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MAKING AND UNMAKING INTELLECTUAL PROPERTY: CREATIVE PRODUCTION IN LEGAL AND CULTURAL PERSPECTIVE, edited by Mario Biagioli, Peter Jaszi, and Martha Woodmansee. University of Chicago Press, 2011. 480 pp. Hardback $115.00, Paperback $40.00.

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This fine collection features a roster of excellent scholars in and out of law schools. Many of the pieces are edited and de-footnoted versions of work available elsewhere,[1] whose value here comes from aggregation and contrast. The remixing is thematically appropriate given the topics and commitments of most participants. The majority of the papers grew out of a Society for Critical Exchange conference, "Con/texts of Invention: Creative Production in Legal and Cultural Perspective," in 2006 (p.vii).

Insightfully, the editors point out that much criticism of current IP regimes comes from scholars who are dissatisfied with IP's institutions, rather than with its normative commitments to capitalism, ownership, and creativity (p.6). But the claim that current IP law is bad for innovation assumes the neutrality of the idea of "innovation," and invites further investigation. This collection does so with interdisciplinarity in its DNA—not just because law needs the insights from other disciplines, though it does, but also because of the way that IP has affected how other academic disciplines constitute and regulate themselves, from copyright permissions to materials licensing by scientific researchers (p.10).

The book is divided into five general areas. The first is High and Low: IP Practices and Materialities, which turns out to be about the history of patents. Mario Biagioli's "Patent Specification and Political Representation: How Patents Became Rights" argues that patents shifted from monopoly grants designed to promote technological transfer to documents that described inventions in sufficient detail to enable third

parties to practice them as part of a political shift (p.25). He suggests that representative democracy created the conditions under which a patent "bargain" between inventors and citizens was possible, focusing on disclosure to the public via the specification. A key consequence of this new idea of what a patent should be was the requirement of true invention, replacing the past practice of allowing patents to be granted based on copying from some other jurisdiction.

The specification and the focus on mental invention in turn made it plausible to grant rights to all embodiments covered by the specifications, thus altering the patent from a right to a particular machine to a right to the immaterial essence of the invention. Utility and reduction to practice took a back seat as the patent became a text, rather than a technology transfer tool. Biagioli's claim is not so much causal—he doesn't present evidence of explicit political thinking directly linked to these changes—but relational: different thoughts about patents became easier to think once the patent "bargain" with the public replaced grants to advance the economic interests of the state.

Kara Swanson picks up the story with "Authoring an Invention: Patent Production in the Nineteenth-Century United States" (p.41). Like Biagioli, she focuses on the patent as text: a document produced with the assistance of experts who shape the form of the patent but still attribute authorship to the "inventor" listed on the patent. Thus, the rhetoric of patents was similar to that surrounding the romantic author in copyright, despite all the helpers behind the scenes. Patent lawyers spoke of the inventor as a genius in need of a ghostwriter, splitting the author-function between the invention and the patent. Yet the authorial function of the patent lawyer was successfully submerged, so that courts now don't hesitate to identify inventors as "authors" of their patents.

William J. Rankin then turns the focus to patents' imagined audiences in "The 'Person Skilled in the Art' Is Really Quite Conventional: U.S. Patent Drawings and the Persona of the Inventor, 1870-2005" (p.55). Patent drawings have contradictory functions: they disclose an invention to the public, but it's also in the inventor's interest to depict an invention as generically as possible to increase the patent's scope. Thus, patent drawings must both appear to depict real objects and also "leave unanswered many questions of manufacture, assembly, or specific materials" (p.57). The Patent Office specified numerous conventions of depiction, including even the angle from which light was to come in the drawing. Initially, the standard conventions made patents intelligible "at a

glance" and implied that all forms of invention were fundamentally the same and could be understood by the same type of person. Over time, however, the drawings reflected increasing specialization, becoming more like engineering drawings and thus easily comprehensible only to those already familiar with the relevant art. The imagined audience is now "ordinary colleagues and competitors," not the public (p.72), which creates interesting questions for Biagioli's argument about the democratic nature of the patent bargain in an age of expertise.

The second section, Before and After the Commons and Traditional Knowledge, begins with Rosemary J. Coombe's "Cultural Agencies: The Legal Construction of Community Subjects and Their Properties" (p.79). It's a theoretical examination of the interactions between international norms and local communities and the ways in which those communities use legal concepts for their own ends—or see them used. As Coombe points out, "[t]o the extent that international treaties and emerging legal norms demand that communities provide consent for the use of their knowledge and resources, such communities must be found, and if they cannot be located on one scale, those bearing obligations to secure consent will inevitably find 'communities' at another scale who are prepared to bargain" (p.86).

Marilyn Strathern contributes "Social Invention," a categorization of approaches to intellectual property, from relations of enthusiasm versus antagonism to breadth versus narrowness and communal versus individual rightsholders (p.99). Mark Perlman's "From 'Folklore' to 'Knowledge' in Global Governance" then traces the history and politics of the changing terminology of international negotiations on protections for "traditional" IP, arguing that just as authorship has been understood in different ways over time, so has the category of the unauthored, which affects both the definitions of what's at stake and the concepts of who might be empowered to exercise authority over it (p.115).

Christopher Kelty, in "Inventing Copyleft," examines a different set of actors: programmers who used concepts of what software programming was and should be alongside their understandings of IP law to create open-source licensing (p.133). Though the actors here are predominantly male, Western, and neither governmental nor part of traditional communities, they, like the subjects of Coombe's and Perlman's pieces, appealed to field-specific expertise as a way to shape the claims of IP law to define and govern their respective fields. Despite some language of resistance,

advocates of free and open source software could never escape the claims of IP law, only negotiate with it.

In the spirit of negotiation, Yochai Benkler's "Designing Cooperative Systems for Knowledge Production: An Initial Synthesis from Experimental Economics," offers a roadmap for commons-based production, with a variety of "design levers" that might be used to create sustainable systems (p.149). Systems that work, he suggests, will: humanize other participants; build trust; increase communication; reinforce norms of cooperation; and provide both fair outcomes and fair processes, where what is "fair" is highly variable; construct a group identity; and provide mechanisms for dealing with troublesome participants (sometimes by allowing punishment for defectors, but not always). Other relevant features of system design include transparency—we care about openness but also about privacy—the level of self-selection for participants; the cost of a particular structure; the extent to which some kinds of rewards may crowd out others; and the nature of sustainable leadership, especially in a context where outsiders may think that lead contributors are "suckers carrying free riders on their back[s]" (p.161). Of particular note is Benkler's point that fairness is most easily assessed in a system where contributions are of the same general type. Where contributions are not commensurable or symmetric, so that some people provide labor, others physical capital, and others financial capital, fairness will be both harder to define and harder to monitor, both of which create problems for cooperation (p.155).

The third section of the volume, IP Crimes and Other Fictions, begins with Lawrence Liang's excellent "Beyond Representation: The Figure of the Pirate," which provocatively challenges the standard IP restrictionist line that noncommercial users and remixers are sympathetic figures while commercial pirates are obviously to be suppressed (p.167). His argument that critical theorists have ignored commercial pirates because they deal in the realm of pleasure (p.168), which generally poses uncomfortable problems for Western legal theory, rings true.[2] Piracy doesn't seem to be a very good example of citizenship, resistance, or creativity, all things that IP restrictionists celebrate when contesting the expansion of copyright and other IP laws. Noncommercial downloading is a Western/high-bandwidth phenomenon, while piracy is associated with Asia, and thus the condemnation of commercial pirates also has a racial and geopolitical component. (For those interested in a fuller discussion of the realities of piracy in emerging economies, the Social Science Research Council has recently published an excellent set of nation-specific studies.[3])

Liang can't quite escape the desire to find creativity among his pirates: he argues that pirate networks of distribution involve innovation in difficult circumstances, generating low-cost infrastructure (p.174). He then suggests that "[t]he epics, stories, songs, and sagas that represent in some ways the collective heritage of humanity have survived only because their custodians took care not to lock them into a system of end usage; instead they embellished them, adding to their health and vitality before passing them on to others" (p.176). If we really valued pure curation—something that is perhaps only possible in a system of mechanical reproduction—then we'd at least want to have the old versions to compare to the embellished ones. Liang's challenge is to ask how we came to value creativity as a universal good; implicitly, he also asks us to reevaluate how we define creativity.

Martha Woodmansee reaches further into the past with "Publishers, Privateers, Pirates: Eighteenth-Century German Book Piracy Revisited," where she tracks the geographic and political divisions that led some German states to encourage reprinting of foreigners' works as a means of cultural development. Printers and authors in other states condemned this as piracy, even though it was not against the law (p.181). This is a familiar modern narrative, and one Adrian Johns has recently explored at length in the British context,[4] but Woodmansee's article shows just how persistent the dynamic is: copying legally unprotected content is one way in which developing states have long supported the education of their populations and the development of technological capacity.

Speaking of Adrian Johns, his contribution to the volume, "The Property Police," traces how IP law developed historically alongside IP enforcement, beginning with publishers' own enforcement activities in early modern Europe (p.199). Johns argues that the industry devoted to finding and stopping "pirates" has always had a profound influence on what piracy *is*. Despite the development of professional police organizations, private policing in IP still exists, and can now often recruit public prosecutors. Johns links copyright and patent enforcement; both have required large private investigative forces, and both have raised concerns for heavy-handed invasions of privacy.

Tarleton Gillespie's "Characterizing Copyright in the Classroom: The Cultural Work of Antipiracy Campaigns" moves from enforcers to educators, examining various pro-copyright curricula promoted by industry organizations designed to teach children and young adults that unauthorized downloading is the same thing as theft and that copying without paying is always wrong (p.215). As he points out, this framing ignores the existence

of fair use and other limitations on copyright, along with public domain or freely shared works. The idea that nothing is really "free" might suit late crony capitalism, but it's not very democratic. These campaigns attempt to convince students that there is a clear creator/audience hierarchy, and that the only available aspiration for a creative student is to join the ranks of paid professionals—whose interests are profoundly harmed by unauthorized copying. Students are not supposed to be remixers or noncommercial creators, just fans who leave no traces of their own: "The recurring imagery of headphones and air guitar is an ironic reminder: this uncanny absence of production marks how fanhood here is understood entirely as an act of consumption" (p.227). As Gillespie concludes, such campaigns ignore changing legal markets and fail to give children tools to distinguish more clearly between legitimate and illegitimate unauthorized uses, to the probable detriment of the copyright industries themselves as well as of creators more generally.

Peter DiCola's "An Economic View of Legal Restrictions on Musical Borrowing and Appropriation" then turns to more conventional law-and-economics analysis (p.235). Because music is both input and output, and because rights in music have been carved up in complicated and sometimes unpredictable ways, it's hard to move from theory to practice, and DiCola spends most of his time categorizing musicians' options under various conditions and levels of uncertainty. In the end, he suggests, constraints may spur creativity, the way that complex tax laws spur tax avoidance—and tax evasion. I don't disagree, but I do wonder whether economics gives us useful tools for distinguishing good constraints from bad ones. When he says that musicians who violate a boundary may add interest to their music, or fulfill an artistic commitment to transgression by creating "illegal" art (pp.246-47), I can't help asking who benefits and who pays under such a scheme. For one thing, gendered distinctions in the acceptability of transgression—both to enforcers and to potential transgressors themselves—mean that deterrence is unlikely to operate equally for male and female artists. Accepting the constraints entailed in writing a sonnet is not really the same thing as accepting the constraints entailed in not ever using any samples without clearing them with the rightsholder.

Section 4, Old Things into New IP Objects, centers around patent law and its discontents. Daniel J. Kevles starts off with "New Blood, New Fruits: Protections for Breeders and Originators, 1789-1930," discussing private and public regimes for protecting lines of animals and plants (p.253). Bringing in private regimes allows Kevles to point out that public regulation offered some consumer protection-like guarantees of quality or at least

accuracy, compared to less reliable private registries. Ultimately, plant breeders succeeded in getting legal protection for seizing on chance variations in the field. Plant patents thus provide a useful contrast to the inventive requirements of a utility patent as detailed by Biagioli.

Alain Pottage and Brad Sherman's "Kinds, Clones, and Manufactures" then argues that the modern patent system grew up alongside, and at its core is most comfortable with, mechanically reproducible consumer goods (and the expensive machines that produced them) (p.269). The very proliferation of identical copies demonstrated the primacy of the abstract design behind those copies. Biological materials, however, offered very different relationships between the first in the series and the next, creating conceptual difficulties that the law preferred to ignore rather than work out. Plant breeders who picked the best mutations were "inventors after the fact" (p.277) who convinced policymakers that cloning was basically a quasi-industrial process, ignoring the absence of design or conception in the sense used for utility patents. But this puts pressure on the patent bargain, since a written description is unlikely to be of much use compared to possession of the biological means of production. Thus, patents on biological material will continue to pose difficulties for the patent system.

Cori Hayden's "No Patent, No Generic: Pharmaceutical Access and the Politics of the Copy" leaves the U.S. system behind to examine the Argentine and Mexican systems (p.285). In Argentina, pharmaceutical patents are functionally unavailable, but brands have taken their place to a certain extent; the first or most successful entity to produce a drug still has a market advantage. In Mexico, as in the U.S., generics have been promoted as a way to "counter the dominance of expensive foreign-made patented drugs" (p.287) and major drug companies have responded by touting the quality of the original. In Argentina, however, the conventional opposition of patented drugs (private property) and legal generics (public domain) is insufficient: Argentina's nonpatented copies of drugs are neither, and often outcompete the "originator" based on the power of the domestic manufacturer's brand name. Moreover, high Argentine prices based on branding and on relationships with medical providers created the same need for lower-cost versions as exists in Mexico and the U.S. As Mark McKenna has suggested, patent and trademark protection may be able to substitute for one another to a certain extent, and thus IP regimes cannot be evaluated in isolation[5]—although a regime with only one, as in Argentina, may have a very different form than a regime with both.

Jonathan Kahn, in "Inventing Race as a Genetic Commodity in Biotechnology Patents," then turns to a recent strategy for achieving patent protection for a drug, or method of use of a drug, that might not otherwise qualify: claiming special utility in a racially defined population (p.305). Race-based patents create economic incentives to engage in race-based clinical research, drug development, and marketing, thus turning race not just into biological fact but into legal right and economic payoff, which may be far more robust and socially powerful.

Pamela Samuelson's "The Strange Odyssey of Software Interfaces as Intellectual Property" covers the roving IP history of interfaces, from trade secret to copyright and, when the courts approved reverse engineering as fair use, to patent (p.321). Samuelson once argued for sui generis protection for software,[6] but here concedes that the ship has sailed. A combination of trade secret, contract, and patent controls rights in software, including interfaces, today. Ultimately, she suggests, the industry worked around the various legal regimes, remaining highly creative no matter what form of protection was in vogue.

The final section, Doing and Undoing Collaborative IP, is the most far-flung. It begins with Evelyn Lincoln's "Invention, Origin, and Dedication: Republishing Women's Prints in Early Modern Italy," which argues that printmakers who selected which engravings to make prints of and added their own dedications to those prints were asserting themselves as authors (p.339). Their curation and selection of appropriate images deserved credit, which they claimed by adding their own names as well. Lincoln argues that cultural pressures against women receiving too much public recognition made such practices particularly appropriate for female printmakers, who could participate in creative life as long as they signed and dedicated images "invented" by others rather than making their own. Patrons, too, including female patrons, were given credit as the moving force behind the creation of particular prints.

Tim Lenoir and Eric Giannella's "Technological Platforms and the Layers of Patent Data" then jumps far ahead in time, arguing that patents make the most sense when understood as embedded in a network of other inventions (p.359). Network analysis then allows them to trace relationships between patents (and patenting researchers and firms) and figure out which are the most significant. They argue that such quantitative studies can usefully supplement more qualitative approaches in science and technology studies.

Dotan Oliar and Christopher Sprigman's "Intellectual Property Norms in Stand-Up Comedy," by contrast, focuses on an extralegal regime (p.385). Stand-up comics don't use IP law for various reasons. Instead, they protect their jokes through anticopying norms and, perhaps most significantly, by shifting in the modern era to a particular type of comedy: identity-based, individualized comedy that would be difficult for anyone else to copy successfully. This result, they argue persuasively, should draw our attention to the fact that IP regimes affect not just the quantity but the *kind* of IP produced. They also highlight that informal IP regimes can't tolerate the kinds of rights-slicing and careful distinctions that formal IP regimes can, because norm-based enforcement would be too difficult if the rules weren't extremely easy to understand. Only one person can own a joke, and that's the person who provided the premise or hired a joke-writer, regardless of whether formal copyright law would assign rights differently.

Fiona Murray's "Patenting Life: How the Oncomouse Patent Changed the Lives of Mice and Men" examines the community of cancer researchers. They too have norms that changed over time as patent protection became more salient (p.339). After the attempted commercialization of mice with important cancer-related genes caused huge controversy, academic researchers adapted rather than rejecting patents outright. While academic freedom still plays a major role in community beliefs about the appropriate use of patents, researchers also adopted patents as another measure of academic success, alongside journal publication, and used patented mice to negotiate relationships among scientists, including the allocation of credit.

Peter Jaszi concludes with "Is There Such a Thing as Postmodern Copyright?" in which he argues that a constellation of recent cases suggests that courts are absorbing a postmodern ethos from the general culture, in which expertise plays less of a role in evaluating creative works and in which the audience gets more credit and control (p.413). This is a fascinating thesis, though I'm not sure the very distinct cases on which he focuses—Jeff Koons's reversal of fortune from *Rogers v. Koons* to *Blanch v. Koons* (acceptance of appropriation art as legitimately transformative based on the change in meaning worked by the appropriation), *Sony v. Universal Studios* (acceptance of audience interest in receiving works and making meaning from them), and *Cartoon Network v. CSC Holdings* (acceptance of the idea that some copies are so transitory that they are outside the control of copyright law)—can be put together to support his claim. But it would be extremely nice to think so.

Overall, this is an excellent collection that would be a great supplement to an advanced IP or IP theory course. If there's anything missing, it's a contribution from a scholar who is willing to discuss cultural issues on the same terms as the other contributors but who generally supports the expansion of intellectual property rights. This is not to say that the volume is unbalanced, especially since so many of the pieces are historical or analytic rather than prescriptive, but the collection does reflect the IP-restrictionist tendencies of many legal scholars (which I happen to think are correct).

ENDNOTES

[1] E.g., Peter Jaszi, Is There Such a Thing as Postmodern Copyright?, 12 Tul. J. Tech. & Intell. Prop. 105 (2009); Dotan Oliar and Christopher Jon Sprigman, There's No Free Laugh Anymore: The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy, 94 Va. L. Rev. 1787 (2008).

[2] See also Susan Reid, Sex, Drugs, and American Jurisprudence: The Medicalization of Pleasure, available at http://blogs.law.columbia.edu/gslonline/files/2011/04/Reid_Legal-Scholarship.pdf.

[3] Social Science Research Council, MEDIA PIRACY IN EMERGING ECONOMIES, Ed. Joe Karaganis (2011).

[4] Adrian Johns, PIRACY: THE INTELLECTUAL PROPERTY WARS FROM GUTENBERG TO GATES (University of Chicago Press, 2009).

[5] Mark P. McKenna, An Alternative Approach to Channeling?, 51 Wm. & Mary L. Rev. 873 (2009).

[6] See, e.g., Pamela Samuelson, Benson Revisited: The Case Against Patent Protection for Algorithms and Other Computer-Related Inventions, 39 Emory L. J. 1025 (1990).

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