle, which accepts the fact that courts do protect private exploitation of a given word as a reason why private exploitation of that word should be protected."[14] He continued:

> The circularity of legal reasoning … is veiled by the "thingification" of property. Legal language portrays courts as examining commercial words and finding, somewhere inhering in them, property rights. According to the recognized authorities … courts are not *creating* property, but are merely *recognizing* a pre-existent Something … [L]egal reasoning on the subject of trade names is simply economic prejudice masquerading in the cloak of legal logic … It will not be recognized or formulated so long as the hypostatization of "property rights" conceals the circularity of legal reasoning.[15]

The legal construct is reified and the rationalizations uncritically accepted because the nature of the thing designated "property," and the rights and duties thus attached to it, are presented—and widely perceived—as preexistent and self-evident. The realist critique of propertization is thus directed at the law's capacity to conceal underlying motivations, to disguise loaded assertions as mere truisms, and so to foreclose the kinds of questions that ought to be raised when such rights are created and allocated. When one scrapes away the façade, a newly political picture emerges in which inequalities loom large and the role of law in the distribution of wealth and power becomes readily apparent. In Cohen's terms:

> Courts, then, in *establishing inequality* in the commercial exploitation of language are creating economic wealth and property … not, of course, ex nihilo, but out of the materials of social fact, commercial custom, and popular moral faiths or prejudices. It does not follow, except by the fallacy of composition, that in creating new private property courts are benefiting society. Whether they are benefiting society depends upon a series of questions which courts and scholars dealing with this field of law have not seriously considered.[16]

Whether, how, and to what extent private rights over the intangible products of human creativity actually benefit society are fundamental questions that now pervade IP scholarship, and feature (increasingly, but not sufficiently) in government policymaking

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[14] Felix Cohen, "Transcendental Nonsense and the Functional Approach" (1935) 35(6) Colum. L. Rev. 809, 815.

[15] ibid 816–17.

[16] ibid.

and judicial decisionmaking. Such questions are brought into sharp relief by the US Constitution, which explicitly ties Congress' power to create copyright and patent rights to the advancement of "progress of science and the useful arts,"[17] explaining at least in part why US scholars have largely led the way in both making and challenging the utilitarian claims and economic rationality of the IP system.[18] The social goals of encouraging learning and innovation in the name of the public good have, however, been at the heart of the justifications offered for copyright and patent laws since their inception.[19] Such teleology would seem to demand empirically informed consideration of the social benefits and costs of private ownership over particular kinds of subject matter in specific contexts—but the legal category of "property," with its presuppositions and deontological ethics, has impeded critical engagement with the logic of the law and the consequentialist claims that are made on its behalf. If it is true that "we are all legal realists now,"[20] then we should agree that legal rules cannot be adequately understood or justified simply by appealing to the abstract concept of property. And so the first point of entrance for a critical approach to copyright law must be the deconstruction of the legal category of "intellectual property" to which it belongs.

3.2 Mesmerizing Metaphors and IP Rhetoric

"Intellectual property" is now the umbrella term commonly used to capture a variety of different but somewhat related and sometimes overlapping protections granted by the laws of copyright, patent, trademark, industrial design or design patent, trade secret, and unfair competition. The very idea of intellectual property as such is, of course, a metaphorical construct—and a relatively recent one at that. Emerging in Europe in the late nineteenth century,[21] this terminology was taken up by defenders of the patent system in response to a growing patent-abolitionist movement, with the political aim of equating the inventor's right with the author's right as protected by the (less controversial) law of copyright. The label "intellectual property" was strategically employed in this context to unite, in the public imagination, the results of intellectual creativity, whether literary or scientific, into a single conceptual category containing analogous

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[17] US Const art. 1, §8.

[18] See e.g. William M. Landes and Richard A. Posner, *The Economic Structure of Intellectual Property Law* (Belknap Press 2003); Mark Lemley, "Property, IP and Free Riding" (2005) 83 Tex. L. Rev. 1031; Brett Frischmann and Mark Lemley, "Spillovers" (2007) Colum. L. Rev. 257; Glynn Lunney Jr, "Reexamining Copyright's Incentives-Access Paradigm" (1996) 49 Vand. L. Rev. 483.

[19] See Ronan Deazley, *On the Origin of the Right to Copy* (Hart 2004) 31–50. See also Brad Sherman and Lionel Bently, *The Making of Modern Intellectual Property Law* (Cambridge University Press 1999) 11–42.

[20] See Joseph William Singer, "Legal Realism Now" (1988) 76 Cal. L. Rev. 465, 467–8, 503–16.

[21] First adopted by the North German Confederation in Article 4(6) of its 1867 ("der Schutz des geistigen Eigenthums") the term was embraced in 1893 with the naming of the United International Bureaux for the Protection of Intellectual Property (subsequently the World Intellectual Property Organization).

things over which natural rights of ownership could be claimed.[22] Analogizing across categories of human creativity through the lens of intellectual property continued, over the following century, to offer readymade rationalizations for the expansion of the IP system and the development of new propertylike controls over an increasing array of intangibles, from software code to trade secrets, and from public personalities to private databases.[23] Lamenting the rise of "intellectual property" terminology in the late twentieth century, Richard Stallman, a prominent "Copyleft" activist, explained: "It leads people to focus on the meager commonality in form that these disparate laws have—that they create artificial privileges for certain parties—and to disregard the details which form their substance: the specific restrictions each law places on the public, and the consequences that result."[24] The seeming immutability of IP structures facilitates their continual creep, unchallenged, into new spheres of human activity.

Not only has the legal category of "intellectual property" performed the political function of uniting a variety of essentially different intangible outputs of human creativity under a single rationalizing roof, but it has also succeeded in conceptually conjoining that category of intangibles with the physical world of real property. Just as Britain's eighteenth century literary property debates were fought through analogies to real property, modern proponents of strong IP frequently present it as "analogous to the home or the castle of the landowner, and thus … present the IP owner as the legitimate recipient of far-reaching rights to control the use of their property."[25] This is the legitimizing function of legal rhetoric at work. The IP metaphor informs our intuitions around entitlement, exclusion, and infringement (commonly referred to as "theft," "piracy," or "misappropriation" in testament to the traction of the metaphor) in a way that misrecognizes both the nature of the subject matter at play and the public interest at stake. Mark Rose, a literature scholar who has written extensively on IP's metaphors, reminds us that "[m]etaphors are not just ornamental; they structure the way we think about matters and they have consequences."[26] William St Clair, whose legal historical work charts the subtle shifting of IP's property metaphors over time, from piracy to landed property to moveable property, captures their epistemological power:

> Metaphors have been intrinsic to the way in which intellectual property has historically been analysed, understood, presented, and enforced, not only by authors, publishers … and other participants in the book industry, but by governments, parliaments, lawyers, judges, and

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[22] Adrian Johns, *Piracy: The Intellectual Property Wars from Gutenburg to Gates* (University of Chicago Press 2009) 276–7. See also Oren Bracha, *Owning Ideas: The Intellectual Origins of American Intellectual Property 1790–1909* (Cambridge University Press 2016).

[23] See Siva Vaidhyanathan, *Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity* (NYU Press 2003) 18.

[24] Richard Stallman, "Did You Say 'Intellectual Property'? It's a Seductive Mirage" (*GNU Operating System*) www.gnu.org/philosophy/not-ipr.html accessed 4 May 2018.

[25] Helena R. Howe and Jonathan Griffiths, *Concepts of Property in Intellectual Property Law* (Cambridge University Press 2013) 2.

[26] Mark Rose, "Copyright and Its Metaphors" (2002) 50 UCLA L. Rev. 1, 3.

> courts … They are part of the history of the nexus of ideas that have historically surrounded and shaped both law and practice through to the present day.[27]

Many IP scholars writing from a variety of different theoretical perspectives have decried the prevalence of the property metaphor, pointing to the problematic infusion of real property reasoning into IP rules notwithstanding critical differences between the physical and intellectual realm.[28] As Mark Lemley warned, however, the shorthand of property has made "the move from rhetoric to rationale … almost irresistible,"[29] and IP protection has increasingly expanded to exhibit, in effect, many of the characteristics of the real property to which it is inaptly compared.[30]

It might reasonably be contested, at this point, that "property" itself is merely a legal construct—a metaphor that similarly inscribes an inevitable but false "thingness" to what is better understood as a manufactured relationship of occupation and exclusion, advantage and disadvantage, established and enforced by law. Indeed, a critical view reveals that, "when all is said and done … property is a social construction and a product of law."[31] But the problem with the IP conceit is that it relies on "heuristics derived in relation to *physical* property, which is rivalrous and excludable."[32] While the property metaphor naturalizes rules that could be said (if only for the sake of argument) to be efficient or necessary (if not necessarily fair) in relation to scarce, depletable, and rivalrous physical property, it mobilizes the same intuitions within the realm of IP, where the public goods in question are nonrivalrous and nonexcludable. The problem is not that intellectual property is a metaphor, then, but that the metaphor is inapposite. Regarded evenly through a critical or realist lens, property and copyright are revealed to be fundamentally different in both their social and political ends and the means by which they purport to achieve them.[33] The nature of *intellectual* property alters the practical and economic equation, as well as the distributional impact and experienced effects, of granting exclusivity through law.[34] As St Clair writes, "[w]hat none of the property metaphors has been able to accommodate is the fact that the

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[27] William St. Clair, "Metaphors of Intellectual Property" in Ronan Deazley, Martin Kretschmer, and Lionel Bently, eds, *Privilege and Property: Essays on the History of Copyright* (Open Book Publishers 2010) 374.

[28] See e.g. Shyamkrishna Balganesh, "Debunking Blackstonian Copyright" (2009) 118 Yale L.J. 1126; Dan Hunter, "Cyberspace as Place and the Tragedy of the Digital Anticommons" (2003) 91 Cal. L. Rev. 439; Mark Lemley, "Property, Intellectual Property, and Free Riding" (2005) 83 Tex. L. Rev. 1031; Neil W Netanel, "Why Has Copyright Expanded? Analysis and Critique," in Fiona Macmillan (ed.), *New Directions In Copyright Law* (vol. 7, Edward Elgar Publishing 2007) 3.

[29] See Lemley (n 18) 1032.

[30] Howe and Griffifths (n 25) 2.

[31] Carol M. Rose, "Canons of Property Talk, or, Blackstone's Anxiety" (1999) 108 Yale L.J. 601 at 639 (citing Mark Kelman, *A Guide To Critical Legal Studies* 258 (1987)).

[32] Brian Frye, "IP as Metaphor" (2015) 18 Chapman L. Rev. 735, 757.

[33] Shubha Ghosh, "Deprivatizing Copyright" (2003) 54 Case W. Res. L. Rev 387, 389.

[34] See e.g. Tom Bell, "Author's Welfare: Copyright as a Statutory Mechanism for Distributing Rights" (2003) 69 Brook. L. Rev. 229.

differences between 'property' and 'intellectual property' are not contingent or superficial but essential, inescapable, and unignorable."[35] So too, then, are the implications for the legal structures that define and regulate them. Even if we resist the reification of property and employ Carol Rose's elegant conception of property as storytelling, we can see that the possession of *intellectual* property tells a very different story.[36] In the absence of any natural scarcity in the realm of knowledge and ideas, IP laws manufacture artificial scarcity—and they make that scarcity real in the world. In respect of a subject matter that could be shared infinitely without depletion, the law intervenes precisely to restrict its free flow.

Baseline assumptions inform how we perceive the law and the demands that should be made of it in the name of fairness or equality. If one begins with the premise that information, ideas, and expression are, but for law's intervention, part of a shared public domain, then the state's creation of private, proprietary rights demands justification—a normative rationalization grounded not in the protection of the owner's property as a matter of private right, but in service of society's interests. By lifting the veil of property, as Felix Cohen suggested, our focus can shift to the social benefits that the system should bring, and its success (or lack thereof) in doing so. Of course, how we might understand and pursue those social benefits opens up yet more ground for debate: whether we are committed to a certain vision of economic efficiency, social progress, or democratic participation, for example, or the extent to which we are convinced by the role of the market, economic incentives, or financial or other rewards in the attainment of that vision. But again, this is precisely the point: to reject IP law's property metaphor is to open the doors to what is necessarily a political debate, allowing light to be shed on the economic and social realities of intellectual and cultural production, consumption, and exchange, and demanding greater accountability in respect of the law and its consequences. Here, critical theorists would insist that the key to generating consensus is not reliance upon metaphors and legal formulae, but normative argument that "encompass[es] the creation and elaboration both of competing social visions and forms of moral persuasion," with people who hold different views engaging in honest dialogue and recognizing competing perspectives.[37]

If, as it is widely claimed, IP law grants exclusive rights over nonrivalrous intangibles with the aim of producing certain beneficial outcomes for society as a whole, property rhetoric has made us complacent about evaluating copyright's practical effects and guarding against the obvious risks of a system that permits the "monopolisation of knowledge, ideas, education and the means by which they are made available."[38] In any attempt to justify the copyright system teleologically, the legitimizing label of "intellectual property" obscures more than it illuminates. As we will see, in doing so it also supports a variety of assumptions about what and who should reap the

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[35] William St. Clair, "Metaphors of Intellectual Property" in Ronan Deazley, Martin Kretschmer, and Lionel Bently (eds), *Privilege and Property: Essays on the History of Copyright* (Open Book Publishers 2010).

[36] See Carol M. Rose, "Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory," (1990) 2 Yale J.L. & Human. 37.

[37] Singer (n 20) 533.

[38] St. Clair (n 27) 395.

benefits of the rights that it accords. Alert to the politics of the law, a critical theory of copyright scrapes away IP's property façade to reveal the interests that it privileges, and the power structures that it perpetuates, when it chooses private property over the public domain—and, as we will see, vice versa.

4. THE POLITICS OF THE "PUBLIC DOMAIN"

The real property analogy and the impression of solidity that it conveys can be sustained only by virtue of accompanying metaphors such as the "public domain," and gatekeeping fictions like copyright law's "originality" threshold and "the idea-expression dichotomy." Taken together, these constructs reify the boundaries of the "work"—the thing over which ownership is claimed—giving its ephemeral essence sufficient shape, substance, and stability that it can perform its assigned role as the object of ownership. At the same time, through these conceptual mechanisms, the law limits the scope of the owner's claim "by erecting presumptively omniscient sentries around the [public] domain's perimeter."[39] Jessica Litman's groundbreaking article, "The Public Domain," was part of a wave of critical US copyright scholarship that built rapidly over the final decades of the twentieth century, challenging the perceived inevitability of copyright law's core constructs. Litman persuasively argued that the idea of the public domain—the unowned intellectual commons on which all are free to draw—is essential to the operation of the copyright system, and to sustaining the myth of original, creative authorship on which it depends:

> The public domain should be understood not as the realm of material that is undeserving of protection, but as a device that permits the rest of the system to work by leaving the raw material of authorship available for authors to use … The public domain … makes it possible to tolerate the imprecision of these property grants.[40]

The public domain is perceived not just as the legal term of art for unowned intangibles, but as a legal *device* employed to sustain the legitimacy of the law in the face of its disconnect with reality. This bold assertion bears the hallmarks of critical legal thinking. The gulf between the actual processes of authorship and the law's construction of human creativity, Litman argued, would render the copyright system unworkable were it not for the construct of the public domain, which "protects the copyright system by freeing it from the burden of deciding questions of ownership that it has no capacity to answer."[41]

4.1 The Politics of Doctrinal Line Drawing

The inherent imprecision of copyright law's grant of exclusivity reflects both the malleable nature of its subject and the messy realities of the human creative process. Copyright protects only "original expression" that results from an author exercising her

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[39] Nard (n 1) 1521.
[40] Jessica Litman, "The Public Domain" (1990) 39 Emory L.J. 965, 968.
[41] ibid 969.

skill, labour, judgment, and/or creative capacities. Ideas, facts, and information are not protected, nor are systems, methods or principles, or unoriginal (copied) or common stock elements. Both the legal definition of originality and the delineation of protectable from unprotectable elements vary from jurisdiction to jurisdiction—and indeed from case to case—depending largely on the underlying philosophy and politics of IP ownership that are brought to bear by lawmakers and courts. But in any copyright case, the line between public and private traverses the work, separating it into pieces that are privately owned and pieces that belong in the public domain. This line is always shifting and subjective, dependent on a decisionmaker's interpretation of doctrine, of course, but also on her impression of the equities at play, the scope of the author's rightful claim, and the degree of moral dis/approbation evoked by the defendant's use. In a moment striking for its ostensible legal realism, Justice Learned Hand famously proclaimed, when finding that a defendant's movie copied only unprotected ideas from the plaintiff's play:

> [T]he whole matter is necessarily at large … We have to decide how much [of the play's content went into the public domain], and while we are as aware as any one that the line, wherever it is drawn, will seem arbitrary, that is no excuse for not drawing it; it is a question such as courts must answer in nearly all cases.[42]

The seemingly arbitrary lines that courts and the law must draw, in copyright as elsewhere, are not dictated or even determined by the simple application of legal doctrine to specific circumstances. There is no legal formula that can produce a definitively "right" answer to the question of how much of a plaintiff's work constitutes protectable "original" "expression," or how "substantially similar" a defendant's work must be in order to "reproduce" it. Most courts are less transparent in their deliberations, however, presenting the lines they draw—between abstract idea and detailed expression, original features and common stock devices, protectable elements and the public domain—as somehow predetermined or self-evident. They purport to discover the lines, rather than to draw them.

The reality, of course, is that these lines do not exist until they are drawn. Even the most detailed expression resides in the realm of ideas, and even the most original expression borrows and builds on what has gone before. Nothing is created out of a vacuum, Litman reminded us, and no one can see inside the human mind (not even the human whose mind it is!) to parse the original and generative from the copied, derived, or inspired. Yet the law requires the results of creativity to be so categorized in order to produce a legal conclusion. It is by virtue of the impossible nature of this challenge that copyright law provides an unusually transparent window onto the internal operations of legal logic. It does not take the critical eye of a radical deconstructionist to see that, whatever side of the public/private binary the court ultimately privileges, an alternative conclusion was available to it. Any semblance of determinacy in a court's application of these legal concepts to a particular work in fact depends on a slew of structural factors and subjective impressions, value-laden commitments, and contentious beliefs.

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[42] *Nichols v Universal Pictures Corporation et al.* 45 F.2d 119 (2d Cir. 1930).

Whatever meaning is privileged, whatever outcome favored, depends less on the internal logic of the law than on the inescapable politics of legal reasoning.

Critical race and feminist theories, building on the insights of critical legal studies, take aim at the law's claimed neutrality, not only for masking its politics, but specifically for its complicity in the construction and ongoing legitimation of racial and gender hierarchies. Adding a feminist frame to the critique would highlight that such seemingly "arbitrary" line-drawing exercises predictably produce gendered results. Certainly, it is striking that many of the groundbreaking copyright rulings that initially defined the limits of copyright and the importance of the public domain in the late nineteenth and early twentieth centuries involved the unusual scenario of female plaintiffs seeking to enforce rights against male alleged infringers. While hardly a systematic study, it could reasonably be contended that courts were uncharacteristically keen, in such cases, to earn their pedigree as defenders of the public domain. In *Nichols*, it was the female playwright who sought protection against male movie producers. In the landmark Privy Council case of *Deeks v Wells* (ruling that no one can own the facts of history or their chronological order) it was a female "spinster" historian who sought protection against copying by the venerated author H.G. Wells.[43] Even in *Baker v Selden*, which established copyright's merger doctrine and its rule against monopolizing systems or methods, the litigation was pursued by the widow of the deceased accountant against his (male) competitor.[44] Such patterns come as no surprise to critical theorists of copyright law. As Ann Bartow writes, "Men have defined key copyright concepts such as 'authorship,' 'protectability,' 'infringement,' and all of the other precepts, terms, and conditions of copyright law. It is highly probable that there are gendered differences in the ways that copyright laws benefit and burden everyone affected by copyright laws and practices."[45]

Similar observations have been made about the gendered nature of decisions regarding "fair use"—the doctrine that permits otherwise infringing uses for purposes such as criticism and review.[46] Requiring an inherently flexible and contextual analysis of the fairness of the use, courts have been more inclined, it seems, to favor fairness and to carefully circumscribe copyright control in cases where the works feature women used in a sexualized way (such that criticism of women's bodies is practically "the prototypical fair use").[47] Based on a comprehensive review of relevant cases, critical IP scholar Andrew Gilden concludes that US courts are most comfortable relegating the plaintiff's work to "raw materials" freely available for the defendant's

[43] *Deeks v Wells* [1932] UKPC 66. See A.B. McKillop, *The Spinster and the Prophet*: *H.G. Wells, Florence Deeks, and the Case of the Plagiarized Text* (Da Capo Press 2000).

[44] *Baker v Selden* (1879) 101 U.S. 99. See Pamela Samuelson, "The Story of *Baker v. Selden:* Sharpening the Distinction Between Authorship and Invention" in Jane Ginsburg and Rochelle Dreyfuss (eds), *Intellectual Property Stories* (Foundation Press 2005).

[45] Ann Bartow, "Fair Use and the Fairer Sex: Gender, Feminism, and Copyright Law" (2006) 14 Am. U.J. Gender. Soc. Pol'y & L. 551, 558.

[46] Fair uses are "outside the public domain in theory, but … inside in effect." Pamela Samuelson, "Mapping the Digital Public Domain: Threats and Opportunities" (2003) 66 L. & Contemp. Prob. 147, 149.

[47] Rebecca Tushnet, "My Fair Ladies: Sex, Gender, and Fair Use in Copyright" (2007) 15 Am. U.J. Gender, Soc. Pol'y & L. 273.

fair use in cases where those "raw materials" consist of, for example, visual representations of "'anonymous' women's body parts, 'generic' black men, and Jamaican men in their 'natural habitat.'"[48] Whether someone is in the privileged position of lawfully mining culture for "raw materials," as opposed to producing or even becoming those "raw materials," is a determination that quite consistently appears to turn on social status, race, and gender.

To be clear, the point of such observations is not to baldly assert that "win" rates in copyright cases are irrationally determined by the gender, race, or sexual orientation of litigants. The point, rather, is that the stories we tell about the logic and limits of IP are essentially narratives about entitlement and exclusion. By retelling the stories from different perspectives, we can see more clearly what alternative endings were available, which characters were pushed to the margins, and what other tales could have been told. This critical approach insists that seemingly basic legal conclusions about what is in—and what is out—of copyright's protective sphere in any particular case are neither predetermined nor arbitrary, but are constructed around gendered, racialized, and other assumptions about entitlement and value, and so function to perpetuate existing social hierarchies. The constructed and malleable nature of IP allows it to be readily allocated or withheld in service of power. On this reasoning, of course, a decision to privilege the public side of the public/private binary and so to allow free use of a work is no less political than a decision to stringently enforce copyright and so to protect the private rights of IP "owners."

4.2 The Making (and Unmaking) of the Public Domain

We considered, in section 3, the political power of IP as a metaphorical construct that reifies and legitimizes the private capture of the intangible commons. Let us now turn, then, to consider the politics of its opposite, the "public domain," as a metaphorical construct in its own right. In this respect, IP scholars have been particularly deliberate in their politicization of public domain discourse, with important implications. Like "intellectual property," the term "public domain" dates back to the late nineteenth century;[49] but the "affirmative discourse" of a public domain—the deliberate "construction of a legal language to talk about public rights"[50] and so to conceptually conjure up "copyright's constraining counterpart"[51]—is a more recent development, coming about a century later. In a 1981 essay criticising the emergence of publicity rights, David Lange urged that proprietary claims for new IP interests should be offset by an "equally deliberate recognition of individual rights in the public domain."[52] Over the next 20 years, a body of scholarship developed that sought to define, map, conceptualize, and deploy the concept of the public domain as a positive entity capable of confining

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[48] Andrew Gilden, "Raw Materials and the Creative Process" (2016) 104 Geo. L.J. 355, 357.

[49] Jane C. Ginsburg, "Une 'Chose Publique'? The Author's Domain and the Public Domain in Early British, French and US Copyright Law" (2006) 65(3) C.L.J. 636, 637.

[50] Mark Rose, "Nine-Tenths of the Law: The English Copyright Debates and the Rhetoric of the Public Domain" (2003) 66 L. & Contemp. Prob. 75, 77.

[51] Ginsburg (n 49) 636.

[52] David Lange, "Recognizing the Public Domain" (1981) 44 L. & Contemp. Prob. 147.

copyright's private domain. Singer's insight seems particularly apt here: whereas liberal theorists purport to "find" metaphors, critical theorists hope to rely more on "making" them.[53] Playing off the same landed property metaphor as its opposite, "IP," James Boyle called for the strategic reimagination of the public domain as an "environment," with the aspiration of mobilizing an "environmental movement" in its name.[54] Public domain activists' efforts to protect—and even to contractually construct—an intellectual and cultural commons did indeed take root and bear fruit over the course of the following decades.[55]

As Boyle explained, how we define the substance and scope of the public domain depends on why we care about the public domain, for what vision of freedom or creativity we think it stands, and what danger it protects against. This is legal realism for the public domain,[56] which is overtly hailed as "a social-legal construct,"[57] imagined to assist us "in thinking of a complex issue, to organize our thoughts, to serve as a 'short cut' to denote a mindset, a view, a perception."[58] Moreover, because "the private domain of copyright and copyright's public domain necessarily share the same boundary,"[59] this effort underscores the indeterminacy of copyright itself. It becomes apparent that energies spent debating doctrinal niceties at the borders of IP might be better spent articulating political goals and identifying the legal tools with which to advance them.[60]

As for those political goals, however, critical legal perspectives have not been uniformly brought to bear in service of the protection and expansion of the public domain. In a powerful intervention in the scholarly conversation, Madhavi Sunder and Anupam Chander drew attention to the manner in which the escalating "romance of the public domain"[61] among progressive IP scholars had itself privileged one position (free) over another (owned), thereby embracing a kind of libertarianism that elided equality concerns and perpetuated global hierarchies of dominance and subordination. Regarded through a critical postcolonial lens, the public domain was increasingly performing as a discursive vehicle capable of justifying the continued devaluation of knowledge and cultural outputs of the global South, indigenous populations, and other racialized and culturally marginalized "Others." Masquerading as the romantic realm of free, equal, and unrestrained access, the public domain was simultaneously a metaphor

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53 Singer (n 20) 533.

54 James Boyle, "A Politics of Intellectual Property: Environmentalism for the Net" (1997) 47 Duke L.J. 87.

55 See Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (Penguin 2004); http://creativecommons.org.

56 Boyle, "The Second Enclosure Movement and the Construction of the Public Domain" (2003) 66 L. & Contemp. Prob. 33, 62, and 67.

57 Pamela Samuelson, "Enriching Discourse on Public Domains" (2006) 55 Duke L.J. 783, 816.

58 Email from Michael Birnhack to Pamela Samuelson (October 28, 2005), quoted ibid 145.

59 Ronan Deazley, *Rethinking Copyright* (Edward Elgar 2006) 131.

60 See Carys Craig, "The Canadian Public Domain: What, Where and to What End?" (2010) 7 C.J.L.T. 221.

61 Anupam Chander and Madhavi Sunder, "The Romance of the Public Domain" (2004) 92 Cal. L. Rev. 1331.

employed to exclude—as though inevitably and necessarily—certain products, people, and voices from the value and power that intellectual propertization confers.

One component of a CLS methodology is to identify the binary oppositions at work in the law as sites of fundamental contradiction, and, by uncovering the previously suppressed sides of such binaries, unveil the myth of law's neutrality.[62] If we take copyright's binaries—owned/unowned, created/discovered, authored/unauthored, private/public—and regard them through a critical lens, we can perceive the politics behind the choice to designate something as owned, created, authored, and private. By the same token, however, this reveals as political any choice to privilege the category of unowned, discovered, unauthored, and public.[63] As with any legal concept—and just like "intellectual property"—the "public domain" can work to suppress and to oppress, rationalizing as legal necessities outcomes that in fact reflect and perpetuate established inequalities on a global scale.

4.3 Race, Gender, and IP's Public/Private Divide

A significant body of critical race and feminist scholarship in the IP field has now developed, which explores not only how IP's protections exclude people from monopolized cultural resources, but also how IP's exclusions preclude people (and *peoples*) from enjoying equal access to the power of IP. Boatema Boetang has been a compelling voice calling out the global politics of intellectual property and the public domain. Cultural products flow freely from the global South to the global North courtesy of the "public domain," she observes, while cultural products flow from North to South prepackaged in the trappings of intellectual property. As a result, "the law has different consequences for groups that vary not only in the nature of their cultural production, but also in their race, ethnicity, nationality, and class. It also affects groups and people within them differently on the basis of gender."[64] Through her work on the gendered nature of cloth production in Ghana, for example, Boateng weaves a complex picture of the ways in which gender interacts with race and class through state, institutional, and legal structures to produce sites of domination, victimization, and, potentially, empowerment. The treatment of indigenous cultural production as "traditional," she argues, renders it "feminized" in its encounter with "masculinized modernity, including IP law."[65] Western IP laws, built on patriarchal knowledge systems and imposed through colonial regimes, reproduce gender biases and operate as a space of continued subordination and exploitation. Ruth Okediji has also been vocal in her criticism of the public domain as "a rhetorical tool used by transnational actors" to justify what she regards as misappropriation of traditional knowledge and cultural resources of the

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[62] See Duncan Kennedy, "The Structure of Blackstone's Commentaries" (1979) 28 Buff. L. Rev 205, 211–12.

[63] See Chander and Sunder (n 61) 1334–5.

[64] Boatema Boeteng, "Walking the Tradition-Modernity Tightrope: Gender Contradictions in Textile Production and Intellectual Property Law in Ghana" (2007) 15 Am. U.J. Gender, Soc. Pol'y & L. 341, 345; citing James Boyle, *Shamans, Software, and Spleens: Law And The Construction of the Information Society* (Harvard University Press 1997) 141–2.

[65] ibid 349.

global South.[66] Pointing to the plasticity of the public domain as political construct, Okediji caustically concludes: "asserting the public domain appears to be principally about protecting *existing* beneficiaries of the IP system."[67]

The racialization of particular kinds of cultural production—coded public, unowned, and free for the taking—has also been the subject of critical inquiry in a body of IP scholarship focused on the unequal treatment of African American music in the development of the modern US music industry. K.J. Greene describes how the early music industry was "built on the back of black cultural production from the era of slave songs and spirituals to the period of black-face minstrelsy" through to ragtime and blues.[68] Repeated patterns of black innovation followed by white imitation demonstrate how deeply and racially coded are the concepts of authorship and appropriation. Poking at the interstices of IP, race, and gender in American society, Greene invokes the idea of intersectionality to emphasize the extent to which black women's contributions to the nascent music industry were both vital and invisibilized. Pointing to commonalities between the treatment of early blues artists and native peoples in the United States—and noting, specifically, the similarly group-focused, collective, and often oral nature of Indigenous and African American creative and cultural practices—Greene condemns IP law for its failure (indeed, refusal) to adequately capture the cultural and economic significance of their works. The potent combination of colonial power asymmetries and colonizing discourses of possessive individualism has consistently ensured that works of the colonized and subordinated have been deemed to be freely appropriable resources residing in the public domain.[69] This is no accident of oversight, nor the necessary outcome of neutral legal rules; from a critical perspective, it is plainly the exercise of power to secure privilege and domination through the political structures of law.

Racialized binaries of owned/unowned (authored/unauthored) have been the target of similarly blistering critique in the context of choreographic copyright, with works by Caroline Picart and Andrea Kraut charting the vagaries of propertization as applied to traditional European ballet (with its whitened aesthetic)[70] and the jazz, tap, and other improvised dance forms performed by racialized black bodies. Picart insists, "[i]t is not surprising that intellectual property law, in general, tends to privilege 'whitened' dance forms, such as ballet, because there are clear choreographers who author … using the bodies of dancers … as 'raw material.'"[71] Charting the ebbs and flows, successes and failures, of copyright claims in choreographic works, Kraut demonstrates that the

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[66] Ruth L Okediji, "Traditional Knowledge and the Public Domain," *CIGI Papers* No 176 (June 2018) 3–4.

[67] ibid 15.

[68] Greene (n 6) 372.

[69] See Greene (n 6) 383, quoting Rosemary Coombe, *The Cultural Life of Intellectual Properties: Authorship, Appropriation and the Law* (Duke University Press 1998) 209. See also Olufunmilayo B. Arewa, "From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context" (2006) 84 N.C.L. Rev. 547.

[70] Caroline Joan S. Picart, *Critical Race Theory and Copyright in American Dance: Whiteness as Status Property* (Palgrave Macmillan 2013).

[71] ibid 64.

recognition or denial of copyright has always depended on the dancer or choreographer's "position in a raced, gendered and classed hierarchy, and on the historical conditions in which they made, and made claims on, their dances."[72] She argues that choreographic copyright emerged out of, and so retains, the same "racialized logic of property that has persistently treated some bodies as fungible commodities and others as possessive individuals."[73]

Feminist IP scholars have also worked to make visible, particularly over the past 15 years, the "underlying masculine assumptions existing in our construction of intellectual property as well as highlight[ing] a political economy of intellectual property that has historically benefited men more than women."[74] On the theme of IP's exclusions, Rebecca Tushnet has pointedly observed that "when we compare fields that get intellectual property protection (software, sculpture) with fields that do not (fashion, cooking, sewing) it becomes uncomfortably obvious that our cultural policy has expected women's endeavors to generate surplus creativity but has assumed that men's endeavors require compensation."[75] Malla Pollack is even more frank in her assessment that "[t]he choice not to protect food and clothing under copyright law is gendered and anti-feminine."[76] Collaborative and collective projects, whether based on relationships of care or born of functional necessity, have been marginalized or problematized by the defining model of individual, commodified intellectual production at the core of copyright law—usually with both gendered and racialized implications.[77]

Without a critical lens, it might be argued that such exclusions simply reflect the appropriate boundaries of copyright as a system that protects original expression—works that appeal to the aesthetic senses rather than functional creations that fulfill practical human needs. A critical perspective reveals that copyright's distinctions turn on established cultural hierarchies that purport to distinguish between "high" and "low" art.[78] Copyright law is, of course, widely claimed to be aesthetically neutral. Alfred Yen has argued, with a distinctly critical bent, that the judicial insistence upon avoiding aesthetic judgment seeks to sustain a distinction between aesthetic reasoning (presumed to be subjective and indeterminate) and legal reasoning (purported to be objective and rigorous). Not only is this distinction entirely illusory, but in copyright cases, Yen argues, "judges necessarily show a preference for certain aesthetic perspectives when

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[72] Anthea Kraut, *Choreographing Copyright: Race, Gender, and Intellectual Property Rights in American Dance* (Oxford University Press 2016) xiii.

[73] ibid xviii.

[74] Debora Halbert, "Feminist Interpretations of Intellectual Property" (2006) 14 Am. U.J. Gender Soc. Pol'y & L. 431, 433. See e.g. Shelley Wright, "A Feminist Exploration of the Legal Protection of Art" (1994) 7 Can. J. Women & L. 59; Caren Irr, *Pink Pirates: Contemporary American Women Writers and Copyright* (University of Iowa Press 2010).

[75] Tushnet (n 47) 557 (quoted in K.J. Greene (n 6) 379).

[76] Malla Pollack, "Toward a Feminist Theory of the Public Domain, or Rejecting the Gendered Scope of United States Copyrightable and Patentable Subject Matter" (2006) 12 Wm. & Mary J. Women & L. 603, 608.

[77] See Peter Jaszi & Martha Woodmansee, "The Ethical Reaches of Authorship" (1996) 95(4) S. Atl. Q. 947, 967–8.

[78] See Christopher Buccafusco, "On the Legal Consequences of Sauces: Should Thomas Keller's Recipes Be Per Se Copyrightable?" (2007) 24 Cardozo Arts & Ent. L.J. 1121; Rebecca Tushnet, "Worth a Thousand Words" (2012) 125 Harv. L. Rev. 683.

they decide cases."[79] I have argued elsewhere that, underlying copyright law, a Romantic aesthetic invokes a strongly gendered vision of the autonomous self and the author "genius."[80] Building on Yen's observations, John Tehranian explains that copyright's aesthetic adjudications

> [i]nextricably affect the type of works we, as a society, receive from our artists … Even more fundamentally, however, aesthetic judgments can serve to both maintain and preserve existing power structures. The seemingly neutral laws of copyright, therefore, have the potential to create a hierarchy of culture that serves hegemonic interests.[81]

In doing so, these laws create and maintain inequalities of property and wealth, but also inequalities in social, cultural, and communicative power. The past few decades have seen astounding advances in information and communication technologies, bringing new possibilities for collaboration and dissent, knowledge sharing and social transformation. The relative "freedom of cyberspace," as Sonia Katyal has argued, "has particular significant for 'outsider' groups, particularly women and minorities," shedding new light on the "relationship between gender, sexuality and intellectual property."[82] The emancipatory promise of digital technologies has, however, been compromised by an architecture of control justified by the protection of IP rights. Given the escalating significance of copyright's regulatory mechanisms in our daily activities, copyright laws are equipped to produce enormous economic (dis)advantage but also, and more insidiously, to thwart social participation, control cultural protest, limit knowledge flows, and punish expressive disobedience.

A critical approach offers a methodology by which to examine IP law, but it also reflects a shared commitment to a political end goal: resisting exploitative power structures that are reinforced by IP law.[83] It might seem, from this survey of copyright's private/public contradictions that we are therefore faced with the political choice of either adopting or rejecting IP structures: seeking either to expand IP to include that which it has wrongfully excluded; or to eradicate it in order to free that which it has wrongfully enclosed. But even this is a false binary. Because critical theories perceive law's embeddedness in (and *as*) culture,[84] strategies of resistance to exploitative power structures can productively include the adaptation of prevailing legal categories. It is sometimes suggested that critical theories run themselves aground on the shores of their own critique: if the law is irretrievably crippled by fundamental contradictions, inescapably political, and therefore always subject to the whims and predilections of

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[79] Alfred C. Yen, "Copyright Opinions and Aesthetic Theory" (1998) 71 S. Cal. L. Rev. 247, 250.

[80] See Carys J. Craig, "Feminist Aesthetics and Copyright Law: Genius, Value, and Gendered Visions of the Creative Self" in I. Calboli and S. Ragavan (eds), *Protecting and Promoting Diversity with Intellectual Property Law* (Cambridge University Press 2015), 273–93.

[81] Tehranian (n 6) 1280. See also Arewa (n 69) 585.

[82] Sonia K. Katyal, "Performance, Property, and the Slashing of Gender in Fan Fiction" (2006) 14 Am. U.J. Gender Soc. Pol'y & L. 461, 466.

[83] See Katyal and Goodrich (n 2) 599.

[84] See Caroline Joan "Kay" S. Picart, *Law In and As Culture: Intellectual Property, Minority Rights, and the Rights of Indigenous Peoples* (Farleigh Dickinson University Press 2016).

those in power, can critical theories promise any truly emancipatory effect *within* the legal system and society in which they are advanced? Indeed they can. Feminist and critical race theorists, in particular, have shown that it is possible to disrupt the hegemony of the law from within its contradictions, formulating normative arguments that use its tools while knowingly inhabiting its tensions.[85]

The law, we know, is not autonomous from politics; but appreciating its *relative* autonomy permits us to be strategically ambivalent about its institutions and arguments.[86] It becomes possible to see, in the politics of IP, the capacity to harness IP discourse and the rhetoric of rights in order to advance social justice and equality. Drawing lessons from feminist and critical race scholarship, I have argued, for example, in favor of embracing the discourse of "user rights" as a political tool to restrain copyright, while also cautioning against the blind embrace of individual rights-based reasoning.[87] Scholarship emerging around the racialized dynamics of musical borrowing acknowledges the inadequacy of copyright's boundary-drawing doctrines while applauding copyright infringement rulings that recognize the marginalized contributions of musicians of color, thereby *shifting* the benefits that flow through our albeit flawed copyright system.[88] Ongoing efforts to protect and preserve traditional knowledge and cultural heritage have walked similarly delicate lines between the rejection and redirection of modern IP/public domain discourse.[89] As Lateef Mtima explains, by turning to extrinsic disciplines such as critical legal theory, the growing IP and social justice movement aims to "socially rehabilitate" IP norms and to "infuse the IP system with a progressive social consciousness."[90] Similar strategies are being employed in efforts to reorient the international IP regime away from trade and toward international development goals.[91] IP talk, for all its frailties and falsities, carries important symbolic freight in the redistribution and equality projects with which critical theorists are engaged.[92]

Recognizing the dynamic circulation of power through law illuminates the counter-hegemonic potential of both claiming and contesting the law's symbolic forms, inviting

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[85] Angela P. Harris, "The Jurisprudence of Reconstruction" (1994) 82 Cal. L. Rev. 741, 744. See also Patricia Williams, "Alchemical Notes: Reconstructing Ideals from Deconstructed Rights" (1987) 22 Harv. C.R.-C.L. Law. Rev. 401.

[86] Balkin (n 8).

[87] Carys J. Craig, "Globalizing User Rights-Talk: On Copyright Limits and Rhetorical Risks" (2017) 33 Am. U. Int'l L. Rev. 1.

[88] See e.g. Sean O'Connor, Lateef Mtima, and Lita Rosario, "Overdue legal recognition for African-American artists in 'Blurred Lines' copyright case," *The Seattle Times* (May 20, 2015). See also *Williams v. Gaye*, No. 15-56880 (9th Cir. 2018).

[89] See e.g. Jane Anderson, "Indigenous Cultural Knowledge and Intellectual Property" (2010) Issues Paper Prepared for the Centre for the Public Domain, online at https://law.duke.edu/cspd/itkpaper/.

[90] Lateef Mtima, "From Swords to Ploughshares: Towards a Unified Theory of Intellectual Property Social Justice" in Lateef Mtima, *Intellectual Property, Entrepreneurship and Social Justice: From Swords to Ploughshares* (Edward Elgar 2015) 265, 265–6.

[91] See e.g. Margaret Chon, "Intellectual Property Equality" (2010) 9 Seattle J. Soc. Just. 259.

[92] cf Rose, "Blackstone's Anxiety" (n 31) 630.

activities that both resist and rework the meanings that accrue to them.[93] The accusations commonly leveled against critical legal theory's deconstructive appetite too readily overlook this reconstructive enterprise. As much of the IP scholarship over the past decades has demonstrated, critical theories illuminate not only channels of critique but also a multiplicity of avenues for action through dialogic engagement with the law, its structures, and its normative discourses.

5. CONCLUSION: CRITICAL RESISTANCE

This chapter has offered just a small sample of the many ways in which a critical legal lens can be brought to bear in the field of intellectual property law to challenge core assumptions about the nature of IP, what it protects and excludes, why and to what end. I have taken, as a point of entry, the metaphor of IP as "intellectual property," and the politics at play in the construction of its opposite, "the public domain." Lurking underneath these ideas are many other features of our IP system that, when probed, open doors to similar insights about the power dynamics, knowledge hierarchies, and patterns of subordination that pervade the system.

Within the field of copyright scholarship alone, critical perspectives have been productively employed to challenge and reimagine all of copyright's core constructs, from its object (the "work") to its subjects (the "author" and its opposite, the "user"/"pirate") and the nature of the "rights" that they (respectively) claim. Thus, for example, copyright's concept of the "work" as an original and stable text has been critically examined by scholars drawing on poststructuralist ideas about language and text, as well as insights from continental aesthetics and literary theory, invoking notions of dialogism and intertextuality that reveal fundamental contradictions within the copyright scheme.[94] The work of feminist literary theorists has been brought to bear to recast and reclaim the authorial contributions of women, as well as to reimagine the empowering potential of authorship as relational and community-oriented, rather than monologic and independent.[95] The idea of the original "author" has been critically

[93] See ibid 97–8, citing Rosemary J. Coombe, "Contingent Articulations: A Critical Cultural Studies of Law" in Austin Sarat and Thomas R. Kearns (eds), *Law in the Domains of Culture* (University of Michigan Press 1998) 37.

[94] See e.g. Robert Rotstein, "Beyond Metaphor: Copyright Infringement and the Fiction of the Work" (1993) 68 Chi-Kent L. Rev. 725; Anne Barron, "Copyright Law and the Claims of Art" (2002) 4 I.P.Q. 368; David Lange, "At Play in the Field of the Fields of the Word: Copyright and the Construction of Authorship in the Post-Literate Millennium" (1992) 55 L. & Contemp. Prob. 139; Michael Madison, "The End of the Work as We Know It" (2012) 19 J. Intell. Prop. L. 1. See also Annemarie Bridy, "Fearless Girl Meets Charging Bull: Copyright and the Regulation of Intertextuality" (2019) 9 UC Irvine L. Rev. 293.

[95] See e.g. Andrea Lunsford, "Rhetoric, Feminism, and the Politics of Textual Ownership" (1999) 61 Coll. Engl. 529; Deborah Halbert, "Poaching and Plagiarizing: Property, Plagiarism, and Feminist Futures" in Lise Buranen & Alice M. Roy (eds), *Perspectives on Plagiarism and Intellectual Property in a Postmodern World* (Suny Press 1999) 111; Carys J. Craig, *Copyright, Communication and Culture: Towards a Relational Theory of Copyright Law* (Edward Elgar 2011).

examined as a relic of romanticism and a mythic ideal, belying the collaborative processes of creativity and celebrating a patriarchal, westernized conception of self-hood.[96] Critical feminist conceptions of the self as, at once, socially constituted and creative, interdependent and autonomous, have been advanced to break down the self/other and agent/dependent dichotomies, injecting into copyright discourse an enriched vision of the author-self.[97] Postcolonial perspectives and indigenous ways of knowing have challenged copyright's individual/community dichotomy as well as the past/present temporal linearity in which it situates its subjects and objects.[98] Critical rights-skeptics have contested the rhetoric of authorial rights within the copyright scheme, and the individuated subject that it assumes.[99] By problematizing copyright's construction of its subjects, and its inherited enlightenment legacies, these critical perspectives create space for new voices and new creative forms. At the same time, these perspectives break down the dichotomy between author/audience, owner/user, and so open up new versions of the user who has resided, until now, on the wrong side of copyright's false creator/copier binary.

As I claimed at the outset, a vast swathe of the intellectual property scholarship that has bloomed over the past few decades, as IP itself has expanded in its reach and relevance, builds implicitly or explicitly on insights gleaned from legal realism, critical legal studies, and their political and intellectual progeny. IP scholarship has, for decades, been preoccupied with exposing the reification of IP law's constructs, its mystifying rhetoric, its inherent indeterminacy, and its inescapably political nature. There are, of course, significant exceptions to be noted. Scholarship rooted in law and economics is still dominant in the US literature and thriving around the world, buoyed by the linkages between IP, trade, and the modern economy, and the ascendency of neoliberal economics. There is also a strong current of traditional liberal rights

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[96] See e.g. Keith Aoki, "(Intellectual) Property and Sovereignty: Notes Toward a Cultural Geography of Authorship" (1996) 48 Stan. L. Rev. 1293; Boyle, *Shamans, Software, and Spleens* (n 64); Marilyn Randall, *Pragmatic Plagiarism: Authorship, Profit and Power* (University of Toronto Press 2001); Mark Rose, *Authors and Owners: The Invention of Copyright* (Harvard University Press 1993); Martha Woodmansee and Peter Jaszi (eds) *The Construction of Authorship: Textual Appropriation in Law and Literature* (Duke University Press 1994).

[97] See e.g. Julie E. Cohen, "The Place of the User in Copyright Law" (2005) 74 Fordham L. Rev. 347; Carys J. Craig, "Reconstructing the Author-Self: Some Feminist Lessons for Copyright Law" (2007) 15(2) Am. U.J. Gender Soc. Pol'y & L. 207; Katyal (n 82); James Meese, *Authors, Users, and Pirates* (MIT Press 2018); Betsy Rosenblatt & Rebecca Tushnet, "Transformative Works: Young Women's Voices on Fandom and Fair Use" in *Egirls, Ecitizens: Putting Technology, Theory and Policy into Dialogue With Girls' and Young Women's Voices* (Ottawa University Press 2015); Betsy Rosenblatt, "Belonging as Intellectual Creation" (2017) 82 Mo. L. Rev. 91.

[98] See e.g. Boatema Boateng, *The Copyright Thing Doesn't Work Here: Adinkra and Kente Cloth and Intellectual Property in Ghana* (University of Minnesota Press 2011); Boateng, "The Hand of the Ancestors: Time, Cultural Production, and Intellectual Property Law" (2013) 47 L. & Soc'y Rev. 943.

[99] See e.g. Julie Cohen, "Creativity and Culture in Copyright Theory" (2007) 40 U.C. Davis. L. Rev. 1151; Haochen Sun, "Copyright and Responsibility" (2013) 4 Harv. J. Sports. & Ent. L. 263.

theorizing in the field, which finds its roots in continental and enlightenment philosophies of natural justice and deontological ethics.[100] Theoretical perspectives informed by liberal conceptions of equality and progress can effectively challenge some disparities in the allocation and enforcement of rights, no doubt; but critical perspectives perceive the ways in which the inequalities flow through the inherited legal constructs, and so demand a more fundamental reimagination of legal norms and institutions, always with a view to disrupting prevailing power structures.[101] To my mind, then, it is these critical approaches—with the new voices they empower and the political activism they propel—that offer the most challenging and promising route by which to understand, situate, and reshape modern IP structures (and so to resist their rapid and seemingly irrepressible growth). Both law and economics and liberal rights-based theorizing offer routes by which to formulate effective internal critiques of IP and its logic—but the IP system requires an immanent critique that transcends its disturbed framework, its contradictions and injustices, rather than couching critique within its terms.[102] Regarded through the lens of critical theory, it is clear to see that IP law now resides "in a cultural battleground of hegemony, social dominance, and resistance."[103] Resistance, by definition, must be capable of registering "without being absorbed, integrated or co-opted into the system against which it stands."[104]

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[100] See e.g. Abraham Drassinower, *What's Wrong with Copying* (Harvard University Press 2015); Robert P. Merges, *Justifying Intellectual Property* (Harvard University Press 2011); Richard A. Spinello & Maria Bottis, *A Defense of Intellectual Property Rights* (Edward Elgar 2009).

[101] Both modern rights theory and law and economics can be understood as heirs to legal realism, but part company with critical theories in their embrace of elements of formalism or formalistic reasoning. See Singer (n 20). See also Cohen, "Creativity and Culture" (n 99) 155–62.

[102] cf Emilios Christodoulidis, "Strategies of Rupture" (2008) 20(1) Law & Crit. 3, 6.

[103] Greene (n 6) 378, citing Rosemary J. Coombe, "Critical Cultural Legal Studies" (1998) 10(2) Yale J.L. & Human. 463, 481.

[104] Christodoulidis (n 102) 5.

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