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Introduction

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Abstract: This issue aims to assess the state of claims over intangible forms of property, which have been expanding in recent decades enabled by Trade-Related Aspects of Intellectual Property and other international conventions. The articles examine the nature and limitations of intellectual property law and related property-like claims over intangible products and expressions, and present cases from the expanding margins of intangible property provisions including analyses of how these trends are playing out in the Global South and in areas outside of intellectual property law. The contributors show how both expansions of intangible property provisions and resistances to these expansions increase the terrain of experience that is enclosed by proprietary claims and suggest alternative strategies for responding to the contemporary intangible property regime.

The realm of intangible objects that can be claimed as property is expanding. Recently France declared its gastronomy as the property of the nation, while the musical creations of Rodgers and Hammerstein were acquired by a Dutch pension fund. The U.S. Supreme Court decided that it is possible to patent engineered forms of life, and the Indonesian state has claimed copyright authority over regional arts from Sulawesi, Java and other islands. Meanwhile India has digitized local medical knowledge to protect it from misappropriation, and the Brazilian state has claimed property rights over the everyday cultural practices of Afro-Bahians at a UNESCO site in Salvador.[1] Some of these efforts constitute part of an expansion of intellectual property rights while others are part of a defensive reaction against this expansion aimed at protecting local intangible resources from misappropriation. However, both maneuvers increase the realms of human creativity and experience that have become subject to proprietary restrictions.

The race to claim knowledge and practices as property has been shaped by the implementation of international agreements—particularly the World Trade

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Organization's Trade-Related Aspects of Intellectual Property (TRIPS) agreement and the Convention on Biological Diversity—that expand the range of intellectual property (IP) laws topically and spatially: that is, both in terms of the range of objects that can become property and through expanding IP regimes around the globe. In addition, human ideas and practices are coming under a proprietary cordon of control through other types of restriction that are not legally or technically proprietary but have similar effects, such as the electronic monitoring of plagiarism and the encoding and safeguarding of cultural heritage.

Much attention has rightly focused on the efforts of corporations from the North to expand the reach of IP laws, and these actors are clearly the initiators in the current regime of enclosure.[2] However, this issue examines struggles over the ownership of nontangible realms that have emerged around the globe at the turn of the twenty-first century in the marginal spaces, in areas of the Global South and, at times, in realms outside of IP law. Contributors show how property regimes both overlap with and are distinct from local orientations to knowledge and creativity and appraise the ways that these provisions reshape state policies and people's subjectivities. They demonstrate how resistances to enclosure result in additional enclosure of knowledge and creativity, and suggest alternatives to this trajectory.

These contributions engage fundamental topics in anthropology, sociology, and law, such as the nature of exchange and alienability of property. Early in the twentieth century, Malinowski's work on exchange in the Kula ring[3] and Mauss's explorations into the meanings of the potlatch[4] challenged Western assumptions about economics and primitive consumption. Now at the outset of the twenty-first century, the present work engages equally fundamental problems of ownership and exchange but in a very different context, a globalized world in which diverse orientations to ownership compete with or reaffirm international property practices that are based on Western, modern, neoliberal property claims that are promoted by multinational corporations, the World Trade Organization (WTO), bilateral agreements, and local governments.

While a number of individual articles and monographs examine such issues, scholars in this area have not assembled to present a broad picture of these emerging property relations. Verdery and Humphrey analyzed the contemporary topography of property relations broadly conceived. Their work did not focus on intangible forms of property, although it did signal that this kind of property-object and its proliferation was linked to an "upheaval in how 'property' works in the world" around the 1980s when alongside the erosion of public property, "new objects such as information came to be defined as 'property.'"[5] Biagioli, Jaszi, and Woodmansee's recent volume *Making and Unmaking Intellectual Property* constitutes an expansive inquiry into the characteristics of IP, focusing on historic and contemporary analyses of cases from the United States and Europe.[6] However, this work does not focus on responses to current IP regimes in the Global South or the propriety effects of non-IP provisions on intangible creations.

The contributions in this issue can also be seen as following up and expanding upon James Boyle's analysis of what he called "the second enclosure movement."[7] Pointing to recent expansions of IP law, Boyle declared that "we are in the middle of a second enclosure movement. It sounds grandiloquent to call it 'the enclosure of the intangible commons of the mind,' but in a very real sense that is just what it is."[8] The first enclosure movement involved the enclosure, or "privatization," of common lands 200 years ago, but today "once again things that were formerly thought of as either common property or uncommodifiable are being covered with new, or newly extended, property rights."[9]

Boyle was referring particularly to the expansion of IP rights, which he says enclose the commons of the mind—and Collins has even suggested that property conventions have been used to enclose human qualities or "human being" and practices of everyday life.[10] This issue will show how this enclosure comes about through IP provisions as well as through related restrictions and applies not just to intellectual material but to a broader realm of intangible experience. Like Biagioli, Jaszi, and Woodmansee's volume, Boyle's work focused on North American and European contexts, while the present issue expands the cultural and geographical perspectives—especially important in a post-TRIPS world—and examines how provisions of international conventions intended to protect local knowledge can end up further enclosing the commons of knowledge and co-opting the interests of local creators who may favor circulation or restriction of their creations.

THE EMERGENCE OF INTANGIBLE PROPERTY

In 1928, Robert Lowie claimed something like IP, or "incorporeal property" to use his term, existed in precapitalist societies in the form of rights to songs and secrecy of certain kinds of knowledge. He cites, for example, research on the Eskimo among whom "a communistic trend as to economic necessaries is coupled with strict individualism as to the magical means of securing food," and describes the process by which ritual knowledge and songs may be "purchased" among the Blackfoot Native American tribe.[11] Hallowell and Seagle responded that this indicates something like mere possession or a type of property relation that is not the same as formal property rights. Such claims, they say, do not have "a commercial flavor" as seen in contemporary property claims.[12]

While it is hard to determine whether practices such as secrecy about knowledge and "owning" songs constitute predecessors to what we know of as IP, the emergence of modern IP law can be more distinctly defined. The granting of patents as privileges to market inventions—but not as ownership of the concept behind the invention—dates back to fifteenth-century Venice, while the elements of modern patent law—wherein the ownership of the incorporeal information linked to a tangible invention is protected—can be traced to transformations in claims of

ownership and ideas about mental and physical labor in eighteenth-century Europe and the United States.[13]

Biagioli traces a shift that occurred around 1790 from conceiving of patents as privileges to protecting patents as rights. New specification requirements for patents or the "textualization of invention"[14] replaced the principle of the invention as a material thing that the inventor presented before representatives of the state to claim ownership. Patent laws adopted in France and the United States around 1790 required a precise description of the invention on paper and resulted in the protection of the inventive idea as property:

> Specification requirements . . . created the conditions of possibility for treating the actual material invention (the entity that used to be protected by early modern privileges) as separate from its "idea" . . . Allowing for the emergence of the idea as a distinct entity, specifications made possible for that idea to become the immaterial "essence" of the invention.[15]

This change also spacialized this new form of property since grantors of patents from this point could search for descriptions of inventions that existed elsewhere.

Sherman and Bentley point to another important distinction in the emergence of IP law in copyright debates in eighteenth-century England when "the law not only came to differentiate between mental and manual labor, it also came to *privilege* the labor of the mind over that of the body."[16] The argument used by publishers was that the mental faculty is what separates man from beasts. Modern IP law did not emerge until the mid-nineteenth century when a further hierarchy was established privileging creativity over "mere" mental labor. Currently, the element of creativity remains enshrined in the requirement that an invention be original and nonobvious.

CHARACTERISTICS OF INTANGIBLE PROPERTY

The distinction between mental and manual labor in the eighteenth-century copyright debates that forms the prelude to modern IP law foreshadows an important distinction between tangible and intangible property relations: ultimately bodily labor is more alienable than mental labor. Marx was concerned that workers should have proprietary rights over what they create through their labor (the assumption is that the labor is physical), and likewise, John Locke—champion of modern property rights to many—argued that what one worked with one's body became one's property.[17] However, in capitalist societies and especially post-Fordist wage-labor regimens, property rights do not inhere in the products of manual labor and most mental labor. Yet they are enshrined for the creator of original mental work who can patent or copyright his or her creations. That right can be transferred—and its transfer can even be required as a condition of working in particular institutions, such as biotech labs or universities. This, however, requires explicit contracts while alienability is easier to accomplish—indeed

it is routine and naturalized—with manual labor. Nevertheless, while less alienable, this distinct status of creative mental work operates almost primarily as a fiction or an ideology.

Some researchers have asserted that a romantic myth of individual invention, emerging in Europe over the last 300 years, informs and legitimates IP law. Rose, Boyle, and Coombe observe that the defense of IP claims is based on the premise that talented and creative individuals spontaneously produce art and scientific innovations that need to be protected from misappropriation. However, the image of the autonomous innovator belies the fact that innovations are influenced by their social context, the work of other individuals, and prior intellectual or artistic movements.[18] This applies to literary authors whose works are always partially the product of other texts[19] and scientific researchers whose discoveries and creations are often incremental additions to prior innovations and the work of mentors and collaborators.[20] Some object to what they see as a double standard in IP law that is caused by the cultural-historical origins of this entitlement wherein the concept of individual innovation and ownership that is linked to capitalist enterprises is protected while collective forms of knowledge remain open for commercial exploitation.[21]

The exalted position of individual creative labor is thus to a significant degree a fiction, an ideological dressing or, anticipating Collins' contribution, a moralizing discourse adopted by the owners of intellectual properties—whether publishers claiming the rights to an author's work, a pension fund purchasing artistic rights to diversify its portfolio, or a pharmaceutical company buying a product and its patent from a smaller company that created it. Products developed by corporations are usually created by groups of workers and are in a sense just as communal as the creations of "cultures" or "indigenous" people (to use categories employed in international property conventions). However, corporate creations are considered individual creations only because corporations are legally, if not really, individuals. The terminology itself—"corporate" as "individual"—belies this contradiction. IP today is thus as much about defending investments in knowledge and artistic creation and the transferability of the ownership of created or acquired IP as it is about defending the ownership rights of an individual who creates a product derived from his or her inner genius.

But intangible property claims do not play out exclusively under the sign of defending the rights of the creative individual. Nations and other groups have claimed ownership of "their" culture and heritage and like to see such relations as inalienable—although elements of "culture," such as folk arts and music, are regularly commodified and sold. While politically progressive individuals and groups are justifiably concerned about protecting people's cultural knowledge from misappropriation, such protections can also further the enclosure of knowledge and creation. While cultural piracy is troubling, Michael Brown urges us to be wary of segregating and enclosing the cultural commons, which may result in an overly litigious world where creativity and hybridity are stifled.[22]

In an early foray into the anthropology of property relations, Hallowell considered: "If the core of the institution of property is rights rather than material things, then any profound significance in the differentiation of corporeal property from incorporeal property breaks down."[23] Doubtless the *relations* of property are crucial and bear similarities whether the objects of property are corporeal or incorporeal. However, significant differences in property relations and access to resources do depend on the tangibility of the objects of property. This is manifest in the differentiation of types of IP (patent, trademark, and copyright), the rules of access to intangible objects claimed as property, and the temporalities and alienability of intangible property. Intangible objects of property are—or are virtually—inexhaustible and nonrival.

Boyle explains that a difference between the emerging enclosure of the intangible commons and the first enclosure movement is that "the commons of the mind is generally 'nonrival.' Many uses of land are mutually exclusive: if I am using the field for grazing, it may interfere with your plans to use it for growing crops. By contrast, a gene sequence, an MP3 file, or an image may be used by multiple parties."[24] This also means that one aspect of the "tragedy of the commons" argument is avoided, that of overuse. Another difference between tangible and nontangible enclosures is that with intangible objects, your property or information often contains the ideas of others and will be necessary for others' innovations. Therefore, incentives in the form of IP can limit productivity in innovation.[25]

Tangible and intangible property relations further vary in terms of the time horizons they invoke. Tangible property is more finite, and the present is marked by anxieties about depletion.[26] The intangible objects of property claims that have become contentious today, such as the genetic information described in Foster's article or the medicinal formulae of Ayurvedic doctors discussed by Wolfgram, have little to no marginal cost and are endlessly reproducible. Unlike the anxious and finite futures of tangible property and resources, forms of intangible property come into being based on a future of promise. The temporality of biotechnology, for example, is an orientation to the future that is marked by "vision and hype" where companies hype the future possibilities of these products to inspire investment to make these originally intangible inventions come to life in the form of marketable products.[27] Corporations that produce intangible products are not concerned so much about how to maximize a time-limited, finite property, but instead are troubled about the endless and cheap reproducibility of their products. Thus there is anxiety about the future here as well, but it is anxiety about how to *limit* the supply and flow of intangible products.

Similarly, cultural knowledge and practice, though seemingly endlessly reproducible, has also been reconceived as a limited resource for nationalist goals. Regarding Indonesia's cultural property initiatives, Aragon shows in this issue how "cultural property discourses and media promotions work to reframe cultural expressions as rivalrous and increasingly scarce in ways analogous to Indonesia's natural resources," and she wonders "whether concepts of scarcity are being created

in conjunction with a legal monopoly of heritage practices for commercial or political purposes."[28] The dichotomy of open circulation versus restriction of knowledge and creation underlies the cases presented in this issue. Sometimes the artificial scarcity created by enclosure works against the interests of local creators, as in the Indonesian case, while enclosure can be tailored to compensate for the marginalization of women and indigenous people as in the case of a drug patent examined by Foster.

Adding another, more indeterminate kind of temporality, Kelty discusses the principle of "modifiability" that is central to the free software movement.[29] Users of free software enter into contracts whereby they are allowed free access to software in exchange for a commitment to make freely available any modifications they make to the software; other movements such as Creative Commons licensing have emerged based on principles of free sharing and modification (including openness that is required and enforced by legal contract or license).[30] A similar type of arrangement in terms of access and modification is suggested in this issue by Srinivas as a form of protection and sharing for local (traditional or indigenous) knowledge that has been or may be commercialized. As commercialization may violate the sensibilities of artists and indigenous representatives—as Hennessy, Aragon, and Srinivas demonstrate—Srinivas looks to the possibility of a commons with rules of access that accommodate local concerns, even allowing a role for spirits in the oversight of creative work. With modifiability in free software products, Kelty observes, finality is indeterminate.[31] Likewise, a creative commons of indigenous or local knowledge may have the advantage of being open-ended, avoiding the problem of partition and creating artificial scarcity that other IP modalities incur.

THE EXPANSION OF INTANGIBLE PROPERTY

Others have reviewed the key legal cases and international conventions involved in the current IP regime,[32] so I will not rehearse this history in detail again, but I will briefly point to significant legislative moments. Narratives of the emergence of the contemporary patent regime often begin in 1980 when the U.S. Supreme Court ruled, in the case of *Diamond v. Chakrabarty*,[33] that biologically engineered organisms could be patented and Congress passed the Patent and Trademark Law Amendment Act (also known as the Bayh-Dole Act), which enabled the commercialization of innovations developed at universities and nonprofit institutions. Ten years later, the California State Supreme Court ruled in *Moore v. Regents of the University of California* that the plaintiff John Moore did not have property rights over a cell line derived from his spleen, which was patented by his physicians.[34]

The status of copyright law, meanwhile, was changed significantly in the United States through major legislative interventions in the 1970s and 1990s. The life of the copyright, which was formerly 28 years, was extended by the Copyright Act of 1976 and again by the 1998 Sonny Bono Copyright Term Extension Act so that it

now extends 70 to 100 years. The result is that "most of twentieth century culture is still under copyright—copyrighted but unavailable."[35]

Meanwhile, several international agreements passed in the last two decades have aimed to either expand IP law or protect local culture and knowledge against such expansions. One of the most significant international conventions that impacts current struggles over intangible forms of property in the Global South, the 1992 Convention on Biological Diversity, sought to implement protections for biodiversity and in doing so provided for IP-based profit sharing when bioprospecting results in the creation of a commercial product.

In 1994, the WTO promulgated TRIPS, requiring all member states to conform their IP laws to TRIPS guidelines, which critics claimed favor corporate patent holders over the public interest. For example, India had to change its Patents Act to conform to TRIPS by overriding its provision to allow only process patents for medications. India had earlier allowed only process patents, whereby the process for making a drug but not the drug product itself could be patented in order to prevent monopoly control of drug production.[36] As evidence of the expansiveness of TRIPS' impact on property regimes around the world, even Cuba has changed its laws to conform to the WTO mandate recognizing individual rights of ownership over creative products and including recognition of corporations as individuals.[37] Contributions to this issue look at the effects of TRIPS, especially the ways countries respond to perceived threats from TRIPS such as the creation in India of a digital database of local medical and biological knowledge to prevent misappropriation.[38]

UNESCO's 2003 Convention for the Safeguarding of the Intangible Cultural Heritage promulgated guidelines for protecting oral tradition, social practices, knowledge about nature, rituals, and other aspects of culture. Although UNESCO emphasizes the term "safeguarding," Collins shows in his analysis of a UNESCO heritage site in Brazil that the Convention has inspired the state to stake proprietary claims over not just knowledge and creations, but also the everyday cultural practices of its people and even, in a sense, their "being"—an effort that hinges on discourses of morality.[39] Hennessy meanwhile explores contradictions between principles of open and restrictive access to digitized heritage in relation to the Convention for the Safeguarding of the Intangible Cultural Heritage as well as the Digital Heritage Charter, which was also passed by UNESCO in 2003.

Section 1: The Relations between Intellectual Property Law and Local Principles of Creation and Control

Bronwyn Parry's intervention is presented first to demonstrate how the principles underlying IP apply to another way of knowing and making claims over nature that developed in the same geographical and historical setting as IP law. This work

thus compels us to consider cultural assumptions about authorship inherent in IP law while reminding us not to overly focus on IP per se in order to understand relations to intangible property. Parry links elements in establishing claims for the discovery of existing biological species established in eighteenth- and nineteenth-century Britain to contemporary claims to own authored biological entities. She reveals how priority of publication, authorship, and deposition (of a tangible specimen) have served since this time as "durable" "epistemic devices for knowing and disciplining relations to the natural world."[40] Foreshadowing contemporary relations of biopiracy, the eighteenth- and nineteenth-century specimen types discussed by Parry came from the far reaches of the British Empire and were deposited at Kew Gardens and Western museums of natural history.

The Western (or perhaps "modern" or "cosmopolitan") style of authenticating scientific knowledge presented by Parry can be contrasted with the process of entextualization in Ayurvedic medicine described by Matthew Wolfgram, whereby authority and authenticity were established through redacting prior medical texts, a style that changed under colonialism and the contemporary patent regime resulting in a more rigid distinction between codified knowledge and interpretation. Wolfgram takes on some of the binary categories used by critics and apologists of IP regimes, such as the opposition of a collective to an individual type of invention demonstrating how collective and individual innovation coexist in the production of Ayurvedic knowledge. Further, we learn that the practice of controlling medical knowledge is not new to this context when we see how Ayurvedic *vaidyans* conceal their pharmaceutical innovations for their own benefit. We then see how local medical knowledge adapts to the contemporary patent regime through the example of a government project that converts local medical knowledge into patentable products for the market.

The problem of individual authorship that Parry affirms as fundamental to European claims to knowledge and discovery is a central problematic in the articles by Aragon and Hennessy. Wolfgram explains that in Indian medical systems, individual creation is recognized although it coexists with and depends on cumulative, communal knowledge. However, ideas of individual creation and ownership are more foreign to Indonesian artists who claim that God and their ancestors create and maintain ownership authority over their productions.

Lorraine Aragon examines the reactions of artists and performers to Indonesia's 2002 copyright law, enacted in response to the WTO's TRIPS agreement. While the law conforms to the requirements of the WTO, the Indonesian state deploys the law to protect the nation's cultural heritage while stoking fears about piracy by Malaysians and other foreigners. We learn that the law is often blind to the views and concerns of local artists and performers who struggle but fail to conceive of their work as property. While the idea of individual ownership enshrined in IP law is foreign to many Indonesians, there is some sense that certain people have authority over intangible cultural productions, such as songs, dances, myths, and plays. But, these also include spirits and ancestors. Many artists largely attribute

originary creativity to God, explaining their role as a conduit yet also recognizing that their divinely inspired, creative additions build upon the work of others. These artists tend to promote the use, appropriation, and circulation of their productions, whereas the state's laws limit the use of their work in the name of defending the artists' rights. "The artists" Aragon tells us, "were more worried that new generations would ignore their group's underappreciated local arts than they were about the possibility that outsiders would gain financially from copying them. They were more interested in governmental promotion of indigenous idioms . . . than they were in governmental regulation of their practices through intellectual property laws."[41]

Aragon introduces the concept of "intangible property nationalism" and as an example of its dynamics, depicts struggles between Indonesia and Malaysia over the ownership of particular songs and recipes, which likely predate the creation of either of these two nation-states, and examines reactions to Robert Wilson's international dramatic production of a classic Sulawesi myth. Government officials in Jakarta criticized Wilson's production as a misappropriation of the intangible heritage of its people (or the people the state "has" or "owns" to quote the law), while some Sulawesi residents praised Wilson's project because it resulted in increased awareness of this epic among the community and internationally and it involved Sulawesi artists. These examples recall Michael Brown's concerns about an overly litigious, artistically enclosed and partitioned world that may result if people respond to IP conventions simply by promoting claims to proprietary ownership on behalf of indigenous and other marginalized peoples.[42] Like Aragon, Wolfgram and Collins show how the state ends up becoming the steward of local knowledge and practices often disempowering communities' control of their creations or heritage.

Kate Hennessy presents two case studies on the use of digital media and intangible cultural heritage. While the Canadian First Nation Doig River Dane-zaa were concerned about culturally sensitive material being made available online and remained vigilant about the exposure of sacred and proprietary knowledge and creations, the Wat Pratupa community in Thailand appeared more eager to circulate and promote their heritage through digital media. These two orientations were not purely open or restrictive, however, as both societies struggled to manage what to circulate and what to restrict based on social contexts and contingencies. Wat Pratupa were eager to promote their heritage in the face of economic changes that were driving young people away and the erosion of their language—ultimately they achieved what Indonesian artists who had the same goals could not because of an overly pro-modernization state. The Dane-zaa were concerned with maintaining the power of particular heritage objects. Hennessy's work shows us how heritage becomes property for the Dane-zaa, but a particular, communally owned form of property, somewhat like the commons model Srinivas suggests in proposing an alternative to the access and benefit-sharing approach to protecting indigenous knowledge.

Section 2: Strategies for Protecting and Sharing

While Aragon highlights the vicissitudes of protecting local heritage through IP rights, Laura Foster claims that properly tailored IP rights can help compensate for women's and indigenous people's contributions to knowledge and culture. Through an examination of controversies over the patenting of breast cancer genes and a weight-loss drug, Foster shows how marginalized groups are differentially affected by IP law. She critiques the free-rational-actor, level-playing-field assumptions in the open public domain model proposed by some critics of the expansion of IP laws. Instead, Foster argues for a "protective public domain" that offers protections and compensations for indigenous people while taking into account gender differences related to the creation and consumption of health products. Drawing on examples from the United States and South Africa, Foster examines how women's labor, knowledge, and bodies are appropriated in the creation of patent-protected products while revealing the inequality of access to the benefits of these products. That is, some women contribute their bodies and knowledge to create products that benefit other women who have access to these products (in this case, weight-loss supplements and breast cancer gene tests). In an American Civil Liberties Union lawsuit challenging the ownership of the *BRCA* breast cancer genes, a patent is being opposed to keep genetic information in the public domain; in the case of a patented product that was enabled by their knowledge of properties of the *Hoodia* plant, the San people in South Africa have asked for and been awarded a share of profits. In this case we see the openness-versus-restriction dichotomy presented in the other contributions, and in this case the more restrictive option is seen as more empowering.

Echoing both Aragon's and Foster's critiques, Krishna Ravi Srinivas asserts "indigenous communities cannot afford to place their knowledge in the public domain and provide unrestricted access to both knowledge and genetic resources. At the same time, choosing IPR to protect their interests and using commercialization as a strategy to prevent misappropriation may result in disregard for their values and result in commodification."[43] Resembling Foster's protective public domain but involving a more explicit critique of access and benefit-sharing models for countering or compensating for the expansion of IP regimes, Srinivas proposes that community groups experiment with traditional knowledge commons and biocultural protocols. Inspired by the Creative Commons and general public licenses that came out of the free software movement and efforts by farmers to organize the sharing of plant resources, these projects establish a commons that both limits access and allows sharing for mutual benefit. Like Aragon, Srinivas shows how the commercialization involved in benefit sharing from IP—promoted, for example, by the Convention on Biological Diversity—does not always fit peoples' notions of ownership or of what they consider appropriate relations to their creative productions, and, like Aragon and Brown, Srinivas is wary of problems that ensue from communities' exclusive control over cultural resources.[44]

Section 3: The Intangible Property Cordon Outside of Intellectual Property Law

Examining the claims by the state and the use of UNESCO provisions that pertain to the right to control, protect, or own cultural heritage in Salvador in northeastern Brazil, John Collins raises issues that lie at the margins of IP law and are provocatively ambiguous as to whether they constitute a kind of intangible property. Recalling the dynamics in Indonesia and India portrayed by Aragon and Srinivas, Brazilian state institutions, in the name of preserving and protecting property of the nation, control and regulate cultural production. Just as Indonesian copyright law refers to "owning" the people who produce original, intangible products, Collins claims that the Bahian state—legitimated by UNESCO's 2003 International Convention for the Safeguarding of the Intangible Heritage—is treating people, specifically Afro-Bahians, as objects of property. Claims to own people might be perceived as claims over tangible forms of property, but it notable that in at least two cases the state is claiming to own its people or, more generously, claim guardianship in order to protect their, and the nation's, creative productions. In this case, the intangible products being claimed are people's everyday practices, their life routines including practices of cooking, cleaning, sex, and small-scale economic activities. But Collins' article goes further, looking at how discourses of morality are deployed in establishing property relations in the interactions between the people and the state in Salvador. We see how Bahian people appropriate moralist claims the state has used in remaking the Pelourinho of Salvador into a UNESCO World Heritage site in their own evaluations of ownership and in their judgment of how Bahian culture is represented.

Moving the focus to another type of control over intangible creations, Mario Biagioli recognizes plagiarism as a form of appropriation that is widely disapproved of, even by vehement critics of IP regimes, yet he alerts us that attempts to protect against plagiarism can serve as a form of surveillance that does not necessarily serve the victims of this offense. Among scientists, software programs detect similarity in publications, which often turn out to be reproductions of literature review sections of articles by scientists who are nonnative speakers of English, but do not protect against plagiarism that occurs in grant reviews which is of far greater concern to scientists. These software programs add to the environment of surveillance and control in scientific knowledge production without addressing the concerns of scientists. Also, by comparing features of plagiarism to IP, Biagioli reveals the contours of IP. He shows how the two involve different temporalities where IP can expire while the offense of plagiarism is not reduced by the age of the work plagiarized.

Outside of the spotlight of IP struggles that have garnered attention in research and media coverage, such as the patenting of genes and HIV medications or the recent disputes in the United States over the proposed Stop Online Piracy Act, lies an expanding realm of enclosure of cultural innovation, artistic expression and

scientific knowledge. While wealthy corporations and states in the North have pushed for the expansion of IP laws to further their own interests, and they can certainly be identified as initiators of the current expansion of enclosure, reactions to these changes in the Global South continue the process of enclosure and partition—perhaps understandably and necessarily so. Also, outside of the spotlight of IP laws, codification and restriction through mechanisms such as cultural heritage projects and plagiarism software only add to the sense of enclosure and limitations on the circulation of knowledge.

While the contributions to this issue do not unite behind a particular solution to the current expansion of enclosure, the analyses do consistently point to the need for laws, or social interventions, to fit the interests of the parties they are alleged to protect. The fine-tuning of laws and policies will help, but the expansion of enclosure continues to be troubling for the future of creativity.

ENDNOTES

1. Halliburton, "Resistance or Inaction?"; Patrick Healy, "Rodgers and Hammerstein Catalog Sold," *New York Times*, 22 April 2009, C3; Rabinow, *Essays on the Anthropology of Reason*; Elaine Sciolino, "Time to Save the Croissants," *New York Times*, 24 September 2008, F1. Also, Aragon, "Copyrighting Culture for the Nation?" and Collins, "Reconstructing the 'Cradle of Brazil,'" this issue.
2. Cullet, "Patents and Medicines"; Mgbeoji, *Global Biopiracy*; Shiva, *Protect or Plunder?*
3. Malinowski, *Argonauts of the Western Pacific*.
4. Mauss, *The Gift*.
5. Verdery and Humphrey, "Introduction," 2.
6. Biagioli et al., *Making and Unmaking Intellectual Property*.
7. Boyle, "The Second Enclosure Movement" and *The Public Domain*.
8. Boyle, "The Second Enclosure Movement," 37.
9. Boyle, "The Second Enclosure Movement," 37.
10. See Collins "Culture, Content, and the Enclosure of Human Being" and Collins, "Reconstructing the 'Cradle of Brazil,'" this issue.
11. Lowie, "Incorporeal Property," 554–56.
12. Hallowell, "The Nature and Function," 243, citing Seagle.
13. Biagioli, "Patent Republic"; Sherman and Bentley, *The Making of Modern Intellectual Property Law*.
14. Biagioli, "Patent Republic," 1160.
15. Biagioli, "Patent Republic," 1143.
16. Sherman and Bentley, *The Making of Modern Intellectual Property Law*, 16.
17. Although Locke is revered by many as a champion of private property rights (see Pipes, *Property and Freedom*), he has been seen by some as a socialist (Tully, *An Approach to Political Philosophy*, 97). Tully shows that Locke's *Two Treatises* can be used to critique the political projects that claim to have been inspired by Locke (Tully, 171–76), and I would argue that Locke's emphasis on the importance of maintaining access to a commons can be used to critique the recent cordoning off of the commons of intellectual creation around the world.
18. Boyle, *Shamans, Software, and Spleens*; Coombe, *The Cultural Life of Intellectual Properties*; Rose *Authors and Owners*.
19. Rose, *Authors and Owners*.
20. Holton, *Thematic Origins*, 165–84; Merton, "The Matthew Effect."
21. Mgbeoji, *Global Biopiracy*; Oguamanam, "Local Knowledge"; Shiva, *Protect or Plunder?*

22. Brown, "Can Culture Be Copyrighted?" and *Who Owns Native Culture?* Oguamanam recognizes the two-wrongs-don't-make-a-right position that Brown is advocating, but points out that indigenous people are nevertheless caught in this regime of intellectual property and Brown and other anthropological critics foreclose their need to respond:

> contemporary anthropological insights are quick to appeal to the often-exaggerated cosmopolitan and processual nature of culture, thus blackmailing claims to local knowledge as both unrealistic and imperiling the public domain. This approach undermines the unidirectional transfer of knowledge from indigenous and local communities to Western industrial complexes and the unbridled extensions of intellectual property as the real factors that endanger the public domain. Without doubt, the reservations about our anemic public domain and dangers of cultural propertization are well founded. However, contrary to the impression in some quarters, local knowledge and its custodians are more appropriately victims of these phenomena than their scapegoat (Oguamanam, "Local Knowledge," 49).

23. Hallowell, "The Nature and Function," 242.

24. Boyle, *The Public Domain*, 47.

25. Boyle, *The Public Domain*, 48.

26. Although speaking of "resources" rather than "tangible property," Ferry and Limbert observe: "At a moment when the complacency of unfettered resource-making projects itself is becoming the object of nostalgia and fear of a future defined by the lack of resources grows more immediate every day, understanding the ways in which resources and time bleed into each other becomes urgent indeed" ("Introduction," 20).

27. Sunder Rajan, *Biocapital*, 111.

28. Aragon, "Copyrighting Culture for the Nation?," this issue.

29. Kelty, *Two Bits*, 11–12.

30. Creative Commons licensing offers options that are less restrictive than traditional copyright including "some rights reserved" rather than "all rights reserved" licenses and "tools that allow work to be placed as squarely as possible in the public domain" (Creative Commons, "About").

31. Kelty, *Two Bits*.

32. Boyle, *The Public Domain*; Coombe, *The Cultural Life*; Lessig, *Free Culture*; McLeod, *Freedom of Expression®*; Mgbeoji, *Global Biopiracy*.

33. *Diamond v. Chakrabarty*, 447 U.S. 303 (1980).

34. *Moore v. Regents of the University of California*, 51 Cal.3d 120 (1990).

35. While much of this work is available in libraries, it is not published or otherwise circulated because either the copyright is still regnant though the copyrighter holder finds no need to produce the work (and in many cases is deceased) or it is too difficult to find the copyright holder and potential disseminators, including libraries, are unwilling to take the risk of reproducing or digitally scanning the work to make it available on line. Boyle, *The Public Domain*, 9–15.

36. Halliburton, "Drug Resistance, Patent Resistance."

37. Hernandez-Reguant, "Copyrighting Che."

38. See Wolfgram, "The Entextualization of Ayurveda," this issue and Fish, "The Commodification and Exchange" on the digital codification of yoga routines by the Indian state.

39. Collins, "Reconstructing the 'Cradle of Brazil,'" this issue.

40. Parry, "Taxonomy, Type Specimens, and the Making of Biological Property," this issue.

41. Aragon, "Copyrighting Culture for the Nation?" this issue.

42. Brown, *Who Owns Native Culture*?

43. Srinivas, "Protecting Traditional Knowledge Holders' Interests," this issue.

44. Brown, *Who Owns Native Culture*? Perhaps Srinivas' model may be able to accommodate the concerns of Brown as well as the problems Oguamanam raises in his critique of Brown. See note 22 above.

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