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# What is a "Law and Society" Approach to Intellectual Property?

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# Introduction

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## What is a ‘Law and Society’ Perspective on Intellectual Property?

‘Intellectual Property’ is a rather awkward term that denotes several distinct bodies of law, including the law of patents, copyrights, trademarks, trade secrets and so-called rights of publicity. These laws protect diverse types of intangible products of the human intellect, such as biotechnology inventions, digitalized music, consumer product brand names and industrial know-how – hence the term ‘intellectual’. They provide ‘property-like’ protection for such intangibles by granting the owner of intellectual property rights the ability to exclude others from using their intellectual property, at least to a certain extent and, usually, for a limited period of time (Hetcher, 2002). Until fairly recently, intellectual property law was a relatively obscure legal speciality, and one that was subject to little scholarly (much less public) attention. With the rise of the global economy and the prominence of post-industrial information-based industries over the past several decades, however, intellectual property law and related policy issues has become the subject of everyday culture. Indeed, it is hard to read a daily newspaper without encountering references to patent, copyright, or trademark disputes. Intellectual property is also increasingly the subject of attention in the popular press (see, for example, Bollier, 2002, 2005; Klein, 2000; McLeod, 2001, 2005, 2007). Perhaps most telling, contemporary intellectual property law topics are also the subject of mainstream popular culture, such as cartoons.<sup>1</sup> Intellectual property law and related issues thus permeate many areas of everyday life, just like other areas of law long-studied by law and society scholars. Yet, somewhat surprisingly, even though intellectual property is a subject that has attracted an increasing amount of scholarly attention worldwide, relatively little of this academic work focuses on themes or approaches that are at the core of ‘law and society’ scholarship. To be sure, it is problematic to identify a clear or single ‘core’ or ‘canon’ of law and society research (Friedman, 2005, 1986; Sarat, 2004; Seron and Silbey, 2004). Traditionally, however, law and society scholarship has focused on social scientific empirical studies of law in action, including studying the actors, institutions and processes of the law. More recently, law and society scholarship has also encompassed humanities-based approaches to understanding the cultural life of law, everyday legal experiences and law’s socially constitutive nature (Friedman, 2005; Sarat and Simon, 2003; Seron and Silbey, 2004). One common assumption in all of these approaches is that law must be understood in its social, cultural and historical context.

Yet most scholarship on intellectual property law continues to be doctrinal or abstractly philosophical, which is the dominant approach to the study of law in most American law

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<sup>1</sup> See, for example, Hilary B. Price’s syndicated newspaper comic ‘Rymes With Orange’, dated 1/23/00: <http://www.rymeswithorange.com/home.php?date=20000123>. This single-panel comic is entitled ‘The New Agenda’. It depicts an elementary school teacher with her children sitting around her on the floor. The teacher explains ‘Class, today’s lesson on sharing has been cancelled. It will be replaced by a lesson called “protecting intellectual property”’. The comic is funny and revealing about popular culture’s understanding of intellectual property.

schools (Coombe, 2004).<sup>2</sup> This focus on legal doctrine and abstract theory is changing, however, as scholars from a variety of disciplines – such as sociology, political science, anthropology and cultural studies as well as law, – have begun to explore intellectual property law from different perspectives. The essays in this volume draw on and develop this emerging law and society approach to the study of intellectual property, whether or not the author of any particular essay self-identifies as a ‘law and society’ scholar. The essays as a whole have a creatively eclectic approach to the study of intellectual property. They focus on different types of intellectual property, including patent, copyright, trademark, trade secret and right of publicity laws. They employ diverse methodologies. Many of the essays also explore law’s relationship to society and the social institutions and cultures of which it is a part. Importantly, the essays in this volume examine different aspects of intellectual property in several different countries and include a significant focus on the increasingly important global politics of intellectual property worldwide.

## **I Social and Cultural Histories of Intellectual Property**

Historical perspectives on law and a focus on the cultural life of law are at the core of the law and society tradition (Seron and Silbey, 2004). The essays in Part I of this volume focus on different types of intellectual property and focus on different historical periods to examine their particular research questions. Yet these essays share some common approaches and themes, including an appreciation for the historical and cultural dimensions of intellectual property. This perspective highlights that intellectual property is a relatively recent development in Western history. Intellectual property doctrines that create private ownership rights in intangible creations, inventions and information (as well as the social practices and institutions relating to them) are historically contingent and socially contested rather than natural or inevitable (May and Sell, 2006). As the essays in this section show, intellectual property creates boundaries of private ownership that are in tension with principles of public access; these tensions and boundaries are developed and contested in different ways over time.

Martha Woodmansee’s essay (Chapter 1) is an influential and seminal study of the social construction of an ideology of ‘authorship’ in eighteenth-century Germany. Her work is part of a large and interdisciplinary body of scholarship, influenced by Foucault<sup>3</sup> and often grounded in literary theory and cultural studies, that explores how, why and to what effect the modern Western notion of authorship arose (see, for example, Boyle, 1996; Jaszi, 1991; Rose, 1995; Woodmansee and Jaszi, 1994). Woodmansee examines the social and cultural conditions that gave rise to a particular, Romantic, ideology of the author in eighteenth-century Germany. Focusing on an interpretation of published debates during this period, involving writers, literary theorists, publishers and others, Woodmansee shows how eighteenth-century Germany saw the rise of a new concept and social practice of authorship. Renaissance

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<sup>2</sup> Indeed, there is an important and large body of literature outside of the law and society tradition that focuses on justifying intellectual property from primarily philosophical or economic perspectives. (See, for example, Drahos, 1996; Fisher, 2001; Hughes, 1988; Landes and Posner, 2003; Shiffrin, 2001.)

<sup>3</sup> Woodmansee cites Foucault’s essay, ‘What Is an Author?’, in Harari (1979), as framing the issues examined in her essay for this volume.

notions focused on the writer's status as craftsman, of largely equal status to other craftsmen responsible for creating books, such as the bookbinder or publisher. The writer was viewed as a scribe or 'vehicle' who wrote primarily with input from external sources of inspiration. In sharp contrast, Romantic notions of authorship that arose during the eighteenth century came to view the writer as a creative 'genius' whose inspiration derived solely from within. As Woodmansee shows, this transformation of notions of authorship took place in a specific social, economic and aesthetic context, as writers consciously and publicly advocated for a model of authorship that would provide a justification for granting them property rights in the products of their creative efforts. The changing notion of authorship was an important link in justifying the rise of copyright law as a legal means to create a property interest in writings – one that vested in the first instance in authors.

One key insight that this body of work develops is that modern notions of authorship that underlie copyright law in particular are historically contingent and specific constructs that are mutually constitutive with other arenas of social and cultural discourse (Jaszi, 1991). Some of this scholarship also attempts to delineate the ways in which modern intellectual property law (primarily copyright law) has been influenced and, at times, constrained by the ideology of the individual author (Boyle, 1996; Jaszi, 1991). In particular, copyright law privileges the author as an individual creative genius by requiring 'originality' as a necessary basis for protection. One result of this privileging of the individual creative genius in copyright law is that it ignores the social fact that much creative work is the product of collective rather than individual creativity (Arewa, 2006; Demers, 2006; Jaszi, 1991; Seeger 2004; Sherman, 1995). All sorts of creative work, from music to painting to storytelling, are collaborative and cumulative rather than stemming from the mind of a single creative genius creating wholly from nothing.

While the work of Woodmansee and others has been influential to intellectual property scholarship, critics of the Romantic author scholarship have pointed out that it is often difficult to discern the sometimes ambiguous or contradictory relationship between the 'genius-author' construct and any particular strand of copyright law doctrine over time (Lemley, 1997). Bracha (2004) has a related criticism in a suggestive article examining the transformation of patent law from a system of royal 'privileges' in the seventeenth century to a system of 'rights' by the early nineteenth century. As Bracha correctly points out, it is a challenge to the historian of intellectual property law to speak broadly about 'intellectual property' since intellectual property law doctrines – such as the patent law he discusses – may mean very different things in different historical periods. His article demonstrates that early Western patent systems have a very different ideological, institutional and economic context that makes comparison of the logics of early patent law and policy to modern patent law issues problematic.

The question Woodmansee explores historically – who is an 'author' – has a parallel in patent law: who counts as an 'inventor'. Intellectual property scholars have yet to fully study this question historically, although it is clear that a related notion of 'inventive genius' arose in patent law (albeit at a later period) and likewise influenced both legal doctrine and social practices (Bracha, 2005, chapter 5; Fisk, 1998).

One of the most contentious issues in contemporary intellectual property law is the political economy of intellectual property rights. Nations with highly developed IP-based industries,

such as the USA,<sup>4</sup> promote strong intellectual property law systems worldwide and pressure countries with weaker intellectual property law protection by a variety of means, including international trade agreements (Drahos and Braithwaite, 2002; May and Sell, 2006; Sell, 2003). Historian Doron Ben-Atar's essay (Chapter 2) provides an interesting historical perspective on contemporary debates over the politics of industrial policy in early US history.<sup>5</sup> Ben-Atar examines and interprets Treasury secretary Alexander Hamilton's views in the early 1790s on the political economy of international economic competition. Ben-Atar focuses on the 'Report on Manufactures' (ROM) that Hamilton submitted to Congress which set forth what Ben-Atar describes as very bold and aggressive views for the creation of economic prosperity in the new, post-colonial US society. For Hamilton, and others, the key to economic prosperity lay in self-sufficiency, particularly in technologies of manufacture – which were almost entirely lacking in the new nation. The ROM, Ben-Atar argues, advocated such measures to encourage emigration from Europe of skilled artisans, craftsmen and managers who would bring their industrial and technological know-how with them, and even encouraging the smuggling of modern machinery out of Europe to the USA by offering financial incentives. Although the policies Hamilton advocated risked creating further enmity with England, in particular, he strongly believed that the need for technological self-sufficiency overrode any potential political dangers. Interestingly, Ben-Atar argues that Hamilton also took a very partisan view of the need to protect US technology and innovation, advocating for strong protection against transmission out of the USA of American-owned technology and know-how whilst at the same time advising Congress to adopt policies sanctioning 'piracy' of similar information from Europe.<sup>6</sup> Ultimately, Ben-Atar reveals that Hamilton's proposed industrial policies were not adopted, but were largely rendered unnecessary in the light of continued immigration into the USA by many of the skilled workers whom Hamilton's proposals targeted.

The main theme of Ben-Atar's essay, which he also advances in a recent book (2004), is that the USA in its earliest years as a new nation was an active appropriator of industrialized Europe's technological know-how, which was used to develop a thriving indigenous manufacturing capability. This is especially ironic in the light of contemporary international debates over intellectual property where the USA, now an intellectual property exporter, advocates for strong international property protection worldwide.

Many recurring issues relating to intellectual property occur in the workplace. Perhaps this is not surprising since many workers in post-industrial societies are employed as knowledge workers whose creative and inventive products may be protected as intellectual property. Among the most important and potentially vexing issues in this context is who actually owns intellectual property that is either produced by employees or acquired by them in the course of

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<sup>4</sup> For example, computer software and hardware, pharmaceuticals and biotechnology, and entertainment industries (movies, music) are all powerful users of intellectual property systems.

<sup>5</sup> For other useful histories of intellectual property during this period, see Ben-Atar (2004); Bowrey (1997); Bracha (2005); Deazley (2004); Khan (2005); and MacLeod (1988).

<sup>6</sup> This aspect of Ben-Atar's arguments has been criticized by intellectual property historians. Fisk, for example, stresses that the term 'pirate' cannot meaningfully capture the actions that Ben-Atar describes, since in the late eighteenth century, there was no clear law of 'trade secrets' that might protect industrial know-how, nor was there any international law that prohibited the use of technological information or patented inventions in another country (Fisk, 2005).

their jobs.<sup>7</sup> To contemporary minds, the notion that an employer (often a corporation) owns or controls various types of intellectual property of its employees seems unremarkable. Yet, in a series of creative and insightful articles, legal historian Catherine Fisk shows how this modern legal reality is a relatively recent – and contested – development. Her work explores the rapid and sometimes torturous transformation of legal doctrines that came to privilege employer ownership of intellectual property.

Fisk's essay (Chapter 3) focuses on issues of ownership and control of intellectual property in the context of the employment relationship – not on who *is* an author under an IP regime, as developed in Woodmansee's work, but who *owns* the products of authorship and inventorship under IP law doctrines. This contribution is part of a larger body of scholarship in which Fisk explores these issues as they have played out in different arenas of intellectual property law between the nineteenth and early twentieth centuries (Fisk, 1998, 2003). Focusing primarily on a creative analysis of US published legal decisions, and with a deep understanding of the social, cultural and historical context of these decisions, Fisk's work challenges some of the taken-for-grantedness of contemporary understandings of IP law. In particular, Fisk examines the relatively rapid shift between the early nineteenth and early twentieth centuries of several intellectual property law doctrines that privileged employees at the beginning of this period but benefited employers at the end. Fisk's work carefully delineates this dramatic transformation (both in doctrine and in ideology) and convincingly explains why it took place.

Fisk's work on copyright law (Fisk, 2003) shows that throughout much of the nineteenth century, copyright law privileged employee authors who created copyrighted works. Examining all reported judicial decisions in the USA before 1910 that involved an employee author contesting ownership of the authored work, Fisk concludes that, until the early twentieth century, 'virtually every court' dealing with the issue held as a 'default rule' that employee-created copyrighted works were owned by the employee as a matter of copyright doctrine, even if these works were created in the course of employment. This is striking, Fisk notes, because nineteenth-century courts in non-intellectual property law cases were not particularly solicitous of employee rights; the modern default rule that arose in court decisions in the late nineteenth century and was codified in the 1909 Copyright Act (in the so-called 'work for hire' doctrine) is exactly the opposite: it generally recognizes the legal fiction that the employer is the 'author' of works produced by creative employees. Fisk's essay skilfully interprets this transformation in copyright law and draws out the multiple legal, social and cultural factors that influenced it.

Fisk develops a similar theme while looking at the question of how patent law answers the question of who owns patented invention created by an employee (Fisk, 1998). As she does in her work on copyright, Fisk examines patent law as reflected in published US cases, understood in historical, social and cultural context. Her work is a sophisticated and creative interpretation of a shift in patent law understanding of employee ownership rights in their inventions. Thus, Fisk shows that roughly between 1840 and 1880 courts routinely held that an inventor was presumed to own his invention, regardless of his status as an employee. By the turn of the twentieth century, however, this legal presumption changed as courts increasingly held that the employment contract of inventorship, rather than patent law doctrines (and ideologies),

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<sup>7</sup> See, for example, the thorny and unresolved issues of who owns the intellectual productions of academic employees in McSherry (2001).

controls who owns a patented invention. As with the related copyright law example that Fisk explores, the reasons for this transformation in patent law are complicated and often subtle. They include changing judicial attitudes towards the creative and inventive process, the rise of corporations and collaborative employee inventorship, and changing notions of the employment contract.

In Chapter 3, Fisk investigates other intellectual property law doctrines: trade secret law and restrictive covenants.<sup>8</sup> She explores how the rise of trade secret law and the use of restrictive covenants between the nineteenth and early twentieth centuries combined to both limit employee job mobility and to support the rise of corporate control of intellectual property. As with her work on patent law and copyright law, Fisk's work is based on a rich analysis of published cases (primarily from the USA) that deal with issues of ownership and control of trade secrets as well as the appropriate uses of restrictive covenants that limit an employee's ability to switch jobs or to use their knowledge acquired from one employer for the benefit of another employer. Fisk's work is based on a case study of a corporate employer whose archival records during this period allow Fisk to examine transformations of legal doctrine but also to see how changes in legal doctrine actually influenced (or not) corporate actor behaviour.

Fisk examines how at the beginning of the nineteenth century trade secret law simply did not exist; and there were no restrictive covenants to limit employees' ability to use knowledge gained in the course of employment in subsequent employment. There were some restrictions on employees' ability to use valuable workplace information and know-how, but these were limited and tended to stem from formal apprenticeship or fiduciary relationships – they were not duties imposed by law. Fisk concludes: 'There simply was no basis in the law for most people who employed assistants to prevent them from using in a later employment the knowledge that they acquired in an earlier employment. In other words, workplace knowledge and skill remained, in the eyes of the law, an attribute of each worker, not an asset of a firm' (p. 80).

By the end of the nineteenth century, however, this situation had changed quite dramatically. Courts increasingly recognized trade secret information as an asset owned by employers, and they increasingly imposed duties on employees not to disseminate or use workplace knowledge in subsequent employment. As Fisk shows, at the early part of the twentieth century, courts recognized strong and expanded categories of trade secrets, covering not simply discrete proprietary information but also general 'know-how' of skilled workers. They also upheld strong injunctions to protect this valuable information when employees took new jobs. The route courts took was not always straightforward or clear, since courts had to balance changing notions of freedom of contract, the imperatives of economic development and ideologies of free labour that were all contested at this time. But the result by the early twentieth century was the creation of doctrines to protect workplace information as an asset of employers and to facilitate strong policies of corporate control of intellectual property generally.

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<sup>8</sup> Restrictive covenants are not typically viewed as a type of 'intellectual property' law. They are agreements that limit an employee's ability to compete with a former employer, and so are properly considered to be within the law of unfair competition. Since restrictive covenants may restrict the use or dissemination of information such as trade secrets, however, this area of law clearly overlaps with intellectual property law.

Fisk's work in this volume and elsewhere challenges the taken-for-grantedness of contemporary understanding in intellectual property law by highlighting the fact that today's reality of corporate ownership and control of intellectual property is a fairly recent and contested development, the consequences of which are as yet not fully understood.

Legal scholar David Wall's essay (Chapter 4) presents a more contemporary focus on an unusual and relatively recent type of intellectual property: so-called 'rights of publicity'. Rights of publicity generally provide for the protection from unauthorized use of one's persona – to include name, likeness, image, or, more broadly, attributes of identity. The right of publicity is most fully developed in US law, in common law doctrines and statutes. However, there are indications that related rights are increasingly being recognized in other countries. Historically, the right of publicity has roots in privacy law (the personal right to be left alone). But, as many intellectual property scholars have criticized, rights of publicity have developed into powerful and expansive property-like rights in a commodified celebrity persona (Coombe, 1998; Langvardt, 1997; Madow, 1993). Indeed, once the right of publicity is understood to be property rather than merely a personal right, logically it has many of the attributes of property, including post-mortem viability of the celebrity subject.<sup>9</sup> Critical scholars are concerned that the law's recognition of expanded rights of publicity, with often uncertain contours or limits, allows celebrities (who are most often the ones asserting publicity rights) to censor unauthorized use of their personas and unduly restrict public expressive activities (Coombe, 1998; Langvardt, 1997; Madow, 1993). This is particularly problematic because right of publicity owners often successfully assert facially non-meritorious claims against unauthorized use of celebrity personas because few targets of threatened legal action are willing or able to defend themselves in light of the uncertainties and costs of intellectual property litigation (Gallagher, 2005).

Wall's essay examines the social construction and policing of cultural icon Elvis Presley as 'intellectual property' after his death. Wall takes a classic 'law in action' approach to understanding how the Elvis persona was created and recognized under right of publicity law, thus removing the Elvis persona from the public domain. He also creatively details how the owners of the Elvis publicity rights have policed these rights to protect against popular culture appropriation that offers alternative meaning of the Elvis persona. In this and later work on the same subject, Wall shows how the celebrity right of publicity is in tension, as the culturally constructed persona must be restricted (or policed) to preserve the owner's ability to control the authorized meanings associated with the celebrity while at the same time it must be circulated in popular culture to maintain the popularity that allows the rights' owner to exploit the economic benefits of the celebrity persona (Wall, 2003).

'Piracy' is a term that denotes moral deviance, and it is a term that historically has long been linked to claims of unauthorized uses of intellectual property. Woodmansee's essay for this volume shows, for instance, how early debates over the development of copyright law invoked the image of piracy at a historical point where the debate over whether the unauthorized copying of books was an act of piracy or a public benefit was far from certain.

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<sup>9</sup> See, for example, California Civil Code Section 3344.1, which sets forth a statutory right of publicity that pertains to deceased celebrities; see also *Comedy III Productions, Inc. v. Saderup, Inc.*, 21 P.3d 797 (Cal. 2001), which dealt with the publicity rights of long-deceased celebrities known as 'The Three Stooges'.

In a very different context, Demers (2006) argues that the rhetoric of piracy-as-theft embraced by courts in contemporary debates over the proper scope of copyright protection for various musical works and practices threatens to blur distinctions between legitimate and illegitimate musical practices (see also Arewa, 2006). She argues that the failure by courts in prominent copyright infringement cases to properly distinguish between unlawful practices (such as burning copies of a protected CD and sharing it with thousands of others over the Internet) and lawful uses of copyrighted works created by ‘transformative appropriation’ (for example, the borrowing from and allusion to pre-existing works that characterize certain musical genres such as hip-hop or jazz) is facilitated by an un-nuanced notion of copyright piracy that threatens to diminish musical creativity. In yet another context, Drahos and Braithwaite (2002) show how the rhetoric of piracy in political discourse concerning the emergence of a global regime of intellectual property protection is significant. Prior to emergence of the World Trade Organization (WTO) and the development of the Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPS), nations had no general duty to protect or enforce intellectual property rights within their borders. The linking of intellectual property rights issues with trade agreements under TRIPS, however, substantially altered this arrangement since, for the first time, countries bound by TRIPS were required to provide protection for many types of intellectual property. The rhetoric of piracy, Drahos and Braithwaite argue, was a significant ideological resource and tool for persuasion in changing perceptions about the morality and urgency of establishing TRIPS, an ‘agreement that in another era would have been rejected as a global charter for monopolists has come to be thought of as consistent with free trade and competition’ (Drahos and Braithwaite, 2002, p. 38).

Political scientist Debora Halbert’s essay (Chapter 5) develops similar themes. Halbert provides a critical examination of modern narratives of intellectual property piracy in the international political arena. Focusing on US practices towards Asia-Pacific nations that are deemed to have insufficient protection for the intellectual property products they import – which is viewed as a major threat to US industries such as software, pharmaceuticals and entertainment – Halbert shows how narratives of piracy have been employed strategically to aid US intervention in the international exchange of intellectual goods. The piracy narratives, she argues, were an important concomitant to US strategies to link intellectual property and global trade issues beginning in the 1980s, which led to TRIPS. These narratives facilitated and justified the expansion of intellectual boundaries that privilege intellectual property-rich nations such as the USA and label as criminal nations that do not comply with increasingly hegemonic US intellectual property principles. The rhetoric of piracy was necessary precisely because the political and legal landscape had changed. The one who is properly labeled an intellectual property pirate thus has significant consequences as the US struggles to impose its notion of intellectual property rights (and wrongs) globally, including on nations with very different historical and cultural traditions and where intellectual property concepts are weak or even antithetical to US norms (Alford, 1995).

## **II Globalization and the Politics of Intellectual Property**

One of the most significant developments in the last decades of the twentieth century was the emergence of a global intellectual property regime, which was primarily ushered into existence by the 1995 TRIPS Agreement (see, for example, Yu, 2006). The social, economic, cultural,

technological and legal reasons for this development have been fertile ground for intellectual property scholarship (Bettig, 1996; Braithwaite and Drahos, 2000; Drahos and Braithwaite, 2002; Halbert, 1999, 2005; May and Sell, 2006; Sell, 2003). Drahos and Braithwaite have characterized TRIPS as a ‘quiet revolution’ in the way that intellectual property rights have been defined, expanded and protected in the global economy – a revolution that primarily benefited advanced nations and their powerful industrial lobbies and disadvantaged developing nations that were persuaded (or coerced) into joining the agreement even though it increased the costs of using intellectual property protected technology and information. The most dramatic aspect of TRIPS was that it linked international trade agreements with intellectual property by mandating that member states provide minimum levels of intellectual property protection under their domestic laws, with only limited flexibility to enact laws that take into account local economic and social considerations and needs (Correa, 2000, pp. 1–21). TRIPS also provided powerful enforcement mechanisms to sanction non-complying nations. Each of the essays in this section examines different aspects of how the exercise of intellectual property rights in the international arena has expanded social and political control in the post-TRIPS world.

Political scientist Susan Sell’s contribution (Chapter 6) examines the politics surrounding the adoption of TRIPs in 1994 and the concomitant dramatic twentieth-century expansion of a global system for protecting intellectual property. As Sell argues, TRIPs for the first time linked requirements for strong intellectual property protection to multilateral international trade issues. Countries that wanted – or needed – to benefit from the trade aspects of TRIPs were required to shape their domestic intellectual property laws to conform with those of the most developed nations to provide minimum levels of intellectual property protection. Moreover, TRIPS itself also provided effective enforcement mechanisms to police compliance with these TRIPS intellectual property mandates. As Sell shows in her essay, perhaps the most remarkable aspect of the TRIPS story was how a small group of primarily US-based strategic actors from intellectual property-intensive industries (including computer software, entertainment and pharmaceutical industries) were able to influence the development and adoption of TRIPs. Her work highlights the complex historical, cultural and political factors that made TRIPs possible, including the power of legal norms to frame legal issues as ‘commonsensical’ and the role of private industry actors and governmental institutions, both seeking change. Moreover, as Sell shows, the fuller story of TRIPS and the global politics of intellectual property includes an analysis of how the aggressive enforcement of TRIPS by developing countries against developed nations has generated a worldwide debate over TRIPS and the political resistance to it. Many developing nations believe that TRIPS is unduly coercive as well as overly solicitous of private corporate rights to the detriment of human rights and developing nations’ interests. Sell argues that debates over such issues as ‘biopiracy’ or patenting of vital medicines such as AIDS/HIV drugs in developing countries are a product of TRIPS and are emblematic of the difficulties intellectual property ‘haves’ will face in an increasingly contentious global debate over the proper scope of intellectual property, particularly in those developing nations that believe TRIPS was foisted on them without true negotiation.

Peter Drahos and John Braithwaite’s essay (Chapter 7) provides rich context to contemporary debates over the global politics of intellectual property. Their essay is part of a larger body of creative empirical research by these scholars that focuses on global business practices

and regulation (Braithwaite and Drahos, 2000; Drahos and Braithwaite, 2002). The essay in this volume demonstrates how, since the late nineteenth century, ‘global knowledge firms’ have marshalled economic, legal and cultural resources to control scientific and industrial information to achieve marketplace dominance. By the early twentieth century, Drahos and Braithwaite show, multinational corporations in a variety of industries in the USA and Europe had developed large-scale research laboratories for the purpose of generating commercial products. These research labs employed thousands of scientists to generate knowledge that could be privatized and controlled for commercial gain. Over time, and with the help of an emerging profession of patent agents and attorneys with sophisticated knowledge about how to obtain and use intellectual property (whose professional goal has been to expand the scope of intellectual property), these corporations were able to control industrial information to achieve marketplace dominance. Well before TRIPS, Drahos and Braithwaite tell us, large corporate actors had a long history of successfully using intellectual property law and systems to control – indeed, cartelize – entire domains of knowledge. This ‘knowledge game’, they argue, has been played for almost a century for the benefit of elite corporate actors to the detriment of the public interest that the intellectual property laws are ultimately intended to benefit.

Anthropologist Kristin Peterson’s essay (Chapter 8) examines private non-governmental organizations (NGOs) that address some of the inequalities that increasingly characterize the globalization of intellectual property. She focuses on so-called ‘bioprospecting’ NGOs, whose mission is to facilitate benefit-sharing by local indigenous communities in developing nations. Their goal is to provide these local communities a share of the profits derived from the commercialization of biological resources appropriated, and often patented, by international pharmaceutical and botanical corporations. As Peterson and others have argued, this exploitation of local resources has been abetted by the global expansion of intellectual property rights under TRIPS. Peterson seeks to understand what effect the participation of bioprospecting NGOs in developing nations as private intermediaries between local community interests and the interests of international corporations has on the local communities these NGOs were intended to benefit. Peterson examines briefly some of the reasons why bioprospecting NGOs may not provide the benefits they promise. Moreover, she argues that a new form of private governmental and policy-making authority represented by the NGO–industry combinations she studied may also serve to limit public participation and debate over critical issues of biodiversity and development. Peterson’s essay is not a fully developed ethnographic case study, but it does suggest the powerful insights that intellectual property scholars can achieve by utilizing such an approach and focusing on the operation of law as it is conceptualized, negotiated and implemented in a complex web of social, political and power relationships in the shadow of international intellectual property and trade laws.

Legal scholar Keith Aoki’s essay (Chapter 9) is an early and thoughtful article that frames many of the legal and policy issues arising from the globalization of intellectual property law, which many of the authors in this volume address. For Aoki, the increasingly global reach of intellectual property law and the neo-liberal assumptions embedded in it raise three complex and interrelated issues. The first is the skewed distributive effects that a post-TRIPS strong intellectual property regime facilitates between ‘have’ and ‘have not’ nations. Aoki argues that TRIPS permits intellectual property exporting nations to enforce their rights extraterritorially, which erodes historic notions of territoriality and sovereignty, and disadvantages those

developing nations which have very little local intellectual property to exploit and few resources to pay for essential intellectual property-protected goods. Second, the increasing global reach of intellectual property laws requires greater understanding about effective strategies to protect a public domain that cannot be fully owned as intellectual property. Third, Aoki highlights inequalities relating to the exploitation of intellectual property as a form of ‘biopiracy’ or ‘biocolonialism’, as developed nations are able to remove natural resources and discoveries out of developing nations as ‘raw materials’ that can be manipulated and transformed into intellectual property with no recognition or economic benefit (for example, royalties) flowing back to the source nation. Aoki’s essay is a useful synthesis of emerging issues relating to the globalization of intellectual property and an emerging political resistance to it that a number of authors in this volume elaborate on in their own work.

Anita Chan’s essay (Chapter 10) is an insightful case study of a social movement to legislate the mandatory use of ‘free’ – as opposed to proprietary, copyright protected – software for all governmental computers in Peru. Chan examines the processes and dynamics surrounding how free software proponents in Peru successfully transformed or ‘recoded’ the traditional language of the global free software movement, which emanated from developed countries and focused on the presumed technological and economic superiority of free software technology, into a discourse that emphasized governmental relations and citizen rights. The Peruvian free software movement, Chan shows, successfully linked the debate over choice of software to broad issues of governmental reform, democratic participation and the politics of international dominance and dependency.

### III Intellectual Property and the Public Domain

A central issue in intellectual property law is the proper balance between protecting knowledge, innovation and creativity as private property versus disseminating it as free for all to use. The tension between these two is captured in the concept of the ‘public domain’ or, sometimes, the ‘intellectual commons’, which scholars use to denote areas of social life where public access trumps intellectual property rights. Somewhat surprisingly, intellectual property scholarship on the public domain has been relatively sparse until recently (Lange 1981; Samuelson, 2006).<sup>10</sup> Although scholars have not clearly or consistently defined such terms as the ‘public domain’, there is a growing body of scholarship that critiques the over-expansion of intellectual property rights and the (often presumed) concomitant harmful diminution of the public domain (see, for example, Boyle, 2003; Coombe, 1998; Demers, 2006; Drahos and Braithwaite, 2002).<sup>11</sup> Many of these critics contend that expanded domestic and international intellectual property protection threatens access to vital knowledge, free speech and democratic participation. Drahos and Braithwaite (2002) summarize well some of these concerns in their excellent empirical study of the globalization of intellectual property.

The redistribution of [intellectual] property rights involves a transfer of knowledge assets from the

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<sup>10</sup> For a very useful history of the public domain concept in US law, see Ochoa (2002).

<sup>11</sup> As Samuelson (2006) points out there are many different conceptions of ‘public domain’, essentially different public domains that concern scholars for different reasons. But I use the phrase ‘the’ public domain rather than ‘a’ public domain simply because that is the general convention.

intellectual commons into private hands. These hands belong to media conglomerates and integrated life sciences corporations rather than individual scientists and authors. The effect of this, we argue, is to raise levels of private monopolistic power to dangerous global heights, at a time when states, which have been weakened by the forces of globalization, have less capacity to protect their citizens from the consequences of the exercise of this power (p. 2).

As Samuelson points out, there are multiple conceptions of the public domain that scholars use to highlight different issues or policy concerns (Samuelson 2006). She identifies three broad clusters of issues that intellectual property scholars of the public domain generally raise. First are notions of the public domain concerned primarily with the legal status of information resources. What can or should be the subject matter for intellectual property protection is a question that falls within this category. A second notion of the public domain focuses on the proper scope of the public's right to use information resources even where these are protected as intellectual property. The doctrine of 'fair use' of copyrighted materials is an example that fits within this category. The third area Samuelson identifies from the literature pertains to the accessibility of information resources themselves. This typology is helpful to frame and compare the main voices, concerns and critiques involved in scholarship on the public domain.

One criticism of public domain scholarship has focused on the uncritical acceptance or 'romantic' notion that it serves the 'public good' in all circumstances. Chander and Sunder (2004), for instance, argue that the public domain concept may disadvantage certain indigenous groups whose traditional information and culture generally will not qualify for protection under Western models of intellectual property, which privilege individual authorship and inventorship over collective creation or invention. Categorizing these groups' information and culture as part of the public domain, however, leaves them susceptible to lawful appropriation by others – including corporate actors that may themselves be able to successfully claim patent or copyright protections for unprotected genetic resources and traditional information.

Legal scholar James Boyle's essay (Chapter 11) argues that recent decades of expansion of intellectual property law constitute a 'second enclosure movement' directed towards the intellectual commons. Comparing this movement to the 'first' enclosure movement in English history, which was directed towards fencing-off the commons in land, Boyle questions whether the 'tragedy of the commons' that scholars contend justifies propertization of land applies with equal force to the intangibles that intellectual property law protects. Boyle also examines whether concepts of the public domain are sufficiently theorized and robust to create the proper balance in intellectual property between strong private property rights and the public rights of access. A strong public domain is critical, Boyle argues, because intellectual property rights may not serve the public good in the ways that intellectual property law generally imagines, and may actually inhibit rather than promote the dissemination of critical information.<sup>12</sup> Boyle draws on the metaphor of environmentalism as a means of revitalizing and theorizing the concept of the public domain – or, as he stresses, the multiplicity of public

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<sup>12</sup> Drahos and Braithwaite (2002) make a similar argument: that intellectual property law as it actually operates as a system may actually harm competition and decrease the diffusion of knowledge and creativity. Drahos (1992) applies this critique to basic scientific research as it is practised in academia, and asks whether 'intellectual property is a destroyer of some of the benefits that it is meant to be promoting' (p. 56).

domains that are recognized in the scholarly literature – as a step towards rebalancing public and private interests.<sup>13</sup>

Mark Rose's essay (Chapter 12) examines the early history of English copyright law, where the issue of authorial rights versus the public domain were expressly debated. He shows that the emergence of copyright law gave rise to the concept of the public domain as a critical element of civil society, but acknowledges that, from the beginning, claims for the public domain were also weaker than the property claims for copyright. This finding fits well with Boyle's argument for the need to revitalize the public domain concept. Importantly, Rose also demonstrates that the kind of closure that accompanied early copyright law (making literary works private property) actually served to make literary works more accessible than they had been when regulated under a system of publishing guild privileges.

Debora Halbert (Chapter 13), like Boyle, argues for the need to theorize the idea of the public domain as a necessary counterbalance to the over-expansion of intellectual property rights, particularly in copyright law. Halbert argues that the paradigm of private property that legitimates intellectual property threatens the free flow of ideas that is essential to democracy. Drawing on Habermas's notion of the public sphere, Halbert argues for a linkage of that concept with the concept of the public domain – a linkage she contends can clarify and revitalize the public domain and thereby serve as a counterweight to expanding intellectual property rights.

#### **IV Appropriating Indigenous Culture and Knowledge**

There is a large and growing scholarly literature dealing with the possibilities and problems associated with the ownership and control of the traditional knowledge and cultural products of indigenous peoples around the globe, whether through the use of intellectual property law or other legal regimes (See, for example, Brown, 2003; Coombe, 2001, 2005; Cottier and Panizzon, 2005; Dutfield, 2005; Ghosh, 2003; Gibson, 2005; Greaves, 1994; Lange, 2005; Scafidi, 2005; Symposium, 2003). Traditional knowledge is a broad category that may encompass, for instance, information concerning native seed varieties, traditional agricultural practices, and botanical knowledge such as the medicinal properties of native plants (Ragavan 2001; Roht Arriaza, 1996). Traditional cultural products and practices may include music, sacred images and symbols, or artwork (Downes, 2000; Long, 1998; Ragavan, 2001). The central debate engaging intellectual property scholars concerns whether traditional knowledge and culture can – or should – be subject to legal protection that allows for its exclusion from the public domain. Some scholars argue that granting legal protection to traditional knowledge and culture, either under intellectual property law or *sui generis* protection, is vital in order to recognize and respect the heritage and values of often marginalized and vulnerable indigenous peoples, as well as to promote biodiversity, sustainable development practices, sovereignty and human rights (Coombe, 2001).

Perhaps the major issue in the traditional knowledge debate concerns the appropriation of agricultural, biological and genetic resources of developing countries that may have

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<sup>13</sup> Coombe's argument that intellectual property law is generative as well as prohibitive (1999) suggests that a revitalized concept of the public domain may indeed shape social practices of both intellectual property owners and the broader public.

market value as pharmaceutical or other products in developed nations, which some scholars and activists alike have decried as ‘biopiracy’ or ‘biocolonialism’. As these scholars have demonstrated, increased globalization of intellectual property rights has facilitated mostly Western corporate actors’ ability to acquire unprotected ‘raw’ natural resources from the developing world and, with minimal modification, transform them into patentable ‘inventions’ (Greaves, 1994; Halbert, 2005: 135–63). Contemporary patent law, particularly in the United States, promotes this development because it increasingly recognizes as patentable even slightly modified agricultural or biological organisms and isolated or purified genetic materials (Coombe 2005). These practices have been criticized as yet another example of North–South global inequality and exploitation of resources, as developed countries of the North have extracted tradition-based knowledge of the South to produce marketable products for the West without sharing any of the benefits that this commodification of traditional knowledge has produced (May and Sell, 2006: 194–9; Gervais, 2002; Ghosh, 2003).

The politics of the traditional knowledge debate are complex. As legal scholar Sabrina Safrin argues, the increased propertization of biological and genetic materials that has occurred during the past two decades has resulted in ‘hyperownership’ and threatens to create an anticommons that diminishes access to raw genetic materials and the scientific information they provide. This results, she argues, from the extension of patent law to protect previously unpatentable biological and genetic resources, as well as from the subsequent reaction by many developing nations to limit access to natural resources as a response to perceived exploitation. She argues that hyperownership threatens to reduce innovation and, ironically, to threaten the autonomy and liberty of the very indigenous peoples whose communities are the source of much of the world’s biological and genetic resources (Safrin, 2004).

The traditional knowledge debate is equally complex when discussing cultural rather than bio-genetic property. Here, too, the key question is whether ownership of intangible cultural products is desirable (or even possible) and, if so, who exactly should be able to exercise such ownership and control. As many scholars acknowledge, intellectual property law has little capacity to protect communally created cultural products or to protect against unauthorized uses of traditional songs, dances, or sacred symbols (Brown, 2003; Coombe, 2003). Moreover, while legal recognition of indigenous communities’ rights to control their cultural productions might bolster these communities’ heritage and dignity, the enforcement of such rights may also diminish the global cultural commons and threaten norms such as free speech vital to democratic societies (Brown, 2003).<sup>14</sup>

Anthropologist Michael F. Brown (Chapter 14) critically assesses claims made in the traditional knowledge and culture debates, which he also explores in greater depth in his book on this same subject (Brown, 2003). In his essay, Brown argues against an over-reliance on intellectual property law to protect indigenous cultural production and knowledge. He offers a sceptical assessment of various movements to expand intellectual property concepts, particularly copyright law, to protect indigenous culture. Based on case studies of actual disputes over indigenous culture, Brown argues for a pragmatic and nuanced approach to protection, one that relies more on negotiation, mutual respect and joint stewardship of

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<sup>14</sup> Rosemary Coombe (2003) critiques the concerns of some scholars, such as Brown, that recognizing intellectual property rights in indigenous cultural products will have a deleterious effect on the public domain or cultural commons.

cultural information than on expansive intellectual property law, which Brown contends hurts both indigenous peoples and undermines core pluralist democratic and civic values. Brown's essay thus presents a challenge to intellectual property scholars to clarify and specify the potential for protecting indigenous knowledge and culture in light of the complicated social and political context in which indigenous cultures around the world find themselves.

Anthropologist Shane Greene (Chapter 15) develops some of these same themes. Greene's essay is an insightful case study of one bioprospecting project that took place in the Peruvian Amazon in the 1990s. This project aimed to foster traditional knowledge and support the stewardship of local biological resources by including local indigenous Aguaruna communities as collaborators in plans to collect and analyse plants that had potential medicinal value. The project was a unique collaboration of pharmaceutical corporations, universities, NGOs and indigenous groups. However, as Greene explains, this collaborative effort was largely unsuccessful. The difficulties stemmed in part from the politics of the local indigenous communities themselves and included the core issue of who properly represented these communities; the lack of clear communication about the goals and expectations of the benefit sharing project; asymmetries of power between international and local actors; and the often contradictory motivations (and sometimes downright naivety) of each of the participants involved in the project. His study is thus a detailed and suggestive analysis of the challenges posed by efforts to propertize and market biological and genetic information of indigenous communities as well as the serious limitations of intellectual property law as the means for doing so.

Bitá Amani and Rosemary Coombe (Chapter 16) focus on the controversial Human Genome Diversity Project, a research effort proposed in the 1990s to include anthropologists, geneticists, linguists and doctors in the task of mapping the human genetic variation of people throughout the globe. The project was envisioned as a means to collect a valuable scientific database for human genetic materials. It was, however, targeted primarily at collecting genetic information from indigenous peoples. The scientific rationale for this focus was that these indigenous groups' relative historic isolation made their distinct genetic traits highly prized by researchers. As Amani and Coombe demonstrate, the Project very quickly became controversial as indigenous groups mobilized to protest the project's racial and political implications. Ultimately, the Human Genome Diversity Project was never funded, in large part due to the political opposition it generated among indigenous communities who were its main research targets. Amani and Coombe creatively use this example to explore the broader dimensions of issues relating to the patenting of human genetic materials – what they term a 'tide of genetic commodification' – which the authors argue is a natural result of such genetic research in contemporary society. Their essay explores the domestic and international politics underlying this development, including the general absence of political opposition to it (or even understanding of it), which Amani and Coombe link to the hegemony of the neo-liberal ideology underlying intellectual property systems. Amani and Coombe also argue for the need to fully understand and debate the moral and human rights implications of the worldwide movement to commodify human genetic materials, which they suggest pose serious questions such as how this patented genetic material will be used, how patents on human genetics will affect health-care costs or insurance, and whether such patents can facilitate genetic discrimination. This is a powerful and insightful essay that successfully links the struggles of indigenous peoples to more generalizable moral and human rights issues concerning the

patenting of human genetic materials – issues that these authors correctly identify as critical political choices that are too important to leave unexamined. As this essay suggests, a human rights discourse is a potentially powerful framework to de-naturalize ideologies of intellectual property and shift debates over expanding intellectual property rights into broader discussions of the ethical and moral implications of intellectual property.

## **V Resisting Intellectual Property**

The theme of ‘resisting’ intellectual property resonates in a number of the contributions throughout this volume and is also a prominent topic of concern among intellectual property scholars. Scholars generally agree that intellectual property rights play an increasingly important role in modern knowledge-based economies and that these rights have expanded both in duration and in scope of protection (Drahos and Braithwaite, 2002; Halbert, 2005; May and Sell, 2006). One criticism common to much of this literature is that overly-expansive intellectual property rights upset the proper balance between private and public rights and thereby hinder free speech, cultural expression and a rich public domain. Expanding intellectual property also threatens the very creativity and innovation that intellectual property laws are presumed to promote (Drahos, 1992, 1996; Drahos and Braithwaite, 2002; Vaidhyathan, 2001). A related criticism is that the ideology of property rights has obscured the public purpose of intellectual property as well as the historical roots of intellectual property as limited monopoly privileges, not rights (Bracha, 2004; Drahos, 1996). As a number of scholars contend, resistance to expanding intellectual property rights is (and should be, most add) a reaction to the increasing power of intellectual property rights in contemporary society (Drahos, 1992, 1996; Drahos and Braithwaite, 2002; Halbert, 1999, 2005; May, 2000; May and Sell, 2006).

Each of the essays for this section focuses on different meanings of ‘resistance’ to intellectual property. Legal scholar Rosemary Coombe has been one of the most creative and prolific law and society scholars developing this topic. Her essay (Chapter 17) focuses on the rights of publicity asserted by celebrities. Drawing on postmodern legal theory and interpreting multiple secondary sources, Coombe examines how marginalized subcultural groups resist celebrity rights as a form of intellectual property by subverting, refashioning and using them to negotiate meaning in everyday life. These groups, Coombe argues, which include gay male ‘camp’ cultures of the 1950s and 1960s, as well as contemporary lesbian and middle-class female ‘Trekkie fanzine’ subcultures, redeploy the commodified celebrity image to construct new social meanings and self-identities. This is an insightful example of a theme that Coombe develops at greater length focusing on different types of intellectual property (1998): that intellectual property is both prohibitive, as a right of legal exclusion, as well as generative, as it may serve as a communicative cultural resource that consumers invest with multiplex and multivocal social meaning.

Coombe and Andrew Herman develop this point further in Chapter 20. Their essay examines the cultural practices of consumers in online digital environments. Such environments, they argue, are powerful tools for disseminating and policing the meanings of intellectual property, especially trademarks and copyrights. But the technology of the Internet also allows consumers greater power to manipulate these ‘commodity signs of mass culture’. Coombe and Herman review examples of resistance to intellectual property in the digital realm, such as

Internet sites that collect and mock ‘cease and desist’ letters sent to police unauthorized uses of trademarks or copyrights online, and ‘gripe’ or parody online sites that use trademarks and copyrights to comment upon and criticize their presumed meanings and authorized messages. Thus, while the exercise of intellectual property rights may be a form of social and cultural control, the digital environment of the Internet empowers consumer resistance, disruption and transformation of the ‘monologic’ of intellectual property by creating alternative, even subversive, meanings for these symbols. This is a potentially rich area of research for law and society scholars, since we know very little about how, why and to what effect intellectual property owners assert their rights in everyday enforcement practices (Gallagher, 2005) or about the nature of resistance to these enforcement practices.

Legal scholar Severine Dusollier’s essay (Chapter 19) is a thoughtful exploration of resistance to strong copyright protection reflected in the ‘copyleft’ and ‘open source’ social movements. These movements are an attempt by creators of software, music and art to voluntarily (usually by contract or licence) remove or limit copyright restrictions on created works and thereby permit a new form of authorship grounded in creative accretion and collaboration. She explores how this new form of authorial practice does not ultimately undermine copyright, even if it rejects its strong version of the romantic individual author.

Cultural historian Siva Vaidhyanathan explores yet another site for resistance to intellectual property. He argues forcefully that current trends in copyright law inhibit creativity and the free flow of information necessary for democratic dialog (2001). Focusing on case studies of the evolution of US copyright law, Vaidhyanathan shows how expansive copyright protection has undermined doctrines, such as fair use or the idea/expression dichotomy, that are intended to foster public use of copyrighted works.

In Chapter 18, Vaidhyanathan turns his attention to technology as well as doctrine. He examines ‘electronic cultural policy’, a series of attempts by copyright content industries to mandate standards for electronic devices that display or distribute copyrighted materials. These standards are designed to protect electronic copyrighted works, but they also have the capacity to enhance the control of access to cultural products. As Vaidhyanathan shows, the control of technology in this context affects access to intellectual property and, he argues, threatens to extend copyright protection beyond the ‘thin’ limits that copyright has historically permitted. Industry attempts at technological control, however, have been ineffective, and have spurred widespread resistance by hackers and unauthorized ‘pirate’ digital downloaders and file sharers. One result, Vaidhyanathan tells us, is that legitimate creative appropriation of copyrighted works has become more difficult, while ‘underground or anonymous’ appropriation has proliferated. Vaidhyanathan’s essay thus develops an important link between intellectual property and technology as forms of social control.

## **Conclusion**

The ubiquity and importance of intellectual property law and the policy issues it raises in contemporary life are hard to exaggerate. Scholars such as those represented in this volume have employed methodologies and focuses that underlie the law and society tradition in order to understand intellectual property, including examining ‘law in action’ rather than simply ‘law in books’, and drawing on insights about law, society and culture provided by multiple disciplines, such as history, sociology, anthropology, political science and the humanities.

As the contributions to this volume demonstrate, a law and society approach to intellectual property can illuminate much and it can suggest fruitful research questions, methodologies and theories for understanding this important area of law and social life. To date, relatively few academics who self-identify as ‘law and society’ scholars study intellectual property. There is a dearth of scholarship, for instance, on intellectual property topics that have long been a mainstay of law and society research, such as studies of intellectual property lawyers, of administrative agencies or inter-governmental organizations that deal with intellectual property, of the disputing process in intellectual property claims (both in and outside of courts), or of individual attitudes, understandings and practices concerning intellectual property law. This is changing. And, as the essays in this volume suggest, intellectual property promises to be a rich subject matter for much future law and society research.

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