

THE BIOPOLITICS OF INTELLECTUAL PROPERTY

As a central part of the regulation of contemporary economies, intellectual property is central to all aspects of our lives. It matters for the works we create, the brands we prefer and the medicines we consume. But if IP is power, what kind of power is it, and what does it do? Building on the work of Michel Foucault, Gordon Hull examines different ways of understanding power in copyright, trademark, and patent policy: as law, as promotion of public welfare, and as promotion of neoliberal privatization. He argues that intellectual property policy is moving toward neoliberalism, even as that move is broadly contested in everything from resistance movements to Supreme Court decisions. This work should be read by anyone interested in understanding why the struggle to conceptualize IP matters.

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REGULATING INNOVATION AND PERSONHOOD IN THE
INFORMATION AGE

GORDON HULL

University of North Carolina, Charlotte



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Contents

<i>Preface</i>	<i>page vii</i>
1 Introduction	1
1.1 God and Copyright	1
1.2 Theorizing the Expansion of IP	7
1.3 The Core Theory	12
1.4 Outline of the Book	16
2 Theorizing Intellectual Property	20
2.1 Theorizing Power	21
2.2 Power in IP: From Liberalism to Neoliberal Biopower	34
2.3 Theorizations of IP	46
3 Copyright	59
3.1 Copyright as Public Biopolitics	60
3.2 Incentives Theory: Imagining Neoliberal Creative Subjects	64
3.3 Music Sampling and the Ambiguous Biopolitics of Fair Use	71
3.4 Paracopyright	86
4 Trademark	98
4.1 Dilution: The Strange Case of Victor's Little Secret	100
4.2 Disparagement	119
4.3 Geographic Indicators: Resistance and the Limits of Public Biopower	128
4.4 Conclusion: What Is to Be Done?	139

5	Patents	142
5.1	Genetic Testing for Hereditary Breast and Ovarian Cancer	144
5.2	The <i>Myriad</i> Litigation	156
5.3	The Supreme Court versus Neoliberal Patents	170
5.4	Are Patents Property?	179
5.5	Conclusion	182
6	Conclusion: Politics Was Already in the Way	185
	<i>Works Cited</i>	199
	<i>Index</i>	219

Preface

As one might expect of a genealogy, the origins of this book are diffuse. My disciplinary training and academic home are in philosophy, and I began with a combination of history and a heavy dose of contemporary French and German theory. I began learning about intellectual property (IP) as part of teaching, and soon found myself regularly reading from law reviews. This somewhat eclectic nexus of history, law, and contemporary philosophy is both where I remain and where this book is located. In it, I want to show that how one understands power has a lot to do with how one understands intellectual property. Not only that, the socially dominant model of power is changing, and with it the structure of intellectual property policy. I draw the “power” part from the work of Michel Foucault, whose research into the contingent historical bases of some of our most deeply held concepts turns philosophy away from itself and towards the world of politics. It is perhaps not surprising that in intellectual property I have been particularly drawn to the theorists – people like Lawrence Lessig, Yochai Benkler, Julie Cohen, James Boyle, Sonia Katyal, and Madhavi Sunder – who emphasize some of the same entanglements between theory and law.

I view my own contribution as genealogical in the sense that I take a step back and frame what is at stake in a number of contemporary IP debates, show that deeply held convictions about what IP does both shape and animate some very specific policies and institutional decisions, and that all of that is fundamentally important for understanding who we are. I will argue that there are three basic ways of understanding power involved. One is typical of the social contract theorists, and speaks in the language of rights and state powers. Another is typical of modern liberalism, and tries to situate an account of markets into a larger narrative about civil society or the public. The third inverts the second, situating civil society into a narrative governed by the logic of markets. In areas as diverse as fashion advertising and genomics, a regulatory model structured by this third version is ascendant across a number of registers. That said, if the third version is ascendant, it is not despotic,

and I also study how institutional actors like the Supreme Court invoke other understandings of power in an effort to push back.

How these struggles turn out matters enormously. Modern economies are heavily driven by immaterial goods, and contemporary economic theory heavily emphasizes innovation. At a more individual level, the natural human impulse to creative and imaginative play intersects continuously with intellectual property, whether in the form of copyright that structures how we create and access cultural goods like books and videos, of trademark that structures how we interact with brands and corporate logos, or of patents that structure such basic amenities as how we access medical care. This interaction is an important part of what determines who we are as people, and so it is not a stretch to say that IP is in the business of making people.

The theorists who say creativity is a social process are right, and no academic work exists without the benefit of countless interactions, large and small, both in writing and in person. This is doubly true of interdisciplinary work, which simply cannot happen in a vacuum. I have been fortunate to work in a department that encourages interdisciplinarity, and to intersect with academic communities that are willing to engage it. I have had many conversations over the years developing the ideas in this book, and am grateful for all of them. Various parts of the argument have benefitted from presentation at UNC Charlotte, the Society for the Philosophy of Technology (SPT) and the Society for Phenomenology and Existential Philosophy (SPEP). I would like especially to thank Julie Cohen, Brett Frischmann, Ben Hippen, Robin James, Sonia Katyal, Lisa Rasmussen, Madhavi Sunder, and two anonymous readers at Cambridge University Press for reading portions of the manuscript and offering much appreciated feedback. The initial stages of the work were supported by a research leave at UNC Charlotte, and I am grateful for the time that afforded. My greatest debt, as always, is to my family: my partner, Maya Socolovsky, who both pushed me to complete the project and supported it in countless ways, and my children – Ilan, Amia, and Gali – who live the joy of creativity and imagination every day.

An earlier version of the incentives discussion in Chapter 3 appeared as “Copyright between Economic and Cultural Models of Creativity,” in *Spaces for the Future: A Companion to Philosophy of Technology*, eds. Joseph C. Pitt and Ashley Shew (New York: Routledge, 2018), 130–140. An earlier version of the discussion of DRM in Chapter 3 appeared as “Coding the Dictatorship of ‘the They’: A Phenomenological Critique of Digital Rights Management,” in *Ethics and Phenomenology*, eds. Mark Sanders and Jeremy Wisniewski (Lanham, MD: Lexington Books, 2012), 197–219. An earlier version of parts of Chapter 4 appeared as “Cultural Branding, Geographic Source Indicators and Commodification,” *Theory, Culture & Society* 33:2 (2016), 125–145. In all three cases, the present argument is thoroughly revised. I am grateful for the publishers’ permission to rework that material here.