



IP³

Madhavi Sunder

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A quarter century ago, Margaret Jane Radin interrupted the hegemonic law and economics discourse on property with a theory of personhood. And the New Jersey Supreme Court declared in the historic case of State v. Shack that “property rights serve human values.” From these our modern “social relations” theory of property was born. Now, the pundits declare that “intellectual property has come of age.” But is intellectual property philosophically and theoretically mature enough to face the world? Unlike its cousins property law and the First Amendment, which bear the weight of values such as autonomy, culture, equality, and democracy, in the United States intellectual property is understood almost exclusively as being about incentives. To put it bluntly, there are no “giant-sized” intellectual property values. But there should be. Intellectual property has grown, perhaps exponentially, but its march into all corners of our lives and to the most destitute corners of the world has paradoxically exposed the fragility of its economic foundations while amplifying its social and cultural effects. Indeed, with full compliance to the TRIPS Agreement now required in all but the world’s very least developed countries, bringing with it patents in everything from seeds to drugs, intellectual property law becomes literally an issue of life or death. Despite these real-world changes, intellectual property scholars increasingly explain their field through the lens of economics alone, evidence of Amartya Sen’s observation that

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"[t]heories have lives of their own, quite defiantly of the phenomenal world that can be actually observed."

The theory is behind the practice. On the ground, underground, and in the ether, intellectual property is spurring what the New York Times says "could be the first new social movement of the century." I show that in case after case, from MGM v. Grokster, to new licenses from the Creative Commons for developing nations, to the rise of Internet auteurs of fan fiction, mash-ups, and machinima, to efforts to deliver medicines to the world's poor, to demands for "Geographical Indications" for sarees and other crafts of the developing world, and to the nascent global movement for "Access to Knowledge," traditional economic analysis fails to capture fully the struggles at the heart of local and global intellectual property law conflicts. This Article builds from these examples to lay a foundation for a cultural analysis of intellectual property. I offer "IP³" as a metonym. The twentieth century closed with the rise of identity politics, the Internet Protocol, and intellectual property rights. I suggest that the convergence of these "IPs" begins to explain the growth of intellectual property rights where traditional justifications for intellectual property do not. IP³ reveals intellectual property's social effects and this law as a tool for crafting cultural relations. Call it the ripping, mixing, and burning of law.

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INTRODUCTION

A quarter century ago, Margaret Jane Radin interrupted the hegemonic law and economics discourse on property with a theory of personhood.¹ Earlier, the New Jersey Supreme Court had declared in the historic case of *State v. Shack* that “[p]roperty rights serve human values.”² From these our modern “social relations” theory of property was born.³ Property rights today balance myriad values, from efficiency to personhood, health, dignity, liberty, and distributive justice.

Now, the pundits declare that “[i]ntellectual property has come of age”⁴ But is intellectual property mature enough to face the world? Unlike its cousins property law and the First Amendment, which bear the weight of values such as autonomy, culture, equality, and democracy, in the United States intellectual property is understood almost exclusively as being about *incentives*.⁵ Its theory is utilitarian, but with the maximand simply creative output. Intellectual property utilitarianism does not ask who makes the goods or whether the goods are fairly distributed to all who need them. To put it bluntly,

1. See Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

2. 277 A.2d 369, 372 (N.J. 1971) (affirming the right of migrant farm workers to receive medical and legal assistance without the property owner’s permission); see also *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980) (affirming that free speech may trump a property owner’s right to exclude); *Javins v. First Nat’l Realty Corp.*, 428 F.2d 1071, 1080 (D.C. Cir. 1970) (Wright, J.) (iterating a “warranty of habitability” implied within every leasehold).

3. See JOSEPH WILLIAM SINGER, INTRODUCTION TO PROPERTY 2-19 (2001); Stephen R. Munzer, *Property as Social Relations*, in NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 36 (Stephen R. Munzer ed., 2001).

4. Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1075 (2005); see also Robert S. Boynton, *The Tyranny of Copyright?*, N.Y. TIMES, Jan. 25, 2004, § 6 (Magazine), at 40 (pronouncing the same).

5. See JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY 44 (1996) (characterizing economic incentives as a common justification for intellectual property); William Fisher, *Theories of Intellectual Property*, in NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY, *supra* note 3, at 168, 169 (describing utilitarian theory as the “most popular” theory of intellectual property); Lemley, *supra* note 4, at 1031 (“Intellectual property protection in the United States has always been about generating incentives to create.”); Jed Rubenfeld, Professor, Yale Law School, Remarks at the Duke Conference on the Public Domain (Nov. 9-11, 2001), available at <http://www.law.duke.edu/pd/realcast.htm> (calling economic analysis of intellectual property the “ruling paradigm” in the field); cf. William W. Fisher III, *Property and Contract on the Internet*, 73 CHI.-KENT L. REV. 1203, 1214 (1998) (writing that while the judicial and scholarly writings on intellectual property are “rife with invocations of [the utilitarian] ideal,” the theoretical bases of intellectual property are contested). Even the scholarship championing the public domain relies largely on utilitarian arguments regarding the importance of the public domain to the process of creation. I critique that scholarship’s failure to integrate concerns for distributive justice. See Anupam Chander & Madhavi Sunder, *The Romance of the Public Domain*, 92 CAL. L. REV. 1331 (2004); Madhavi Sunder, *The Invention of Traditional Knowledge*, 70 LAW & CONTEMP. PROBS. (forthcoming Spring 2007).

there are no “giant-sized”⁶ intellectual property theories capable of accommodating the full range⁷ of human values implicit in intellectual production.⁸ But there should be.

Intellectual property has grown,⁹ perhaps exponentially, but its march into all corners of our lives and to the most destitute corners of the world has paradoxically exposed the fragility of its economic foundations while amplifying its social and cultural effects. It is increasingly evident that utilitarianism fails as a comprehensive theory of intellectual property, either descriptively or prescriptively. Scholars in both economics and law are unable to make economic sense of new rights.¹⁰ Meanwhile, rapid-fire technological advances and new forms of creative output, from the advent of open source collaborative networks¹¹ to garage bands, remix culture, and the World Wide

6. Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L.J. 1, 30 (2002) (“Giant-sized First Amendment theories tend to start with one or both of two giant-sized ideas: either democracy or individual autonomy.”).

7. The hegemony of law and economics in intellectual property scholarship does not reflect the discipline’s deeper traditions. *See, e.g.*, MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* 48 (1993) (describing the rise of authorship centered on notions of honor and reputation); Jane C. Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 COLUM. L. REV. 1865, 1873 (1990) (describing early copyright law as a device for the promotion of learning); Pam Samuelson, *Copyright and Freedom of Expression in Historical Perspective*, 10 J. INTELL. PROP. L. 319, 319-27 (2003) (detailing historical focus of copyright law, since the Statute of Anne, on public access to knowledge).

8. Notable exceptions include Margaret Chon, *Intellectual Property and the Development Divide*, 27 CARDOZO L. REV. 2821, 2900-09 (2006) (proposing a substantive equality principle for global intellectual property law); William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1744-93 (1988) (offering a “utopian analysis” of copyright’s fair use doctrine); and Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 288 (1996) (arguing that “neoclassicism cannot serve as the basis for copyright doctrine because copyright’s primary goal is not allocative efficiency, but the support of a democratic culture”). *See also* Julie E. Cohen, *Copyright, Commodification, and Culture: Locating the Public Domain*, in *THE FUTURE OF THE PUBLIC DOMAIN* 121 (P. Bernt Hugenholtz & Lucie Guibault eds., 2006); Rosemary J. Coombe, *Fear, Hope, and Longing for the Future of Authorship and a Revitalized Public Domain in Global Regimes of Intellectual Property*, 52 DEPAUL L. REV. 1171, 1173 (2003); Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287 (1988).

9. *See* Robert P. Merges, *One Hundred Years of Solicitude: Intellectual Property Law, 1900-2000*, 88 CAL. L. REV. 2187 (2000).

10. *See* *Eldred v. Ashcroft*, 537 U.S. 186, 254 (2003) (Breyer, J., dissenting) (saying of the Copyright Term Extension Act of 1998 that “no one could reasonably conclude that copyright’s traditional economic rationale applies here”); *id.* at 257 (“[I]n respect to works already created . . . the statute creates no economic incentive at all.”); *id.* at 263 (“There is no legitimate, serious copyright-related justification for this statute.”); *see also* Brief for George A. Akerlof et al. as Amici Curiae Supporting Petitioners at 2, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618), 2002 WL 1041846 (stating the conclusion of economists, including five Nobel Laureates, that “[t]he term extension for existing works makes no significant contribution to an author’s economic incentive to create . . .”).

11. *See* Yochai Benkler, “Sharing Nicely”: *On Shareable Goods and the Emergence of Sharing as a Modality of Economic Production*, 114 YALE L.J. 273 (2004); Yochai

Web itself,¹² undermine utilitarian intellectual property law's very premise: that intellectual property rights are necessary to incentivize creation.¹³

At the same time, the legal regime of intellectual property has insinuated itself more deeply into our lives and more deeply into the framework of international law, affecting everything from the recreational home user's ability to share music, to the farmer's ability to replant seed, to the production and distribution of life-saving drugs. Indeed, with full compliance to the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement now required (as of January 1, 2005) in all but the world's very least developed countries,¹⁴ intellectual property law becomes literally a question of life or death.¹⁵

Despite these real world changes, intellectual property scholars increasingly explain their field through the lens of economics. Giving evidence to Amartya Sen's observation that "[t]heories have lives of their own, quite defiantly of the phenomenal world that can be actually observed,"¹⁶ legal scholars continue to understand intellectual property as solely a tool to solve an economic "public goods" problem: nonrivalrous and nonexcludable goods such as music and scientific knowledge will be too easy to copy and share—thus

Benkler, *Coase's Penguin, or, Linux and The Nature of the Firm*, 112 YALE L.J. 369 (2002).

12. The creator of the World Wide Web shunned intellectual property rights in his creation. See TIM BERNERS-LEE, *WEAVING THE WEB: THE ORIGINAL DESIGN AND ULTIMATE DESTINY OF THE WORLD WIDE WEB BY ITS INVENTOR* (1999).

13. The question is by no means new. See, e.g., Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 286-87 (1970) (suggesting alternate methods of incentivizing creative work, including government subsidies).

14. Nations described as "least-developed" by the United Nations are given until January 1, 2016 to implement the provisions on pharmaceutical patents under a decision taken at the Doha Ministerial Conference in November 2001. See World Trade Organization, *The Doha Declaration Explained*, http://www.wto.org/English/tratop_e/dda_e/dohaexplained_e.htm. The United Nations excludes from the list countries with populations of 75 million or more. See U.N. Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Developing States, *The Criteria for the Identification of the LDCs*, <http://www.un.org/special-rep/ohrlls/ldc/ldc%20criteria.htm>. Thus, even though in 2003 India, Nigeria, and Pakistan had annual incomes per capita, respectively, of \$530, \$320, and \$470 (as well as very low life expectancy and literacy and very high infant mortality), they are omitted, thus removing India's 1.1 billion people, Nigeria's 136 million, and Pakistan's 148 million from consideration. See WORLD BANK, *WORLD DEVELOPMENT REPORT 2005: A BETTER INVESTMENT CLIMATE FOR EVERYONE* 256-57 (2004), available at http://siteresources.worldbank.org/INTWDR2005/Resources/complete_report.pdf.

15. Whereas, prior to TRIPS, many developing countries such as India did not recognize patents in pharmaceutical drugs and thus were able to produce cheap generics of drugs, they must now offer twenty-year patents for "products or processes . . . in all fields of technology," including essential medicines. Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 27(1), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1197 (1994) [hereinafter "TRIPS"]; see also discussion *infra* Part III.B.

16. Amartya Sen, *Democracy Isn't 'Western,'* WALL ST. J., Mar. 24, 2006, at A10.

wiping out any incentive to create them in the first place—without a monopoly right in the ideas for a limited period of time.¹⁷

In contrast, this Article maps a network of cultural, technological, and legal regimes that are making and remaking intellectual property law in the new century. I offer “IP³” as a metonym.¹⁸ The twentieth century closed with the rise of three phenomena: identity politics, the Internet Protocol, and intellectual property rights. I suggest that the convergence of these “IPs”—call it “IP³”—begins to explain the growth of intellectual property rights at the very moment that the traditional justifications for intellectual property have less explanatory force.

Part I foregrounds intellectual property’s convergence with identity politics. While identity politics remains problematic,¹⁹ we cannot understand intellectual property today without recognizing the identity struggles embedded within it. Intellectual property’s convergence with identity politics reveals links between cultural representation and development, which traditional economic analyses of intellectual property overlook. Indeed, as social and economic power in the new millennium promises to derive from knowledge (what the United Nations calls a “Knowledge Society”²⁰), the implications of intellectual property laws today are profound. The “Internet Protocol” in Part II is shorthand for digital architecture, which empowers democratic cultural participation and ushers in “a semiotic democracy” in which all individuals can “rip, mix, and burn” culture. But when technology combines with the economic rationale for intellectual property (in a mash-up I call “teconomics”), scholars limit law’s role to retaining the old balance between economic incentives and access, eliding the new technology’s democratic potential.

17. This is the classic account of copyright and patent rights. See WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 37-165, 294-333 (2003). Recent understandings of trademark also encompass a version of the incentive rationale. See *id.* at 166 (“[T]rademark law [is] highly amenable to economic analysis . . .”).

18. The forces I explore here are parts, not the whole, of the world that is making intellectual property in the new millennium. Indeed, there are even other “IPs”: e.g., indigenous people. IP³ does not tell a definitive story but rather seeks to deepen our understanding of modern phenomena through the addition of a cultural lens. See MARILYN STRATHERN, *PROPERTY, SUBSTANCE, AND EFFECT: ANTHROPOLOGICAL ESSAYS ON PERSONS AND THINGS* 163 (1999) (reminding us of “the power of connecting otherwise distinct domains of ideas” where we can observe “explicit parallels [that] have influenced the outcome of claims”).

19. See *infra* notes 61-68 and accompanying text.

20. See, e.g., U.N. DEP’T OF ECON. & SOC. AFFAIRS, *UNDERSTANDING KNOWLEDGE SOCIETIES*, U.N. Doc. ST/ESA/PAD/SER.E/66 (2005), available at <http://unpan1.un.org/intradoc/groups/public/documents/UN/UNPAN020643.pdf>; U.N. DEV. PROGRAMME, *ARAB HUMAN DEVELOPMENT REPORT 2003: BUILDING A KNOWLEDGE SOCIETY* (2003), available at http://hdr.undp.org/reports/detail_reports.cfm?view=712 (writing that social and economic development require access to knowledge and the ability to contest and create new knowledge); UNESCO, *UNESCO and the World Summit on the Information Society (WSIS): Towards Knowledge Societies*, <http://www.unesco.org/wsis>.

The theory is behind the practice, as my case studies in Part III reveal. On the Internet, Netizens abandon the “Information Age”—in which consumers passively receive culture protected by intellectual property—to embrace the “Participation Age”²¹ of remix culture, blogs, podcasts, wikis, and peer-to-peer filesharing.²² This new generation views intellectual properties as the raw materials for its own creative acts, blurring the lines that have long separated producers from consumers: witness a disc-jockey named “Dangermouse” who perfects a digital “mash-up” of the Beatles’ *White Album* and hip-hop artist Jay-Z’s *Black Album* to create the award-winning “*Grey Album*”;²³ witness girl fans of Harry Potter who post stories at www.fanfiction.net to retell life at Hogwarts from Hermione’s perspective;²⁴ witness video game players who become “machinima” *auteurs*, scripting and recording play in virtual worlds.²⁵ In case after case, from *MGM v. Grokster*,²⁶ to new licenses from Creative Commons for developing nations and cultural heritage, to efforts to deliver medicines to the world’s poor, to demands for “Geographical Indications” for sarees and other crafts of the developing world, and to the nascent global movement for “Access to Knowledge,” we see that traditional law and economics analysis fails to capture fully the struggles at the heart of local and global intellectual property law conflicts.

On the ground, underground, and in the ether, intellectual property is spurring what “could be the first new social movement of the century.”²⁷ Historically disempowered individuals are appropriating intellectual property,

21. I borrow Sun Microsystems’s slogan for our era. See Jonathan Schwartz, President, Sun Microsystems, Free Software Has No Pirates (June 16, 2005), <http://blogs.sun.com/jonathan/date/20050616> (“The Participation Age leaves behind the network as a tool for the uninformed to access great databases in the sky (known as the Information Age), and drives toward a network in which individuals can *participate*.”).

22. Both blogs, which are Web-based journals published by individuals or groups, and podcasts, which are audio broadcasts published on the Web, permit the author to bypass entirely traditional channels of mass communication such as newspapers and radio stations.

23. See Renee Graham, *Jay-Z, the Beatles Meet in ‘Grey’ Area*, BOSTON GLOBE, Feb. 10, 2004, at E1.

24. See, e.g., B. Bennett, *Watching Harry*, <http://www.sugarquill.net/read.php?storyid=316&chapno=1> (Aug. 2, 2002) (describing Hermione’s efforts to keep Harry safe from Voldemort); Silvrer Phoenix, *The Sorceress Diaries*, <http://www.fanfiction.net/s/1449533/1/> (Oct. 29, 2003) (transforming Hermione’s passivity into thoughtful introspection through a series of diary entries written from her perspective).

25. See Clive Thompson, *The Xbox Auteurs*, N.Y. TIMES, Aug. 7, 2005, § 6 (Magazine), at 23.

26. 125 S. Ct. 2764 (2005); see discussion *infra* Part III.B.

27. Boynton, *supra* note 4, at 40. Intellectual property activism in the courts, for example, appears to be growing. When the Supreme Court heard the case testing 2 Live Crew’s version of “Oh, Pretty Woman” in 1993 (the Court’s holding setting the standard for parody), only a handful of third parties filed amicus briefs with the Court. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 571 (1994). Today, an intellectual property case heard by the Court can draw a dozen briefs from both industry and social groups. See, e.g., *eBay Inc. v. MercExchange, L.L.C.*, 126 S. Ct. 1837 (2006); *Grokster*, 125 S. Ct. 2764.

using it as a tool for recognition and redistribution, development, and human rights. Call this the ripping, mixing, and burning *of law*. In the final Part, I begin to craft a cultural analysis of intellectual property that would help to better explain and guide current intellectual property conflicts. I draw upon Amartya Sen's and Martha Nussbaum's capabilities approach to human development, the social relations approach to property, and what I call a "New Enlightenment" analysis of culture, in which the core values of Enlightenment—reason, democracy, freedom of expression, and the call, in Kant's words, to "think for [one]self"²⁸—are extended to the cultural sphere.²⁹ My reinterpretation of intellectual property applies to suburban American fan fiction authors and rural Indian weavers alike: all seek greater capacity for accessing and participating in crafting new knowledge of the world. In turn, these cultural capabilities structure our social relations. But let me be plain: I do not seek to replace an economic lens with a cultural one. Rather, I argue that either lens alone provides an incomplete picture and urge intellectual property scholars to begin to integrate the two.³⁰ We must recognize that the interrelationship between culture and economics goes well beyond incentives. I illustrate with an example currently in the news.

The international circuit traveled by a song composed in a squalid Johannesburg hostel by a black migrant worker in 1939 links north and south, past and present, copyrights and patents, songs and medicines, intellectual property and social relations. Solomon Linda composed the song "Mbube" ("lion" in Zulu), drawing from his childhood protecting cattle from lions in the South African hinterlands.³¹ The song was sung *a cappella* in Zulu tradition, but Linda mixed the syncopation of contemporaneous American music with a haunting falsetto overlay.³² The song became what was probably Africa's first pop hit.³³ It would go on to be recorded more than 150 times, generating

28. IMMANUEL KANT, *Answer to the Question: What Is Enlightenment?*, in BASIC WRITINGS OF KANT 133, 136 (Allen W. Wood ed., Thomas K. Abbott trans., Random House 2001) (1784).

29. The present Article forms the final part of a trilogy of works in which I have examined the relationship between contemporary law and the New Enlightenment. See Madhavi Sunder, *Piercing the Veil*, 112 YALE L.J. 1399 (2003); Madhavi Sunder, *Cultural Dissent*, 54 STAN. L. REV. 495 (2001).

30. As Amartya Sen writes, "[W]hat is needed is not the privileging of culture as something that works on its own, but the integration of culture in a wider picture, in which culture, seen in a dynamic and interactive way, is one important influence among many others." Amartya Sen, *How Does Culture Matter?*, in CULTURE AND PUBLIC ACTION 37, 55 (Vijayendra Rao & Michael Walton eds., 2004).

31. Sharon LaFraniere, *In the Jungle, the Unjust Jungle, a Small Victory*, N.Y. TIMES, Mar. 22, 2006, at A1.

32. Frank Walusimbi, *Uganda: Lion Sleeps Tonight's Linda Gains Posthumously*, MONITOR (Kampala), Mar. 19, 2006, available at <http://allafrica.com/stories/200603200463.html>; see also Michelle Faul, *'Lion Sleeps Tonight' Deal Likely To Boost Poor Musicians*, CHI. TRIB., Mar. 23, 2006, at 14.

33. Faul, *supra* note 32. To this day, South Africans call this style "Mbube."

millions of dollars, with its lyrics rewritten as “The Lion Sleeps Tonight” and incorporated into Disney’s immensely profitable movie, *The Lion King*. The “most famous melody ever to emerge from Africa”³⁴ added to the wealth of many, especially in the United States, but not its composer, who died destitute from a curable kidney disease in 1962 at age fifty-three, with less than \$25 to his name.³⁵ One of his daughters would share a similar fate, dying of AIDS in her thirties in 2002, unable to afford antiretroviral treatment.³⁶ The children had heard their father’s song playing over the radio, but for much of the twentieth century remained unaware of their intellectual property claims in it, until a South African writer chronicled the injustice in 2000. In February 2006, the publishing house, which claimed the song on the basis of an apartheid-era assignment from Linda for less than \$2, settled with Linda’s family.³⁷

This story of international injustice illustrates a number of my points. First, it demonstrates the intercultural dimensions of creativity. Linda’s creation offers an exemplar of Paul Gilroy’s “Black Atlantic” thesis, evidencing the interchange of culture across the African diaspora,³⁸ from syncopation to Mbube.³⁹ Second, it shows that these exchanges take place against sharp differentials in power and knowledge. Taking the warning of Linda’s story to heart, African lawyers today urge local creators to protect themselves from a similar fate by learning their rights.⁴⁰ Third, Linda’s tale tragically illustrates the interrelationship between intellectual property rights and other freedoms. His failure to be recognized—and rewarded—for his contribution to our shared cultures in turn prevented him and his family from having the resources to access medicines first for himself and then for his daughter to live.

Calls for reforming intellectual property law can be heard from the *New York Times*⁴¹ to the *Times of India*,⁴² the WTO to WIPO,⁴³ and the west coast

34. Rian Malan, *In the Jungle*, ROLLING STONE, May 25, 2000, at 54.

35. LaFraniere, *supra* note 31. Mr. Linda was buried without even a gravestone, which was beyond his widow’s means. *Id.*

36. *Id.* (“Linda’s children toiled as maids and factory workers, lived without indoor plumbing and sometimes had to borrow from their lawyer for food.”).

37. Faul, *supra* note 32 (noting that assignment occurred “at a time when apartheid laws robbed blacks of negotiating rights”). The Linda family’s lawyer relied on a colonial-era British Commonwealth law that reverted copyright to an author’s children twenty-five years after his death. *Id.*

38. PAUL GILROY, *THE BLACK ATLANTIC: MODERNITY AND DOUBLE CONSCIOUSNESS* (1993).

39. *The Lion King* itself bears remarkable similarities to a 1960s Japanese film *Kimba the White Lion*, recounting the adventures of an orphaned lion cub as he follows in the footsteps of his father, the lion king.

40. See Walusimbi, *supra* note 32 (detailing advice to register works and to keep sealed and postmarked copies with a lawyer or professional and in a bank safe deposit box).

41. At the time of this writing, the *New York Times* dedicated four opinion pieces in a single week to the need to reform intellectual property law. See Tina Rosenberg, *The Scandal of ‘Poor People’s Diseases,’* N.Y. TIMES.COM, Mar. 29, 2006 (decrying the lack of incentives for the creation of medicines that afflict the poor but not the rich); Editorial, *EBay*

to the east coast.⁴⁴ The time for reform is now.⁴⁵ Intellectual property should not be the law of the jungle.

I. IDENTITY POLITICS

A. *From Redistribution to Recognition*

In the late twentieth century, social movements took a distinctly cultural turn. As the social philosopher Nancy Fraser has famously described, “the demise of communism [and] the surge of free-market ideology”⁴⁶ steered social movements away from socialist claims for the redistribution of goods toward a quest for recognition of cultural distinctiveness.⁴⁷ To be sure, a doomed Marxism was not the only factor steering this change in the course of

at the Bar, N.Y. TIMES, Mar. 28, 2006, at A16; Editorial, *Free Trade and AIDS Drugs*, N.Y. TIMES, Mar. 28, 2006, at A16; Editorial, *Patently Ridiculous*, N.Y. TIMES, Mar. 22, 2006, at A24.

42. See, e.g., Rajindar Sachar, *Wrong Medicine: Patent Ordinance to Drive Up Drug Prices*, TIMES OF INDIA, Mar. 15, 2005, available at <http://timesofindia.indiatimes.com/articleshow/980623.cms> (denouncing proposed patent revisions that would “virtually rule[] out access and availability of medicines at low cost”).

43. See *infra* notes 195, 290-91 and accompanying text.

44. I presented an abridged form of this argument at the “Cultural Environmentalism @ 10 Conference” at Stanford Law School in March 2006. The conference celebrated a decade-long, progressive intellectual property “movement,” in Yochai Benkler’s words. The conference followed a day-long symposium on “Intellectual Property and Social Justice” held at UC Davis. In April 2006, scholars and activists from around the world met at Yale Law School to develop the agenda for Access to Knowledge (A2K).

45. The revolution in real property law drew inspiration from the civil rights struggles of the day. Judge J. Skelley Wright candidly expressed this fact in a letter to Edward Rabin, a UC Davis colleague of mine:

Unquestionably the Vietnam War and the civil rights movement of the 1960s did cause people to question existing institutions and authorities. And perhaps this inquisition reached the judiciary itself. Obviously, judges cannot be unaware of what all people know and feel. . . . I was indeed influenced by the fact that . . . most of the tenants in Washington, D.C. slums were poor and black and most of the landlords were rich and white.

See Edward H. Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517, 549 (1984) (reprinting the letter).

46. NANCY FRASER & AXEL HONNETH, REDISTRIBUTION OR RECOGNITION?: A POLITICAL-PHILOSOPHICAL EXCHANGE 8 (Joel Golb et al. trans., 2003); see also BALAKRISHNAN RAJAGOPAL, INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS, AND THIRD WORLD RESISTANCE 241 (2003) (“[S]ocial movements in the Third World emerged substantially as a response to the failure of Marxism as a liberatory discourse.”).

47. Fraser describes the historic shift “in the terms in which justice is imagined”: “the most salient social movements are no longer economically defined ‘classes’ who are struggling to defend their ‘interests,’ end ‘exploitation,’ and win ‘redistribution.’ Instead, they are culturally defined ‘groups’ or ‘communities of value’ who are struggling to defend their ‘identities,’ end ‘cultural domination,’ and win ‘recognition.’” NANCY FRASER, JUSTICE INTERRUPTUS: CRITICAL REFLECTIONS ON THE “POSTSOCIALIST” CONDITION 2 (1997).

social movement history. The psychological wounds inflicted by colonialism⁴⁸ also led to a desire in the global South to reclaim cultural identity from imperial power. Globalization, modernization, market liberalization, and the Internet, which facilitated unprecedented flows of commerce, people, and culture, confounded the efforts of minority and disempowered cultures to preserve their distinctiveness and further heightened anxiety about cultural survival.⁴⁹

The most famous articulation of an ensuing “politics of recognition”⁵⁰—more popularly known by the name “identity politics”⁵¹—is Charles Taylor’s. Taylor eloquently described the emergence of a new paradigm for understanding equality. Minority groups decried not material deprivation but psychological injury deriving from demeaning and misleading cultural images expressed in mainstream media and markets. “Nonrecognition or misrecognition” of one’s identity, Taylor wrote, “can inflict harm, can be a form of oppression, imprisoning someone in a false, distorted, and reduced mode of being.”⁵² Power derives from the ability to shape and influence culture; inversely, those who do not have power to create and contest culture “truly are powerless.”⁵³

Identity politics has been widely criticized as leading to heightened factionalism,⁵⁴ decentering class,⁵⁵ threatening autonomy,⁵⁶ commodifying identity,⁵⁷ and as bad for women and children.⁵⁸ Indeed, among many

48. See generally FRANTZ FANON, *THE WRETCHED OF THE EARTH* (1963); ASHISH NANDY, *THE INTIMATE ENEMY* (1983); EDWARD W. SAID, *ORIENTALISM* (1979).

49. See Sunder, *Cultural Dissent*, *supra* note 29.

50. Charles Taylor, *The Politics of Recognition*, in *MULTICULTURALISM* 25 (Amy Gutmann ed., 1994) (describing a move by minority groups to have their cultural distinctiveness recognized and preserved).

51. See RICHARD THOMPSON FORD, *RACIAL CULTURE: A CRITIQUE* 18-19 (2005) (distinguishing the “politics of recognition” from “identity politics”).

52. Taylor, *supra* note 50, at 25, 36 (“[W]ithholding of recognition can be a form of oppression.”).

53. Salman Rushdie, *Excerpts from Rushdie’s Address: 1,000 Days ‘Trapped Inside a Metaphor,’* N.Y. TIMES, Dec. 12, 1991, at B8 (excerpts from speech delivered at Columbia University) (“[T]hose who do not have power over the story that dominates their lives, power to retell it, rethink it, deconstruct it, joke about it, and change it as times change, truly are powerless, because they cannot think new thoughts.”).

54. See, e.g., CASS SUNSTEIN, *REPUBLIC.COM* (2001).

55. See FRASER, *supra* note 47.

56. See K. Anthony Appiah, *Identity, Authenticity, Survival: Multicultural Societies and Social Reproduction*, in *MULTICULTURALISM*, *supra* note 50, at 149, 162-63 (asking whether, if we take autonomy seriously, identity politics does not replace “one kind of tyranny with another”); Janet E. Halley, *Culture Constrains*, in *IS MULTICULTURALISM BAD FOR WOMEN?* 100, 103-04 (Joshua Cohen et al. eds., 1999).

57. See ELIZABETH A. POVINELLI, *THE CUNNING OF RECOGNITION* 17, 33 (2002) (expressing concern that communities may conform themselves to rigid legal definitions, stifling cultural dynamism).

58. See Susan Moller Okin, *Is Multiculturalism Bad for Women?*, in *IS MULTICULTURALISM BAD FOR WOMEN?*, *supra* note 56, at 7 (arguing that multiculturalism is not in the best interests of women and children); cf. SEYLA BENHABIB, *THE CLAIMS OF*

intellectuals on the left and the right, identity politics stands in bad odor today.⁵⁹ I myself have led the charge to expose critically legal efforts to preserve “culture,” which erroneously conceive culture as a homogeneous and static “thing” rather than as dynamic processes of shared meaning-making.⁶⁰

I want to distinguish that kind of identity politics from the way in which I use that term here. For my purposes, identity politics serves as shorthand for the attention to culture and identity in current social movements. This is the identity politics that, as I will show, is converging with intellectual property movements. I suggest that a deracinated, degendered view of intellectual products and markets fails to capture the dynamic interrelationship between culture and economics. Indeed, many critique identity politics for its temptation to place representation above other concerns, such as the redistribution of social and economic power. The problem, as Iris Marion Young describes it, is when “misrecognition” becomes a “problem independent of other forms of inequality or oppression.”⁶¹ I embrace a more sophisticated understanding of identity politics that recognizes the “interpenetration” of economics and culture.⁶² Cultural representation—in the form of who is represented, how, and under what terms—affects economic and social power and relations, and vice versa.

The mere fact that many have taken an overly simplistic or erroneous view of identity and culture does not mean that we ought to turn our heads from the important ways in which a cultural analysis matters.⁶³ As I have argued earlier,

CULTURE: EQUALITY AND DIVERSITY IN THE GLOBAL ERA 67 (2002) (seeking to balance women’s rights to both equality and cultural community); Sunder, *Piercing the Veil*, *supra* note 29, at 1432-33 (arguing that women seek equality and freedom within cultural community, not just without it).

59. See FORD, *supra* note 51.

60. See Sunder, *Cultural Dissent*, *supra* note 29, at 549-50 (criticizing the U.S. Supreme Court for treating Boy Scouts of America as homogeneous and static, and ignoring that the association is rife with conflict over the place of gays); Sunder, *Piercing the Veil*, *supra* note 29, at 1421 (arguing that human rights law defers to claims of religious elites about law and meaning, inadvertently thwarting claims of dissenting women who offer alternative religious interpretations).

61. IRIS MARION YOUNG, INCLUSION AND DEMOCRACY 105 (2000). Young would recharacterize cultural or social groups in the structural or relational terms of social relations rather than in the psychological or biological terms that proliferated during the first wave of identity politics. See *id.* at 82-83.

62. See FRASER & HONNETH, *supra* note 46, at 61, 62 (“[N]ominally cultural matters affect not only status but also economic position. In neither case, therefore, are we dealing with separate spheres.”); see also Nancy Fraser, *From Redistribution to Recognition? Dilemmas of Justice in a ‘Post-Socialist’ Age*, 212 NEW LEFT REV. 68, 79 (1995) (writing that cultural and economic subordination “intertwine to reinforce one another dialectically”). For more on this interpenetration, see Margaret Jane Radin & Madhavi Sunder, *Foreword: The Subject and Object of Commodification*, in RETHINKING COMMODIFICATION (Martha M. Ertman & Joan C. Williams eds., 2005).

63. As Amartya Sen writes:

Taking culture to be independent, unchanging and unchangeable can indeed be very problematic. But that, on the other hand, is no reason for not taking full note of the

we ought not to discard cultural analysis but rather should employ it more critically, retaining a commitment to recognizing the heterogeneity, dynamism, and interconnectedness of cultures.⁶⁴ We must, as Arjun Appadurai reminds us, acknowledge the ways in which cultural theory—and even understandings of culture on the ground—have evolved during the last decade or more.⁶⁵ As my case studies reveal, deployments of both identity politics and intellectual property emerging today are far more sophisticated and balanced than they were just a few years before.⁶⁶ I am cautious of “object fetishism,” as Radin was earlier,⁶⁷ but I highlight here how new culture-based claims for intellectual property are increasingly enlightened and seek to avoid such fetishism. Finally, we must avoid the trap of viewing “culture” as separate from other factors related to inequality. As Appadurai writes, “The challenge today . . . is how to bring the politics of dignity and the politics of poverty into a single framework. Put another way, the issue is whether cultural recognition can be extended so as to enhance redistribution.”⁶⁸

B. *The Property Turn in Identity Politics*

Intellectual property is increasingly understood as a legal vehicle for facilitating (or thwarting) recognition of diverse contributors to cultural and scientific discourse. The linking of identity politics to intellectual property brings social movements back, full circle, to redistribution: diverse authors and inventors seek to benefit materially from their cultural production, especially where recognition and material benefit were denied in the past.⁶⁹ Indeed, in the

importance of culture seen in an adequately broad perspective. . . . [I]f culture is recognized to be nonhomogeneous, nonstatic, and interactive, and if the importance of culture is integrated with rival sources of influence, then culture can be a very positive and constructive part in our understanding of human behavior and of social and economic development.

Sen, *supra* note 30, at 44.

64. See Sunder, *Cultural Dissent*, *supra* note 29, at 561-67.

65. Arjun Appadurai, *The Capacity to Aspire: Culture and the Terms of Recognition*, in *CULTURE AND PUBLIC ACTION*, *supra* note 30, at 59, 59 (“[T]here has been real refinement and academic progress [in the area of defining culture]. . . . Today’s definitions are both more modest, and more helpful.”).

66. Indeed, I am much more hopeful today than I was several years ago about the prospects for a fruitful collaboration between intellectual property and identity politics, precisely because cultural theorists’ earlier critiques are having some effect. See Madhavi Sunder, *Intellectual Property and Identity Politics: Playing with Fire*, 4 J. GENDER RACE & JUST. 69 (2000) [hereinafter Sunder, *Playing with Fire*] (warning that characterizing cultural identity in intellectual property terms would lead to static and homogeneous identity and culture).

67. See *infra* note 344 and accompanying text.

68. Appadurai, *supra* note 65, at 62-63 (citation omitted).

69. See, e.g., Regina Austin, *Kwanzaa and the Commodification of Black Culture*, in *RETHINKING COMMODIFICATION*, *supra* note 62, at 178 (arguing for social and economic empowerment for blacks by reclaiming market control of their cultural representations).

Knowledge Age, as social and economic power promise to derive more and more from access to knowledge and the ability to make new cultural knowledge, the social, cultural, and economic implications of intellectual property laws are profound.

I note a recent shift in the interplay between identity politics, the Internet Protocol, and intellectual property. Initially, the insights of identity politics focused on using intellectual property laws *defensively*, to stop demeaning images of minority cultural groups or the misappropriation of their cultural knowledge for others' economic gain.⁷⁰ These early intellectual property movements focused largely on the psychological harms of cultural misrepresentation that Taylor described: Native Americans contested as demeaning trademarks such as the "Redskins," held by professional football teams and businesses,⁷¹ and the family of Crazy Horse considered a "right of publicity" claim to prohibit the use of his name and image to sell malt liquor. (The revered Indian leader was well known for his efforts to combat pervasive alcoholism on reservations.)⁷² The United States Patent and Trademark Office established a Database of Official Insignia of Native American Tribes, which listed words and symbols ineligible for trademark registration.⁷³ New Zealand's trademark law was similarly amended to exclude Maori symbols from trademark registration where the community would find such property rights offensive.⁷⁴ The Chinese State Intellectual Property Office created a team of patent examiners specializing in traditional Chinese medicine,⁷⁵ and

70. See Doris Estelle Long, *The Impact of Foreign Investment on Indigenous Culture: An Intellectual Property Perspective*, 23 N.C. J. INT'L L. & COM. REG. 229, 245 & n.42 (1998) (citing the efforts of Chief Crazy Horse's descendants to bar the unauthorized use of their ancestor's name as an alcoholic beverage brand); Lakshmi Sarma, *Biopiracy: Twentieth Century Imperialism in the Form of International Agreements*, 13 TEMP. INT'L & COMP. L.J. 107, 128-29 (1999) (describing exploitation by transnational corporations of traditional communities in India and Nicaragua); Lester I. Yano, *Protection of the Ethnobiological Knowledge of Indigenous Peoples*, 41 UCLA L. REV. 443, 472-73 (1993) (discussing contracting efforts between indigenous peoples and pharmaceutical corporations to ensure certain rights and compensations to a community for use of its ethnobiological knowledge); Michael M. Phillips, *Bitter Remedies: The Search for Plants That Heal Generates International Feuding*, WALL ST. J., June 7, 2001, at A1 (chronicling a conflict between a Swiss research institute and the University of Zimbabwe over patent rights to a plant traditionally used in Zimbabwe).

71. See, e.g., *Pro-Football, Inc. v. Harjo*, 284 F. Supp. 2d 96 (D.D.C. 2003).

72. See Nell Jessup Newton, *Memory and Misrepresentation: Representing Crazy Horse in Tribal Court*, in *BORROWED POWER: ESSAYS ON CULTURAL APPROPRIATION* 195, 211-12 (Bruce Ziff & Pratima V. Rao eds., 1997); see also *Hornell Brewing Co., Inc. v. Brady*, 819 F. Supp. 1227, 1230 (E.D.N.Y. 1993).

73. See Native American Tribal Insignia Database, 69 Fed. Reg. 55,415 (Sept. 14, 2004).

74. Trade Marks Act 2002, 2002 S.N.Z. No. 49 § 17(1)(c), amended by Trade Marks Amendment Act 2005, 2005 S.N.Z. No. 116 (allowing the trade mark commissioner to refuse to register a mark "likely to offend a significant section of the community, including Maori").

75. See WORLD INTELLECTUAL PROP. ORG., INTELLECTUAL PROPERTY AND

the Indian government established the TKDL, or “Traditional Knowledge Digital Library,” to document local knowledge as “prior art” in order to defeat outsiders’ efforts to patent ancient Indian remedies.⁷⁶

But now individuals, often from disadvantaged communities, are seeking *affirmative* intellectual property rights of their own. They are increasingly calling attention to themselves as the authors of distinct cultural works and demanding a share of profits to be had in global markets for their wares. In India, local artisans are applying for “Geographical Indications” in Darjeeling tea and Mysore silk, which would grant an exclusive right to peddle goods under these names.⁷⁷ In the United States, a New Mexican Indian tribe is suing the state for using the tribe’s spiritual sun symbol on the state flag without the tribe’s permission, demanding \$1 million for each year of unauthorized use for a total of \$74 million.⁷⁸ In Australia, aboriginal communities are demanding that courts recognize collective copyrights in their artwork.⁷⁹ And in Canada, indigenous peoples are seeking copyrights in traditional stories, described by some natives as “all we have” after colonialism.⁸⁰

These claims suggest, as a UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions makes plain, the complementary nature of the cultural and economic aspects of development.⁸¹ The UNESCO Convention urges that the cultural contributions of the poor be encouraged,⁸² recognized, and materially rewarded.⁸³ At the same time, it takes

TRADITIONAL KNOWLEDGE 20 (2004), *available at* http://www.wipo.int/freepublications/en/tk/920/wipo_pub_920.pdf.

76. See Chander & Sunder, *supra* note 5, at 1357-58.

77. See discussion *infra* Part III.B.

78. See Phil Patton, *Trademark Battle Over Pueblo Sign*, N.Y. TIMES, Jan. 13, 2000, at F1.

79. See *Yumbulul v. Reserve Bank of Australia* (1991) 21 I.P.R. 481; *Milpurrurru v. Indofurn Pty Ltd.* (1994) 130 A.L.R. 659 (holding that aboriginal artist’s work was misappropriated and awarding communal damages for “culturally based harm” resulting from the desecration of the sacred work, which was reproduced on carpets upon which people would walk).

80. Lenore Keeshig-Tobias, *Stop Stealing Native Stories*, in *BORROWED POWER: ESSAYS ON CULTURAL APPROPRIATION* 71, 72 (Bruce Ziff & Pratima V. Rao eds., 1997).

81. See UNESCO, Convention on the Protection and Promotion of the Diversity of Cultural Expressions (Oct. 20, 2005), *available at* <http://unesdoc.unesco.org/images/0014/001429/142919e.pdf>. The Preamble, for example, recognizes “the importance of traditional knowledge as a source of intangible and material wealth” and “the importance of the vitality of cultures, including for persons belonging to minorities and indigenous peoples, as manifested in their freedom to create, disseminate and distribute their traditional cultural expressions and to have access thereto, so as to benefit them for their own development” *Id.* pmbl.

82. The Convention requires parties to encourage “the strengthening of the cultural industries in developing countries.” To this end, the Convention proposes:

(i) creating and strengthening cultural production and distribution capacities in developing countries; (ii) facilitating wider access to the global market and international distribution networks for their cultural activities, goods and services; (iii) enabling the emergence of viable local and regional markets; (iv) adopting, where possible, appropriate measures in

a balanced view of new intellectual property rights spurred by concerns for development and human rights. The Convention celebrates “interculturality”—that is, the exchange of ideas between cultures—and eschews a conception of cultural enclaves that are hermetically sealed off from one another.⁸⁴ Yet the Convention is also aware that rapid globalization and new technologies simultaneously “afford unprecedented conditions for enhanced interaction between cultures” and “represent a challenge for cultural diversity, namely in view of risks of imbalances between rich and poor countries.”⁸⁵ The Convention links culture to developmental goals and would foster respectful and equitable interactions between and within cultures.

C. *The Identity Turn in Intellectual Property*

These new claims for intellectual property do not follow traditional economic logic. Instead, they are voiced in terms of identity politics, cultural survival, and human rights.⁸⁶ Partly, this is strategic. When assessed in conventional terms, indigenous claims for intellectual property rights often fail because a discourse in ex ante incentives for creation does not protect knowledge and biological resources that are ancient and pre-existing; traditional intellectual property does not generally recognize the work of collectives; intellectual property enforcement is expensive and complicated; and ownership is as amorphous as the boundaries of indigenous identity.

developed countries with a view to facilitating access to their territory for the cultural activities, goods and services of developing countries; (v) providing support for creative work and facilitating the mobility, to the extent possible, of artists from the developing world; (vi) encouraging appropriate collaboration between developed and developing countries in the areas, *inter alia*, of music and film

Id. art. 14.

83. *See id.* art. 7 (urging parties “to create in their territory an environment which encourages individuals and social groups [to] create, produce, disseminate, distribute and have access to their own cultural expressions, paying due attention to the special circumstances and needs of women as well as various social groups, including persons belonging to minorities and indigenous peoples”).

84. *Id.* art. 1 (including, as objectives, the desire “to encourage dialogue among cultures with a view to ensuring wider and balanced cultural exchanges in the world in favour of intercultural respect and a culture of peace; to foster interculturality in order to develop cultural interaction in the spirit of building bridges among peoples”); *see id.* art. 4, ¶ 8 (defining “interculturality” as “the existence and equitable interaction of diverse cultures and the possibility of generating shared cultural expressions through dialogue and mutual respect”).

85. *Id.* pmb1.

86. *See* Statement of the Bellagio Conference, Cultural Agency/Cultural Authority: Politics and Poetics of Intellectual Property in the Post Colonial Era (Mar. 11, 1993), available at <http://www.case.edu/affil/sce/BellagioDec.html> [hereinafter Bellagio Declaration] (“Intellectual property laws have profound effects on issues as disparate as scientific and artistic progress, biodiversity, access to information, and the cultures of indigenous and tribal peoples. Yet all too often those laws are constructed without taking such effects into account . . .”).

Indeed, for these reasons it is now commonly observed that the international intellectual property system now made salient by the TRIPS Agreement fails to protect “poor people’s knowledge.”⁸⁷

In a separate paper, I argue that these commonly perceived differences between “modern” intellectual property and “traditional” knowledge are overdrawn.⁸⁸ In fact, problems encountered in protecting the knowledge of the poor turn less on novelty or finding an individual author, than on the poor’s lack of knowledge of their rights, and their diminished capacity to strike fair bargains. Recall, for example, the case of Solomon Linda, the original African composer of “The Lion Sleeps Tonight.”⁸⁹

In this Article, however, I want to focus less on what’s *similar* about the new intellectual property claims by the poor and examine more how they are *different*. These new claims for intellectual property understand rights not just in the familiar terms of *incentives-for-creation*, but also as *tools for both recognition and redistribution*.⁹⁰ To be sure, this understanding of intellectual property emerges from the convergence of various legal regimes, from international intellectual property to human rights.⁹¹ But I argue that the shift must also be understood as an artifact of IP³. Tracking a shift in human rights thinking away from first-generation rights (which focus on civil and political rights) toward third-generation rights (which focus upon culture, development,

87. See J. Michael Finger, *Introduction and Overview*, in *POOR PEOPLE’S KNOWLEDGE: PROMOTING INTELLECTUAL PROPERTY IN DEVELOPING COUNTRIES* 1, 1 (J. Michael Finger & Philip Schuler eds., 2003) (characterizing TRIPS as “about knowledge that exists in developed countries”).

88. See Sunder, *The Invention of Traditional Knowledge*, *supra* note 5, at 15.

89. See *supra* notes 31-37 and accompanying text.

90. WIPO, for example, outlines the key objectives of traditional knowledge (“TK”) protection to include:

- Recognition of value and promotion of respect for traditional knowledge systems
- Responsiveness to the actual needs of holders of TK
- Repression of misappropriation of TK and other unfair and inequitable uses
- Protection of tradition-based creativity and innovation
- Support of TK systems and empowerment of TK holders
- Promotion of equitable benefit-sharing from use of TK
- Promotion of the use of TK for a bottom-up approach to development

WORLD INTELLECTUAL PROP. ORG., *supra* note 75, at 16; see also DARRELL A. POSEY & GRAHAM DUTFIELD, *BEYOND INTELLECTUAL PROPERTY: TOWARD TRADITIONAL RESOURCE RIGHTS FOR INDIGENOUS PEOPLES AND LOCAL COMMUNITIES* 175 (1996).

91. See Laurence R. Helfer, *Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 *YALE J. INT’L L.* 1, 55 (2004) (arguing that in the case of traditional knowledge, for example, developing countries have shifted focus from TRIPS to international legal fora in the areas of human rights and biodiversity, which offer greater access to NGOs and a discourse more aligned with developing country interests); Kal Raustiala & David G. Victor, *The Regime Complex for Plant Genetic Resources*, 58 *INT’L ORG.* 277 (2004) (describing the increasing density of legal institutions governing plant genetic resources, from international intellectual property to trade, environmental, and human rights regimes, all of which now exert influence when a conflict over these resources arises).

and distributive justice),⁹² new claims for intellectual property rights in traditional knowledge tether social justice movements to the attainment of greater cultural and social power. In the next Part, I will consider some of the ways that new technologies both bolster and threaten this power.

Identity politics' turn to intellectual property law should not be surprising; this legal regime is, after all, primarily responsible for governing ownership of cultural artifacts. It follows that intellectual property would then regulate the cultural meanings and social relations that flow from these. The result, as the anthropologist Marilyn Strathern writes, is that now "[i]ntellectual property rights' takes its place as part of the current international language of commerce and human rights alike."⁹³ Both the Universal Declaration of Human Rights⁹⁴ and the International Covenant on Economic, Social, and Cultural Rights (ICESCR) proclaim an equal right of all peoples to be recognized for their cultural creations and to materially benefit from these creations.⁹⁵ A November 2005 document elaborating on the meaning of this provision in the ICESCR concludes: "intellectual property is a social product and has a social function."⁹⁶

The convergence of identity politics and intellectual property reveals intellectual property law as more than a mere tool for incentivizing creativity. Studying intellectual property through the lens of identity politics reveals *intellectual property as a struggle over social relations*.⁹⁷ Identity politics has

92. See RAJAGOPAL, *supra* note 46, at 247 (describing the shift from first to third generation human rights).

93. STRATHERN, *supra* note 18, at 21.

94. Article 27 of the Declaration states:

- Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
- Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Universal Declaration of Human Rights, G.A. Res. 217A, art. 27, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

95. International Covenant on Economic, Social, and Cultural Rights art. 15, *opened for signature* Dec. 19, 1966, 993 U.N.T.S. 3 (recognizing "the right of everyone . . . [t]o benefit from the protection of moral and material interests resulting from any scientific, literary or artistic production of which he is the author"); see also Draft Declaration on the Rights of Indigenous Peoples, U.N. Doc. E/CN.4/Sub.2/1994/2/Add.1 (1994) (declaring rights to artifacts, designs, ceremonies, technologies, visual and performing arts, literature, traditional medicines and health practices).

96. U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. and Cultural Rights, General Comment No. 17, at 9, U.N. Doc. E/C.12/GC/17 (Jan. 12, 2006) ("The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author (article 15, paragraph 1(c), of the Covenant).").

97. Darrell A. Posey, *International Agreements and Intellectual Property Right Protection for Indigenous Peoples*, in INTELLECTUAL PROPERTY RIGHTS FOR INDIGENOUS PEOPLES: A SOURCEBOOK 225, 227 (Tom Greaves ed., 1994) (arguing that indigenous peoples need not accept existing legal concepts on their own terms—rather, "the term can be purposefully molded, expanded, or re-designed"); see also Mataatua Declaration on Cultural

opened intellectual property law up to scrutiny of its role as a full-fledged legal regime governing the exercise and distribution of cultural power and wealth. The ground beneath this law is shifting. New people assert themselves as intellectual property subjects, controlling rights in cultural creations, and reject earlier categorization as law's objects. In Strathern's words, "the world is shrinking in terms of resources" and yet "expanding in terms of new candidates for ownership."⁹⁸

To be sure, there is much to be wary of in the confluence of identity politics and intellectual property. In an important book, the anthropologist Michael Brown worries about indigenous intellectual property's threat to our traditions of free speech and the public domain.⁹⁹ Elizabeth Povinelli and others, myself included, point out the dangers of commodifying culture, as the allure of "rights" puts pressure on groups to define themselves in reified and traditionalist terms rather than as dynamic, living communities.¹⁰⁰ Commodification theorists bemoan new intellectual property claims as part of the inexorable march toward the propertization of each and every thing, and worry especially about the commodification of that which is most personal to us—our very identity.¹⁰¹ Finally, we must be aware that arguments that empower the poor will be co-opted by the powerful. Indeed, this is already happening, from identity-based justifications for an expanded right of publicity¹⁰² to state and federal antidilution laws regarding trademarks.¹⁰³

and Intellectual Property Rights of Indigenous Peoples, June 18, 1993, available at <http://www.ankn.uaf.edu/IKS/mataatua.html> (recommending that indigenous peoples pursue intellectual property rights on different terms from traditional Western owners).

98. STRATHERN, *supra* note 18, at 23-24.

99. See MICHAEL F. BROWN, WHO OWNS NATIVE CULTURE? (2003).

100. See Elizabeth Povinelli, *At Home in the Violence of Recognition*, in PROPERTY IN QUESTION: VALUE TRANSFORMATION IN THE GLOBAL ECONOMY 185, 193 (Katherine Verdery & Caroline Humphrey eds., 2004) (bemoaning pressure on indigenous peoples to present their communities as "a synchronic structure" that comports to legal requirements for land based on colonial notions of authentic difference); Michael Rowlands, *Cultural Rights and Wrongs: Uses of the Concept of Property*, in PROPERTY IN QUESTION: VALUE TRANSFORMATION IN THE GLOBAL ECONOMY, *supra*, at 209 (expressing concern about "the essentializing claim of a politics of recognition"); Sunder, *Playing With Fire*, *supra* note 66; cf. Radin & Sunder, *supra* note 62.

101. Compare Matt Fleischer, *Patent Thyself*, AM. L., June 2001, at 84 (describing efforts by individuals to patent themselves or their children's cell lines), with *Moore v. Regents of Univ. of Cal.*, 793 P.2d 479 (Cal. 1990) (holding individual had no property rights in a patented cell line derived from material removed from his body, but that doctors who derived the cell line did).

102. See, e.g., *White v. Samsung Elecs. Am., Inc.*, 989 F.2d 1512, 1514 (9th Cir. 1993) (petition for rehearing en banc denied) (Kozinski, J., dissenting) (denouncing court for erecting "a property right of remarkable and dangerous breadth" in finding actress Vanna White to hold an intellectual property right in any likeness of her image); *Hoffman v. Capital Cities/ABC, Inc.*, 33 F. Supp. 2d 867 (C.D. Cal. 1999), *rev'd* 225 F.3d 1180 (9th Cir. 2001) (rejecting argument by actor Dustin Hoffman that *Los Angeles Magazine's* unauthorized photograph of Hoffman dressed as character from the movie "Tootsie" violated his right of publicity).

All of these concerns are warranted. Nonetheless, understanding intellectual property today requires that we grapple with the identity struggles that this law has been invited to help resolve. Intellectual property law's convergence with identity politics reveals links between cultural representation and equality, which traditional economic analyses of intellectual property overlook. In Strathern's words: "Late twentieth-century cultural politics makes it impossible to separate issues of identity from claims to the ownership of resources."¹⁰⁴

II. INTERNET PROTOCOL

A. *The Technology of Semiotic Democracy*

At the turn of the century these social and legal movements converged with a technological one. The rise of the Internet and digital technology significantly enhanced the possibility of subaltern influence over meaning-making. Several features of the "Internet Protocol," my shorthand for the high-technology architecture of the new millennium, from the digital medium to the Internet, have enabled the social and cultural aspirations of the New Enlightenment. This digital architecture enhances the ability to dissent and to participate in making culture.¹⁰⁵ Most importantly, by disseminating more widely the levers of making cultural meaning, it assists us as we seek "to think for [ourselves],"¹⁰⁶ reflecting Kant's aspiration for humankind.

These technological features include:

- *Many-to-many interactivity.* Unlike traditional communications media (telephone, radio, and television), the Internet allows for "many-to-many interactivity."¹⁰⁷ While traditional media allowed for either one-to-one interactivity (a phone conversation between two people) or one-to-many non-interactivity (a broadcast radio or television program), the Internet allows many people at once to communicate with many others (described variously as "narrowcasting" or "multicasting"). Given that

103. *Compare* *Lucasfilm Ltd. v. High Frontier*, 622 F. Supp. 931 (D.D.C. 1985) (holding that dilution of mark "Star Wars" by use in publicity campaigns for and against Strategic Defense Initiative is not protectable under trademark law), *with* *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522 (1987) (upholding statutory protections of the word "Olympic" against uses that threatened to "dilute" its wholesome meaning).

104. STRATHERN, *supra* note 18, at 134.

105. *See generally* YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* 276 (2006) ("[T]he technical characteristics of digital information technology, the economics of networked information production, and the social practices of networked discourse qualitatively change the role individuals can play in cultural production.").

106. KANT, *supra* note 28, at 136.

107. ANDREW L. SHAPIRO, *THE CONTROL REVOLUTION: HOW THE INTERNET IS PUTTING INDIVIDUALS IN CHARGE AND CHANGING THE WORLD WE KNOW* 15 (1999).

traditional media tends to privilege the message of those with access to the few channels of communication,¹⁰⁸ the democratizing potential of this new communicative power has been well noted,¹⁰⁹ even by the United States Supreme Court: “Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer. . . . ‘[T]he content on the Internet is as diverse as human thought.’”¹¹⁰

- *Amenability to manipulation.* Information stored in digital form is far easier to manipulate than information in analog form.¹¹¹ Cutting and pasting once involved scissors and glue. The digital medium facilitates the rearranging of art, music, and video, and permits the addition of new elements along the way. “Rip, mix, and burn” democratizes the arrangement and production of culture.¹¹²
- *End-to-end architecture.* The architecture of the Internet shifts away from popular media with top-down control to a system known as “end-to-end architecture.”¹¹³ The current infrastructure of the Internet offers a system in which intelligence is located not in the middle but at the ends—that is, in the computers of the users themselves.¹¹⁴ This open architecture facilitates “discursive resistance,” defined as “a process through which text, oral, nonverbal communication, and other forms of meaning-making are employed to imagine alternatives to dominant power structures.”¹¹⁵ Internet users can create culture rather than receive it from some omnipotent central stations in the heavens.¹¹⁶

108. Neal Netanel labels this the “speech hierarchy,” which he describes as “the disproportionate power of wealthy speakers and audiences to determine the mix of speech that comprises our public discourse.” Neil Weinstock Netanel, *Market Hierarchy and Copyright in Our System of Free Expression*, 53 VAND. L. REV. 1879, 1884 (2000). Netanel observes that powerful private media corporations might themselves serve at times as a useful counterweight to governmental authority. *Id.* at 1885.

109. See, e.g., A. Michael Froomkin, *Habermas@Discourse.Net: Toward a Critical Theory of Cyberspace*, 116 HARV. L. REV. 749, 855-71 (2003) (discussing blogs, wikis, and collaborative filtering as “hardware for democracy”).

110. *Reno v. ACLU*, 521 U.S. 844, 870 (1997) (quoting *Reno v. ACLU*, 929 F. Supp. 824, 842 (E.D. Pa. 1996)).

111. See, e.g., SHAPIRO, *supra* note 107, at 16.

112. See discussion of “mash-ups” in Part III.B.5, *infra*.

113. See Mark A. Lemley & Lawrence Lessig, *The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era*, 48 UCLA L. REV. 925, 930-33 (2001).

114. *Id.*

115. ANDREW F. WOOD & MATTHEW J. SMITH, *ONLINE COMMUNICATION: LINKING TECHNOLOGY, IDENTITY, AND CULTURE* 181 (2001).

116. See Anupam Chander, *Whose Republic?*, 69 U. CHI. L. REV. 1479, 1488-89 (2002) (arguing that the Internet empowers minorities who have not been reflected in traditional media to represent themselves and build new national and transnational

- *Digital hardware.* Digital video cameras now abound, creating amateur *auteurs*. Sony's recent introduction of a high-definition video camera for \$3000, while an expensive luxury for most home users, brings even high-quality video imaging within the reach of some middle-class households. The computer itself, of course, is the most powerful piece of digital hardware. Its increasing penetration in American households has extended access to the digital revolution,¹¹⁷ though a digital divide still persists.
- *Authoring software.* Consider Apple's iMovie, which Apple distributes for free with every Macintosh. Apple music software GarageBand lets you, depending on your preferences, feel and sound like a rock star or conduct a full orchestra.¹¹⁸ Both iMovie and GarageBand come free with the purchase of an Apple computer. The Web itself comes with authoring software. Tim Berners-Lee, the Web's inventor, insisted that Web software include not just a browser, which would enable one to access content on others' computers, but also an editor, which would enable the user to add her own content.¹¹⁹ "Mod" software, such as Machinima, enables users to not merely watch a movie or play a videogame, but also to turn the games into film and to "modify" or "re-skin" existing characters to look like themselves.¹²⁰ Increasingly, software will allow our children to insert themselves into their favorite make-believe worlds. Dollhouses now face virtual competition.¹²¹
- *Peer-to-peer networks.* Technologies of creation require technologies of communication. Peer-to-peer networks give us each a bullhorn, mercifully without forcing anyone else to listen to what we have to say. Peer-to-peer services capitalize upon the fact that at any moment most computers exhaust only a small percentage of their computational power and their network access. Bandwidth access can be expensive, but peer-to-peer services reduce the need for the author to purchase large amounts of such access by making the file available for download from a variety of distribution points across the Internet. Even very large files—typically ones including video—can be rapidly disseminated

communities).

117. See ERIC VON HIPPEL, *DEMOCRATIZING INNOVATION* 13 (2005) ("Users' ability to innovate is improving *radically* and *rapidly* as a result of the steadily improving quality of computer software and hardware, improved access to easy-to-use tools and components for innovation, and access to a steadily richer innovation commons.").

118. See Apple, GarageBand, <http://www.apple.com/ilife/garageband/>.

119. BERNERS-LEE, *supra* note 12, at 57; Chander, *supra* note 116, at 1491.

120. For an overview of the use of modification or "mod" software in computer gaming, see generally *Mod (Computer Gaming)*, WIKIPEDIA, http://en.wikipedia.org/wiki/Mod_%28computer_gaming%29.

121. See, e.g., Andrew Lavalee, *Now, Virtual Fashion*, WALL ST. J., Sept. 26, 2006, at B1 (describing "the fast-growing virtual world of Second Life" in which game players buy clothes for their avatars).

using software such as BitTorrent. The more popular a file, the more readily it becomes available via peer-to-peer services. By sharing computing resources across the Web, each of us becomes more powerful than any of us might be standing alone.

- *Blogs*. Companies such as Google and Moveable Type offer free software to create Web-based diaries that enable any individual or group to comment on the issues of the day—or on the issues of their own lives. They also host such blogs for free. Blogs now number in the tens of millions.¹²²
- *Wikis*. Even the task of writing a major encyclopedia of the world is no longer in the hands of a small group of editors at a major publishing house. Wikipedia takes advantage of the distribution of human knowledge by permitting individuals worldwide to contribute bits and pieces to a large encyclopedia. It is written and edited “collaboratively by volunteers, allowing most articles to be changed by anyone with access to the website.”¹²³
- *Podcasting and vidcasting*. The radio station now faces competition from home-brewed talk and music available on the Internet. The wide distribution of mobile digital music players enables users to download readily their favorite audio-cast and listen to it at their convenience. Rather than rely on editors at radio stations to determine audio programming, podcasting permits anyone to supply material, subjecting herself only to the mercy of the audience. Fast on the heels of podcasting has been vidcasting, in which individuals—equipped with digital camcorders, editing software, and a home computer—offer television clips, music videos, political commentary, and amateur videoblogging on popular sites such as YouTube¹²⁴ without requiring the intermediation of large studio houses.

Many have expressed the hope that this technological revolution would indeed fuel a social one, ushering in a “semiotic democracy”¹²⁵ in which everyone would have the power to create and disseminate cultural knowledge.¹²⁶ The cultural theorist John Fiske is credited with coining the term

122. Carl Bialik, *Measuring the Impact of Blogs Requires More than Counting*, WALL ST. J. ONLINE, May 26, 2005.

123. *Wikipedia*, WIKIPEDIA, <http://en.wikipedia.org/wiki/Wikipedia>.

124. YouTube has rocketed to the top of the charts of World Wide Web sites in just a year’s time. See Press Release, comScore Networks, *Online Video Officially Goes Mainstream as YouTube.com Breaks into the comScore Media Metrix Top 50* (Aug. 15, 2006), available at <http://www.comscore.com/press/release.asp?press=982>.

125. JOHN FISKE, *TELEVISION CULTURE* 95, 236-39 (1987); see *supra* note 29 and accompanying text.

126. See, e.g., LAWRENCE LESSIG, *FREE CULTURE* 37 (2004) (arguing that the twenty-first century could be both “read and write” because of technical advances that make creating and disseminating cultural products easier and cheaper); Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information*

“semiotic democracy.” He initially described the concept in the context of the dominant medium of the last century: television. Despite television’s very different architecture compared to the Internet Protocol, Fiske characterizes television as a far-from-static medium. Calling it “a text of contestation,” he describes how given characters, themes, and settings are nonetheless reinterpreted and imagined by diverse viewing audiences.¹²⁷ Fiske shows that even the top-down, cool medium of television is amenable to dialogical processes of identity formation, allowing individuals to make subcultural meanings and to “produce knowledges of the world.”¹²⁸ His analysis suggests, of course, that meaning-making is always a dialogic, not monologic process: cultural authorities are presented to us but not necessarily accepted whole cloth.

The Internet Protocol goes beyond illustrating this. It facilitates semiotic democracy, handing us the tools, from iMovie to CD burners to mod software, that make it even easier to create “bespoke identities, tailored for the wearers by themselves.”¹²⁹ As Eric von Hippel writes, a traditional top-down model of scientific and cultural innovation does not efficiently distribute resources and information to “the right people” who may make the best use of these. But “[d]emocratization of the opportunity to create is important beyond giving more users the ability to make exactly the right products for themselves,” von Hippel adds.¹³⁰ “[T]he joy and the learning associated with creativity and membership in creative communities are also important, and these experiences too are made more widely available as innovation is democratized.”¹³¹

B. *Techonomics and Technocracy*

But when the technology combines with the economic rationale for intellectual property (in a mash-up I call “techonomics”), the vast democratic and egalitarian benefits of the Internet get lost. This is because, guided by the

Society, 79 N.Y.U. L. REV. 1, 37 (2004) (observing that “[d]igital technology makes the values of a democratic culture salient to us because it offers the technological possibility of widespread cultural participation”); Yochai Benkler, Lecture, *Freedom in the Commons: Towards a Political Economy of Information*, 52 DUKE L.J. 1245, 1246-47 (2003) (tracing how the Internet allows the growth of nonmarket production of cultural content through decentralized production and distribution); Chander, *supra* note 116, at 1492-93 (criticizing CASS SUNSTEIN, *REPUBLIC.COM* (2001), for failing to recognize the benefits of the greater diversity of voices on the Internet); Froomkin, *supra* note 109, at 798 (highlighting how Internet governance mechanisms conform to a high standard of discourse ethics as outlined by Jurgen Habermas).

127. FISKE, *supra* note 125, at 236-39.

128. *Id.* For a critique of Fiske, see Mike Budd et al., *The Affirmative Character of U.S. Cultural Studies*, 7 CRITICAL STUD. MASS COMM. 169 (1990) (arguing that Fiske overestimates both the freedom of audiences in receiving popular media and the amount of oppositional cultural reading taking place).

129. SALMAN RUSHDIE, *THE GROUND BENEATH HER FEET* 95 (1999).

130. VON HIPPEL, *supra* note 117, at 123.

131. *Id.* at 123-24.

incentive rationale alone, law's role simply is to restrike the old balance between economic incentives and access that existed before the technological advance. In the context of the Internet Protocol, we hear calls for law to restore copyright owners back to the position they held before the Internet Protocol. Presuming that the old law got copyright's elusive balance between incentives and access just right, legal regulations to control the new technologies would elide the technologies' democratizing potential and their challenge to existing social relations.

Worse still, technomics has in fact urged a policy of using technology to govern itself and its users. The rise of digital rights management (DRM), in which "the answer to the machine is in the machine,"¹³² allows private property owners to technologically disable users from accessing and using protected works. Private contracts enhance even further the power of private property holders to control the terms of use.¹³³ The economic rationale for intellectual property rights affirmatively pushes away from semiotic democracy and towards technocracy, a world in which digital encryption code—backed by legal code¹³⁴—would control the people's access to knowledge.¹³⁵ First, the rationale ignores, and thus fails to harness, the technology's potential for semiotic democracy. Worse, it threatens to quash the technology's liberating potential, believing that the technology is bad because it reduces authors' incentives.¹³⁶ The discourse does not register potential benefits of the technology that may be described, understood, and explained outside the framework of economic analysis—for example, the proliferation of new authors and the democratization of culture.

132. PAUL GOLDSTEIN, *COPYRIGHT'S HIGHWAY 170* (2003) (quoting Charles Clark, the Legal Advisor to the International Publishers Copyright Council, in 1995). Clark envisioned a digital architecture that would "record and reward." *Id.* Home users would pay to play through Internet applications coded to monitor identity and provide access in exchange for appropriate royalties. While Goldstein names the potential perfected form of this convention in digital media the "celestial jukebox," emerging trends in e-commerce, most evident in Apple iTunes and Real Rhapsody, confirm that this seemingly fantastic theory is closer to reality than science-fiction. *See* Apple iTunes, <http://www.apple.com/itunes/> (selling the right to download from its archive of popular songs for \$0.99 per song and coding the songs to enable users to make three legitimate hard copies of each song); RealNetworks, Rhapsody, <http://www.real.com/rhapsody> (providing unlimited access to an archive of over one million songs in exchange for a monthly fee and enabling users to copy Rhapsody licensed songs to qualified mobile MP3 players while their subscriptions remain current).

133. *See* Fisher, *Property and Contract on the Internet*, *supra* note 5.

134. *See* U.S. COPYRIGHT OFFICE, *THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998: U.S. COPYRIGHT OFFICE SUMMARY* (1998), available at <http://www.copyright.gov/legislation/dmca.pdf>; Jonathan Band, *The Digital Millennium Copyright Act: A Balanced Result*, STAN. TECH. L. REV. (1998), <http://stlr.stanford.edu/STLR/Events/dmca/index.html>.

135. *See* LESSIG, *supra* note 126; LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* 122-41 (1999) [hereinafter LESSIG, CODE].

136. *Cf.* Justin Hughes, "Recoding" *Intellectual Property and Overlooked Audience Interests*, 77 TEX. L. REV. 923, 940-66 (1999).

Techonomics not only fails to recognize calls for greater freedom to use knowledge and culture in the present and future; it threatens to even whittle away the freedoms we have had in the past.¹³⁷ If the neoclassical economic theory of “market failure” is the only justification for “fair use” of copyrighted material,¹³⁸ for example, then the Internet’s promise of perfect global markets would render “fair use” obsolete. Some would boldly herald such a technocracy.¹³⁹ Techonomics prefers technocracy because it is efficient. The potential to perfectly regulate information through digital technology and computer networks is heralded for reducing transaction costs and the administrative costs of law.¹⁴⁰ And a few prominent law and economics thinkers hold that indefinitely renewable copyright (as imagined by technocracy) is not inconsistent with the economic rationale for intellectual property (though it is inconsistent with the Constitution).¹⁴¹

Many others, however, would mourn the loss of “socially important opportunities” under technocracy.¹⁴² Indeed, the discomfort with the specter of technocracy should give us pause about the limits of the economic analysis of intellectual property. On the whole, it would seem intellectual property scholars are increasingly committed to economic analysis and yet are reluctant to accept its fate.¹⁴³ More and more, it seems questionable that the governance of cultural works and technology itself fits wholly within this narrow economic realm.¹⁴⁴

137. See LESSIG, *supra* note 126.

138. See Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1601 (1982) (acknowledging that “[w]hile other approaches to fair use may legitimately be advanced, much of fair use depends on the resolution of” market-based concerns, in particular whether the “defendant could not appropriately purchase the desired use through the market”).

139. See Glynn S. Lunney, Jr., *The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act*, 87 VA. L. REV. 813, 814 & n.4 (2001).

140. See *id.*

141. See William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U. CHI. L. REV. 471, 517-18 (2003) (arguing in favor of indefinite copyright protection, made constitutional through limited terms with an unlimited potential for renewal).

142. WILLIAM W. FISHER III, PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT 162 (2004); see also LESSIG, CODE, *supra* note 135, at 135 (“[W]hen intellectual property is protected by code, nothing requires that the same balance be struck. Nothing requires the owner to grant the right of fair use. . . . Fair use becomes subject to private gain.”).

143. See *infra* Part III.B.1 (discussing MGM v. Grokster, 125 S. Ct. 2764 (2005)).

144. Compare Gordon, *supra* note 138, with Robert P. Merges, *The End of Friction? Property Rights and Contract in the “Newtonian” World of On-Line Commerce*, 12 BERKELEY TECH. L.J. 115, 134 (1997) (arguing that fair use has historically harbored a variety of non-market values and predicting that in the future fair use “will revolve less around market failure, and more around the idea of favoring certain classes of users with a statutory privilege”).

III. INTELLECTUAL PROPERTY

A. *The Failure of Utilitarianism as a Comprehensive Theory of Intellectual Property*

It is increasingly evident that utilitarianism fails as a comprehensive theory of intellectual property, either descriptively or prescriptively. Intellectual property theorists begin with the “utilitarian” goal of maximizing creative output. Because information is assumed by its nature to be nonrivalrous and nonexcludable, free-riding will eliminate any incentives to produce information. State-granted property rights in information create the excludability necessary to incentivize production. Indeed, market failure is cited as the *raison d’être* for intellectual property, explaining copyright, patent, and even trademark.¹⁴⁵ A central feature of this account is its focus on the market as the vehicle for solving distributional problems. Willingness to pay determines access to the fruits of this information regime. After the property right is established, the government’s role is limited to protecting that property right—and also to intervene in cases of further market failures, such as in the case of fair use in copyright.

To be sure, this account in legal scholarship differs from the understanding of utilitarianism among moral philosophers and even among economists themselves. Rather than presuming the goodness of maximizing creative output, utilitarians would begin with individual preferences, and build the theory from there. Focusing on individual preferences would require us to consider impacts on people without any ability to pay for intellectual goods.

But given that my goal is to *reinterpret intellectual property law*, I will concentrate my energies on the *utilitarianism of intellectual property scholars*.¹⁴⁶

I offer three critiques of intellectual property utilitarianism: (1) it fails descriptively to capture fully the dynamics of cultural creation and circulation; (2) it fails descriptively as a comprehensive account of extant legal doctrine; and (3) it fails prescriptively as an account for deciding the important intellectual property conflicts of the day. I develop these critiques through the vehicle of case studies below.

145. See, e.g., LANDES & POSNER, *supra* note 17, at 37-70, 40 (“In the absence of copyright protection the marginal price of a book or other expressive work will eventually be bid down to the marginal cost of copying with the result that the work may not be produced in the first place because the author and publisher may not be able to recover their costs of creating it.”); see also *id.* at 166-209 (discussing the economics of trademark law); *id.* at 294-333 (explaining economic theory underlying patents).

146. For one operationalization of *philosophical* utilitarianism in intellectual property law, see William W. Fisher & Talha Syed, *Why We Should Reform Developed Nations’ Drug Innovation Systems to Address the Health Crisis in the Developing World*, 40 U.C. DAVIS L. REV. (forthcoming February 2007).

In particular, two well-known complaints about utilitarians' prescriptions apply here. First, within utilitarianism's all-engulfing category of "utility" we have no way of judging which specific types of utility (public health?) rank high, and which (cultural productivity?) rank low.¹⁴⁷ The modern law and economics approach would rely upon the market to spur creation—but this leads to the mistake that drugs for baldness are more important than drugs for malaria because the former enjoys a multi-billion dollar market, while those who need the latter are too poor to offer much to save their own lives. Understanding intellectual property as incentive-to-create reduces to the claim that the ability to pay, as evidenced in the marketplace, should determine the production of knowledge and culture.

Utilitarianism's central failure, of course, is its neglect of distribution.¹⁴⁸ At times, utility in the intellectual property context is defined simply as the maximization of creative output. The goal then becomes creating the greatest number of cultural artifacts to be trickled down to the greatest number of people.¹⁴⁹ The utilitarian approach to intellectual property does not ask: Who makes the goods? Who profits, and at whose expense? Is high-tech production up in India but without significant benefit to women or the poor?¹⁵⁰ Martha Nussbaum describes this as "the problem of respect for the separate person."¹⁵¹ A utilitarian calculus that presumes overall welfare in the aggregate "doesn't tell us where the top and the bottom are," Nussbaum critiques. "[I]t doesn't tell us 'who has got the money, and whether any of it is mine.'"¹⁵² Analyses based on the well-being of the aggregate do not confront distinctions between the developed and developing worlds, the urban and the rural, women and men, blacks, Asians, Latinos, and whites. In Nussbaum's words, "aggregate data

147. This recalls John Stuart Mill's distinction between "high" and "low" pleasures, and more recent discussions of "utility monsters." See generally JOHN STUART MILL, *UTILITARIANISM* (Roger Crisp ed., Oxford Univ. Press 1998) (1863); ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974).

148. See AMARTYA SEN, *Equality of What?*, in *CHOICE, WELFARE AND MEASUREMENT* 353, 354 (1982) ("The utilitarian objective is to maximize the sum-total of utility irrespective of distribution."); *id.* at 356 ("Insofar as one is concerned with the *distribution* of utilities, it follows immediately that utilitarianism would in general give one little comfort.").

149. See R. Polk Wagner, *Information Wants To Be Free: Intellectual Property and the Mythologies of Control*, 103 COLUM. L. REV. 995, 1017-19 (2003) (arguing that dynamic incentive effects reveal that greater control by property holders leads to maximum production of cultural goods).

150. In May 2004, for example, India's Bharatiya Janata Party suffered a surprising electoral upset because its economic growth had not benefited the country's sizeable poor population. S. Nihal Singh, *Indian Election: Of Computer Mice and Men*, YALEGLOBAL ONLINE, May 17, 2004, <http://yaleglobal.yale.edu/display.article?id=3887>.

151. MARTHA C. NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* 61 (2000).

152. *Id.*

aren't enough for a normative assessment" of how we are doing. We "need to know how each one is doing, considering each as a separate life."¹⁵³

As my case studies below illustrate, there is increasing frustration with utilitarian intellectual property. The critics focus on law's failure to accommodate plural values attendant to intellectual production, from the security of basic human rights to capability for cultural participation and distribution of the material benefits of cultural productivity. But before proceeding, let me be plain: I do not reject the utilitarian account's central insights in toto; it remains a necessary tool in formulating intellectual property policy. Neither do I wish to exchange one metanarrative for another. I simply seek to expose some of the gaps in this theory and to begin to develop a cultural and social account of intellectual property that could supplement our current understanding of this law.

B. Case Studies

In case after case today, we see that traditional law and economic analysis fails to capture fully the struggles at the heart of local and global intellectual property law conflicts. In the handful of case studies that follow—ranging from high technology to low, from First World to Third—we see that the proponents of that school have failed to persuade the United States Supreme Court, let alone activists in the developing world seeking access to essential medicines. And yet, even lacking a comprehensive theoretical account of intellectual property, we witness its exponential growth. Through the case studies that follow, I will demonstrate that the *raison d'être* for intellectual property rights must be understood in broader terms. Rather than narrowly viewing intellectual property as *incentives-for-creation*, we must understand intellectual property as *social and cultural relations*. Intellectual property rights structure social relationships and enable, or disable, human flourishing. Despite calls to maintain an originalist understanding of intellectual property simply as a utilitarian tool for stimulating creative production, intellectual property law more and more demonstrates its commitment to plural values, from concerns about social effects and distributive justice to its relationship to participatory cultures.

I want to be careful to avoid falling prey to Hume's is-ought fallacy.¹⁵⁴ The case studies show us the complexity of values that appear to be at stake; they demonstrate the inadequacy of the utilitarian intellectual property story—as a descriptive matter. They do not tell us what our normative values should be. Yet, in discussing these cases, we can begin to see that just recognizing the

153. *Id.* at 60.

154. See DAVID HUME, A TREATISE OF HUMAN NATURE, bk. 3, pt 1, § 1 (warning writers to be on their guard when deriving prescription from description).

disparate social and cultural effects of our global intellectual property policy becomes a rallying cry to take these effects into account.¹⁵⁵

1. MGM v. Grokster

In deciding the copyright case of a generation, the Supreme Court refused an invitation to rewrite copyright law according to popular law and economic rationales.¹⁵⁶ Consider the backdrop against which the Court decided the case: a brief of illustrious law professors and economists, including Nobel laureates Kenneth Arrow and Gary Becker, urged a purely economic approach. In answering whether peer-to-peer file-sharing services such as Grokster should be secondarily liable for copyright infringement committed by users of its software, this group sought to make trial courts economic cost accountants, imposing liability on the basis of whether the intellectual property holder or the alleged secondary infringer is the cheaper enforcer of the intellectual property holder's rights. Arrow and company urged that the Court adopt a test inquiring "whether the indirectly liable party at low cost could have discouraged the infringing uses, and whether the complaining copyright holder at low cost could have pursued the direct infringers rather than litigating on indirect liability theories."¹⁵⁷

But where the law and economics scholars argued in favor of imposing liability on Grokster on the basis of efficiency, the Supreme Court chose to impose liability for what it saw as moral wrongdoing.

Justice Souter's opinion for the Court instead adopted the common law approach to fault-based liability, which turns not on cost-benefit analysis but on the basic principle of fairness. The Court ultimately held that Grokster would be accountable because it had demonstrated, or so the record suggested, a *bad intent* to encourage and profit from illicit copying by users. As the Court quoted common law precedent, "There is a definite tendency to impose greater responsibility upon a defendant whose conduct was intended to do harm, or

155. This is not unprecedented: economic critiques of maximalist intellectual property rights, which posit that strong intellectual property rights stifle future creators as a *descriptive* matter, are typically followed with *prescriptive* arguments to cut back on intellectual property protection and return to a prior optimal state of "balance" between private and public rights.

156. In so doing, it continued its earlier rejection of pure economic reasoning. *See Eldred v. Ashcroft*, 537 U.S. 186, 222 (2003) (finding that the Court is not in a position to second-guess Congress's policy decision to extend copyright protection). Indeed, *Grokster* represents the second time that Nobel laureate economists, including Kenneth Arrow, failed to convince the Court to set intellectual property law on a firm economic foundation.

157. Brief for Kenneth J. Arrow, Ian Ayres, Gary Becker, William M. Landes, Steven Levitt, Douglas Lichtman, Kevin Murphy, Randal Picker, Andrew Rosenfield, and Steven Shavell as Amici Curiae Supporting Petitioners at 8, *MGM v. Grokster*, 125 S. Ct. 2764 (2005) (No. 04-480), 2005 WL 176441.

was morally wrong.”¹⁵⁸ The Court adopted an “inducement rule” that ultimately premised indirect liability on “purposeful, culpable expression and conduct.”¹⁵⁹ Where an economic approach might predicate liability on least cost avoiders or on the effects of infringement on creators’ incentives—but certainly not on the bad mind of the actors—the Court focused on *moral* culpability.¹⁶⁰

The Court’s opinion also broke stride with the economic reasoning offered in *Grokster*’s favor. A brief on behalf of “Internet Law Faculty” penned by a group of Harvard law professors, for example, worried about the harm that imposing secondary liability on entities such as *Grokster* would cause for technology innovation.¹⁶¹ Their argument was that a twenty-year-old precedent, *Sony Corp. of America v. Universal City Studios, Inc.*,¹⁶² in which the Court refused to impose secondary liability on the makers of the then-innovative technology of the VCR, had struck the proper balance between incentives for property owners and incentives for the innovators of new technologies.¹⁶³ The brief sang a familiar intellectual-property-as-incentives tune. The goal of copyright law is an efficient balance between incentives for creators and the rights of future innovators. The *Sony* case, the Harvard authors argued, struck the right balance. That standard, they argued, “has proven to be an effective means of balancing the interests of copyright owners with the equally important need to preserve incentives for technological innovation.”¹⁶⁴

The Court, of course, declined to ground its ruling narrowly on either economic theory. And while the Court did acknowledge one aspect of the economic analysis from the Arrow Brief—recognizing indirect liability as a practical option when direct enforcement is infeasible—this was not the Court’s central concern.¹⁶⁵ The Court accepted the economic argument as legitimate, but refused to sanctify it as supreme over all other arguments. In

158. *MGM v. Grokster*, 125 S. Ct. 2764, 2780 (2005) (citing W. KEETON ET AL., PROSSER AND KEETON ON LAW OF TORTS 37 (5th ed. 1984)).

159. *Id.*

160. *See id.* at 2781 (requiring evidence of “unlawful purpose” in order to find secondary liability where defendant lacks actual knowledge of infringement).

161. Brief for Internet Law Faculty as Amici Curiae Supporting Respondents, *MGM v. Grokster*, 125 S. Ct. 2764 (2005) (No. 04-480), 2005 WL 508098.

162. 464 U.S. 417 (1984).

163. *See* Brief for Internet Law Faculty as Amici Curiae Supporting Respondents, *supra* note 161, at 3 (arguing that “the *Sony* standard works well; the Court should neither change it, nor deem it inapplicable to today’s technologies”).

164. *Id.* at 11 (bemoaning the “impact of such a change . . . on technological innovation”).

165. Here, the Court explains, “When a widely shared service or product is used to commit infringement, it may be impossible to enforce rights in the protected work effectively against all direct infringers, the only practical alternative being to go against the distributor of the copying device for secondary liability on a theory of contributory or vicarious infringement.” *Grokster*, 125 S. Ct. at 2776.

rejecting the economic approach as a sufficient basis for its ruling, the Court acknowledged the other values at stake.

I seek here neither to defend nor to attack the Court's holding, but rather (1) to discern what motivates intellectual property analysis today, and (2) to locate in the Court's reasoning a prescriptive approach to complement traditional economic analysis of intellectual property. Here, we witness an analysis that suggests that for all of its uniqueness, intellectual property law is also common law,¹⁶⁶ with all its teeming values, inconsistencies, and historical contingency. The Court sought to create a set of fair rules to regulate relations between authors and inventors and between various commercial and non-commercial interests. Perhaps the most surprising element of the *Grokster* decision is that scholars thus far refuse to acknowledge that their account of intellectual property is not one shared by the United States Supreme Court.

2. *New from the Creative Commons: The developing nations license*

Intellectual property's role in structuring social relations even across borders comes into stark relief in the context of a new license developed by Creative Commons. Creative Commons found that even the array of the half-dozen licenses it initially offered proved inadequate to satisfy the eleemosynary intentions of creators.¹⁶⁷ Some creators sought to distinguish between grants to a public domain in the developing and developed world, happy to donate to the former, but not to the latter. Working with Jamie Love of the Consumer Project on Technology (now renamed the Knowledge Ecology Project) and others,¹⁶⁸ Creative Commons put forward a new "developing nations" license. This "DevNat" license allows authors in the First World "to invite a wide range of royalty-free uses of their work in developing nations while retaining their full copyright in the developed world."¹⁶⁹ The DevNat Commons Deed grants persons in developing nations freedom to copy, distribute, display, and perform the work (including digital performance on the Web) as well as to make derivative works, requiring only attribution. DevNat defines "developing

166. Literally so, at times: secondary liability in copyright, of course, is entirely judge-made law, not hinted at in the Federal Register.

167. Creative Commons Japan, for example, permits people to disallow pornographic uses. Creative Commons in the United States has responded to diverse needs by developing new licenses for sampling and developing nations.

168. The license was designed in cooperation with the Silicon Valley law firm of Wilson Sonsini Goodrich and Rosati and other experts on intellectual property and development. See Press Release, Creative Commons, Developing Nations Copyright License Frees Creativity Across the Digital Divide (Sept. 13, 2004), available at <http://creativecommons.org/press-releases/entry/4397>.

169. *Id.*; see also Creative Commons Legal Code, Developing Nations 2.0, <http://creativecommons.org/licenses/devnations/2.0/legalcode> [hereinafter DevNat Code]. The license will terminate automatically upon either a breach by the licensee or within five years of any Developing Nation ceasing to qualify as such. *Id.* § 7.

nation” as one that is not classified as “high income” by the World Bank.¹⁷⁰ At the same time that the World Wide Web brings DevNat licensed works to the developing world, it complicates the project of donating intellectual property to that part of the world. Licensees in the developing world, of course, might employ the Internet to distribute the original or a derivative. Given the World Wide Web’s ubiquity, this would run contrary to the intent of the licensor, who seeks to maintain her rights in the developed world. DevNat accordingly requires licensors who post the licensed work or any derivative thereof on the Internet to take reasonable measures (such as geo-location through IP addresses) to limit its distribution to developing nations.¹⁷¹

DevNat recognizes a variety of impulses among licensors: that many refuse to make money off the backs of the world’s poorest people; that they believe that the poorest peoples have a human right to access knowledge materials; and that intellectual property rights can be a tool for restructuring social relations.¹⁷² Users of the license channel technology to operationalize their social vision. Indeed, DevNat illustrates *intellectual property as a social movement*. License co-architect Larry Lessig hails it as a tool for authors seeking to “participate first-hand in reforming global information policy.”¹⁷³ As Love states, the license has a strong distributive ethic: “It is a tool to make the resource-poor information-rich.”¹⁷⁴

To be sure, DevNat is largely consistent with the economic account of intellectual property. The decision to adopt DevNat responds in part to a market failure: because of the information costs of determining the price at which the IP holder would be willing to sell his or her work in the developing world, few people in the developing world seek to license those authors’ works, giving up republishing or translating the works even when the costs of doing so might be less than their willingness to pay. The license, which recognizes authors’ desires to protect their copyright in the First World, also affirms a familiar intellectual-property-as-incentives thesis—the incentive to create is preserved by the economic remuneration available from developed world markets. These understandings permit me to reiterate that I do not deny the importance of the economic account of intellectual property.

170. *Id.* § 1(c).

171. *Id.* § 4(d) (The license expressly “does not authorize making the Work, any Derivative Works or any Collective Works publicly available on the Internet unless reasonable measures are undertaken to verify that the recipient is located in a Developing Nation, such as by requiring recipients to provide name and postal mailing address, or by limiting the distribution of the Work to Internet IP addresses within a Developing Nation.”).

172. DevNat represents a voluntary version of the global democratic culture vision offered by Neal Netanel. See Neil Weinstock Netanel, *Asserting Copyright’s Democratic Principles in the Global Arena*, 51 VAND. L. REV. 217, 224 (1998) (advocating compulsory licenses “for the production of export-restricted copies and translations of expressive works in countries in which . . . the works are . . . not available at reasonable cost”).

173. See Press Release, Creative Commons, *supra* note 168.

174. *Id.*

Yet, it remains a partial account. Consider some current uses of this license: architects have made their safely structured designs available to African developers. The organization Architecture for Humanity has offered post-conflict reconstruction designs for Sudan under DevNat.¹⁷⁵ After the 2005 South Asian earthquake, Architecture for Humanity has sought to develop DevNat-licensed guides for earthquake-resistant architecture.¹⁷⁶ Even novelists are beginning to use the license.¹⁷⁷ While formulated largely as a device for transferring knowledge from the developed to the developing world, DevNat has been deployed by some in the developing world to establish a kind of limited commons property regime within the developing world. These developing country creators are happy to share their work freely in the developing world, but happy at the same time to exploit any financial remuneration available from developed world markets.¹⁷⁸ Market failure alone cannot explain these projects. Concerns for distributive justice and human rights are evident.¹⁷⁹

The existence of these multiple values illustrates the conceptual fissures in what is often called the “copyleft” movement—the effort to use intellectual property law to advance progressive social goals. For example, one of that movement’s pioneers and stalwarts, Richard Stallman, critiques DevNat because it prohibits noncommercial copying in the First World, a right he considers fundamental to freedom.¹⁸⁰ Lessig responds that while the freedom to copy is important, it can be overridden where “it interferes with other

175. See Architecture for Humanity, Sudan: Dying for Change, <http://www.architectureforhumanity.org/programs/Sudan/index.htm> (including an agriculture technology center, sand bag huts, water collection units, and food distribution centers).

176. Architecture for Humanity, Design[ER]: A Call for Ideas for an Earthquake Resistant Housing Manual for Kashmir, http://www.architectureforhumanity.org/programs/South_Asia_Earthquake/designer_requirements.htm.

177. See, e.g., Darren Waters, *Digital Citizens: The Activist*, BBC NEWS ONLINE, July 22, 2005, <http://news.bbc.co.uk/1/hi/entertainment/4112004.stm> (discussing the release of CORY DOCTOROW, *SOMEONE COMES TO TOWN, SOMEONE LEAVES TOWN* (2006), under the DevNat license).

178. For example, the West Africa Doctors and Healthcare Professionals Network, based in Accra, Ghana, makes information available under DevNat. See West Africa Doctors and Healthcare Professionals Network, <http://www.wadn.org/wadn>.

179. As Lessig himself states: “The fact is that most of the world’s population is simply priced out of developed nations’ publishing output. To authors, that means an untapped readership. To economists, it means ‘deadweight loss.’ To human rights advocates and educators, it is a tragedy. The Developing Nations license is designed to address all three concerns.” Press Release, Creative Commons, *supra* note 168.

180. Email Interview with Richard Stallman, Founder, Free Software Foundation (Feb. 6, 2006), available at <http://www.linuxp2p.com/forums/viewtopic.php?p=10771>; see also Benjamin Mako Hill, *Towards a Standard of Freedom: Creative Commons and the Free Software Movement*, ADVOGATO, <http://www.avogato.org/article/851.html> (July 29, 2005) (lamenting that the developing nations license and sampling licenses replace what could have been a call for a world where “essential rights are unreservable” with the relatively hollow call for “some rights reserved”).

important values.”¹⁸¹ Note the tensions between the utilitarian (economic), libertarian (Stallman), and egalitarian (Love) visions. DevNat implicates all of these visions, refusing to endorse just one.

In short: people seek not just a “free culture” but also a “fair culture.”¹⁸² New efforts from the Science Commons¹⁸³ to the Public Intellectual Property Resource for Agriculture¹⁸⁴ also reflect these diverse goals, as do historic efforts that created the “Green Revolution.”¹⁸⁵

3. *Access to essential medicines*

In 1971, the New Jersey Supreme Court declared that property rights could not stand in the way of the health and well-being of the poor. In *State v. Shack*,¹⁸⁶ a farmer employed migrant workers for his seasonal needs, housing them at a camp on his property. Attorney Tejeres sought out a migrant worker who needed the removal of twenty-eight sutures. Attorney Shack sought to discuss a legal problem with another migrant worker. Tejeres and Shack insisted on delivering their aid and information to the workers in the privacy of their living quarters. When they entered the property, the owner called upon a state trooper to evict them. The New Jersey Supreme Court held that the owner’s rights in his land could not “stand between the migrant workers and those who would aid them.”¹⁸⁷ “Property rights serve human values[,]” the court memorably declared.¹⁸⁸

State v. Shack sits firmly in the property law canon. It represents property law’s “social enlightenment”—the recognition that in a complex and increasingly interconnected society, property rights will inevitably conflict with other vital interests, from the property rights of others, to health, to speech, to

181. Lawrence Lessig, *CC in Review: Lessig Letters on Creative Commons Important Freedoms*, <http://creativecommons.org/weblog/entry/5719> (Dec. 7, 2005).

182. I borrow this phrasing from my student, Leena Kamat, co-founder of the Intellectual Property and Social Justice student group at King Hall.

183. See Science Commons, <http://sciencecommons.org>.

184. See PIPRA, <http://www.pipra.org>.

185. The Green Revolution refers to the technological “transfer and diffusion of a package of improved agricultural practices involving high-yielding varieties of seeds, fertilizers, pesticides, controlled water, credits, and some agricultural machinery” to developing world countries such as India since the mid-1960s. Govindan Parayil, *The Green Revolution in India: A Case Study of Technological Change*, 33 *TECH. & CULTURE* 737, 753 (1992). This technology transfer responded to agricultural and development failures, including the threat of famine in India just preceding the transfer. See *id.* The Green Revolution has been hailed as a successful social, economic, and technological policy, which assisted countries such as India in becoming “self-sufficient in food grain production.” *Id.* at 756. The Green Revolution has been critiqued by some, including Vandana Shiva. See VANDANA SHIVA, *THE VIOLENCE OF THE GREEN REVOLUTION* (1991).

186. 277 A.2d 369 (N.J. 1971).

187. *Id.* at 372.

188. *Id.*

civil rights.¹⁸⁹ And like the landlord/tenant cases such as *Javins v. First National Realty Corp.*,¹⁹⁰ which responded to the civil rights struggles of the previous decade,¹⁹¹ *Shack* paid heed to social facts about the plight of migrant farm workers from Mexico. The court in *Shack* was openly moved by governmental recognition of the poor living and social conditions of the nearly one million migrant farmworkers arriving as seasonal workers to the United States. The court noted that private property rights could not be used to prevent this “highly disadvantaged segment”¹⁹² of society, which was “rootless and isolated . . . unorganized and without economic or political power,”¹⁹³ from accessing the assistance to which the state held they were entitled.

Fast-forward thirty years: in the new millennium, the world’s attention has again turned to poverty and social relations between the First and Third Worlds. Today, the Internet and digital technology enable information to trespass legal and technical barriers, and social workers such as Doctors Without Borders seek to bring medicines to those suffering from AIDS and other illnesses in the Third World.¹⁹⁴ Again, property rights would stop them, although this time they are copyrights and patents rather than rights in land. And again, we witness a social movement articulating fundamental rights to health and well-being—and the tragedy of property rights thwarting them.

The movement has gathered pace since poor countries signed onto TRIPS in 1995, which required all WTO member states to recognize patents in everything from medicines to seeds by 2005.¹⁹⁵ Prior to TRIPS, states had immense discretion about whether and how to protect intellectual property rights. Developing countries such as India did not recognize patents in essentials such as food and drugs in order to facilitate competition—and thus, lower prices and greater access to these goods. The crucial distinction made in the Indian Patent Act of 1970 was to recognize patents in pharmaceutical processes but not products.¹⁹⁶ This approach allowed for the proliferation of a

189. *Id.* at 373 (“[A]n owner must expect to find the absoluteness of his property rights curtailed . . . for the promotion of the best interests of others The necessity for such curtailments is greater in a modern industrialized and urbanized society”) (quoting 5 RICHARD POWELL, *THE LAW OF REAL PROPERTY* § 746 (1970)).

190. 428 F.2d 1071, 1072-73 (D.C. Cir. 1970) (Wright, J.) (establishing a “warranty of habitability” implied within every leasehold).

191. See Rabin, *supra* note 45, at 546-48.

192. *Shack*, 277 A.2d at 372.

193. *Id.*

194. Doctors Without Borders provides “treatment to more than 57,000 people living with HIV/AIDS in . . . 29 countries” Médecins Sans Frontières, MSF’s Projects for People with HIV/AIDS, <http://www.doctorswithoutborders.org/news/hiv-aids/index.cfm>.

195. The Least Developed Countries have until 2013 to be fully TRIPS compliant and until 2016 to grant patents in pharmaceutical drugs. See Press Release, World Trade Organization, Poorest Countries Given More Time to Apply Intellectual Property Rules (Nov. 29, 2005), http://www.wto.org/English/news_e/pres05_e/pr424_e.htm.

196. Prior to 1970, India had strict, Western-style patent laws—a vestige of its colonial days—and, as a result, some of the highest drug prices in the world. After 1970,

booming generic drug industry in India (so long as a company could develop an alternate way of producing a drug, it was legal). Competition from generics in turn drastically lowered drug prices and facilitated access to medicines for the poor—not just in India, but in poor export markets, from Asia to South America to Africa. The stringent requirement of TRIPS for patents in both processes and products threatened to raise drug prices and impede access to life-saving drugs.¹⁹⁷ As the Nobel Peace Prize-winning relief organization Doctors Without Borders argued at the 2005 WTO meeting in Hong Kong last December, too-strong patent rights can kill.¹⁹⁸

The WTO's Doha Declaration in 2001 that TRIPS “does not and should not prevent members from taking measures to protect public health”¹⁹⁹ began a process of social enlightenment of intellectual property. The Doha Declaration affirmed that TRIPS “can and should be interpreted and implemented in a manner . . . to protect public health and . . . to promote access to medicines for all.”²⁰⁰ The Doha Declaration comes closest to offering a *State v. Shack* for intellectual property. With it, the WTO announces that intellectual property, too, serves human values. The Declaration understands that incentives are necessary to stimulate pharmaceutical production, enabling the drug companies to recoup their research and development costs, but it also recognizes that the strict patent regime imposed by TRIPS—twenty-year terms on patents in all technologies—will lead to hikes in the prices of drugs and limited access to life-saving treatments for the poorest people.

The Doha call for limiting patent holders' rights in drugs to accommodate public health crises cannot be explained by traditional law and economics analysis. The Doha Declaration permits compulsory licenses to correct a *moral* failure, not a *market* failure. In fact, drug companies do not target entire populations of Third World countries; to the contrary, they quite openly identify a market in only a small portion of a developing country's population. One major Western drug company calculates the *effective* drug market in India to be seventy to eighty million people, for example—less than 10% of that

India saw a proliferation of generic drugmakers and lower prices. See Donald G. McNeil, Jr., *India Alters Law on Drug Patents*, N.Y. TIMES, Mar. 24, 2005, at A1.

197. Several recent studies “predict price increases of twofold or more with full implementation of TRIPS requirements in developing countries.” *E.g.*, THE SECRETARIAT, WORLD HEALTH ORGANIZATION, INTELLECTUAL PROPERTY RIGHTS, INNOVATION AND PUBLIC HEALTH, WHO Doc. A56/17 (May 12, 2003), available at http://www.who.int/gb/ebwha/pdf_files/WHA56/ea5617.pdf. The negative effects of price increases are amplified in countries such as India, where health insurance is rare. See Ouseph Tharakan, *Access to Drugs the Key Issue*, FIN. EXPRESS, Apr. 6, 2005, http://www.financialexpress.com/fe_full_story.php?content_id=87106.

198. See Heda Bayron, *WTO Warned Patent Rules Shrinking Access to Cheap Drugs for Poor Nations*, VOICE AM., Dec. 13, 2005, <http://www.voanews.com/english/archive/2005-12/2005-12-13-voa10.cfm>.

199. World Trade Organization, Ministerial Declaration of 14 November 2001, ¶ 4, WT/MIN(01)/DEC/2, 41 I.L.M. 755 (2002) [hereinafter Doha Declaration].

200. *Id.*

country's population.²⁰¹ From the point of view of the economic story, there is no failure to move medicines to needy people, so long as the needy people are defined as those willing and able to pay.

The Doha Declaration makes a different assessment, arguing that even where rights may be efficient, intellectual property holders' rights do not include the ability to preclude access to essential medications for millions. To that end, the Doha Declaration clarifies that TRIPS allows for each member state to grant compulsory licenses in the event of a national emergency or a public health crisis.²⁰² The Doha Declaration also recognizes that the least-developed countries cannot take advantage of the compulsory licensing provisions in TRIPS because they lack the manufacturing capability to produce generics in their home countries.²⁰³ In late 2005, the WTO temporarily resolved this conundrum by amending TRIPS to allow countries such as India to use compulsory licenses for export markets, as well.²⁰⁴

The Doha Declaration clarified that certain actions would be consistent with the limited flexibility built into the TRIPS Agreement. But it was up to individual countries to use this flexibility. The world was accordingly particularly keen to see what countries such as India would do.²⁰⁵ Prior to 2005, India had the fourth largest pharmaceutical industry in the world; two-thirds of its exports go to the developing world.²⁰⁶ The Indian generic industry supplies, by some estimates, "half the AIDS patients in the Third World."²⁰⁷

201. Rosemary Arackaparambil, *India's New Patent Law to Shake Up Drug Industry*, REUTERS, Dec. 30, 2004, available at <http://in.news.yahoo.com/041230/137/2ir3u.html> ("There could easily be 70 to 80 million people [in India] who can afford expensive medicines, just as they go out and buy expensive cars, branded clothes and consumer goods. . . . That is equal to the size of a UK or a Germany." (quoting an anonymous pharmaceutical executive)).

202. Doha Declaration, *supra* note 199, ¶ 5.

203. Article 31 of TRIPS provides that countries can only evoke compulsory licenses "predominantly for the supply of the domestic market"—impairing a country such as India, for example, from using a compulsory license to produce a drug for export to an LDC. TRIPS, *supra* note 15, art. 31.

204. Press Release, World Trade Organization, Members OK Amendment to Make Health Flexibility Permanent (Dec. 6, 2005), available at http://www.wto.org/English/news_e/pres05_e/pr426_e.htm. Humanitarians have worried that the accommodation may not prove meaningful, given that no country to date has chosen to follow the TRIPS procedure to assert the waiver for exports or imports. See World Trade Organization, Notifications by Exporting WTO Members, http://www.wto.org/english/tratop_e/TRIPs_e/public_health_notif_export_e.htm (reporting no notifications for exporting have been made); see also Frances Williams, *WTO Eases Rules on Drugs for the Poor*, FIN. TIMES, Dec. 7, 2005, at 12 (offering both praise and criticism of the amendment).

205. See McNeil, *supra* note 196; Médecins Sans Frontières, Prognosis: Short-Term Relief, Long-Term Pain: The Future of Generic Medicines Made in India (May 4, 2005), available at <http://www.accessmed-msf.org/prod/publications.asp?scentid=452005121572&contenttype=PARA&>.

206. See Siddharth Srivastava, *Illegal Drug Trade Outsourced to India, Too*, ASIA TIMES ONLINE, Apr. 27, 2005, http://www.atimes.com/atimes/South_Asia/GD27Df04.html.

207. See McNeil, *supra* note 196.

Because India had been one of the few countries with the ability to manufacture generics not only for its domestic population, but also for other developing countries,²⁰⁸ competition from India's generic producers lowered prices dramatically throughout the developing world. Over a ten-year period, the introduction of Indian generics in Africa reduced the price of AIDS treatments from \$15,000 to \$200 annually, bringing life-saving treatment within the ordinary person's reach.²⁰⁹

At first glance, the Indian Patents Act of 2005 seems hopeful.²¹⁰ It automatically authorizes the compulsory license of all drugs commercialized before 2005, as long as a "reasonable" royalty is paid.²¹¹ Furthermore, it explicitly authorizes the export of generic drugs under specified conditions.²¹² In reality, however, the exercise of the rights to make generic versions of drugs under patent may be hobbled by administrative requirements and the prospect of litigation-induced uncertainty and delay. First, a company must wait three years before it can apply for a compulsory license on drugs commercialized after January 1, 2005,²¹³ and there is no limit on the amount of time the negotiation for the license may take.²¹⁴ Second, the Controller General may refuse any application for a compulsory license²¹⁵—a very serious possibility as the Indian Government seeks to curry favor with foreign countries and companies. Third, the Controller General can even refuse to permit export to any other country,²¹⁶ again a serious possibility because the Indian government may be unwilling to challenge foreign patent holders and their governments in order to supply a drug to a developing country. Finally, the statute does not cap royalty rates; given that "reasonable" may be in the eye of the beholder, prolonged litigation may well ensue.

208. Brazilian generics, in contrast, had been used primarily for its domestic patients. *See id.*

209. *Id.*

210. The law, which seeks to make India fully TRIPS compliant, became effective as of January 1, 2005. *See* The Patents (Amendment) Act, 2005, No. 15, Acts of Parliament, 2005, *available at* http://www.patentoffice.nic.in/ipr/patent/patent_2005.pdf [hereinafter Patents Act 2005].

211. *Id.* ¶ 10.

212. *Id.* ¶ 55.

213. The Patents Act, 1970, No. 39, Acts of Parliament, 1970, § 84, *available at* <http://www.patentoffice.nic.in/ipr/patent/patAct1970-3-99.html> [hereinafter Patents Act 1970].

214. *Id.*

215. *Id.*

216. *See* Patents Act 2005 ¶ 55 (§ 92A) (allowing for exportation if the importing country has been granted a compulsory license or has notified India that its generics have been approved for importation). "In other words, an officer in India will sit judgement [sic] on another country's sovereign government before permitting a domestic company to manufacture and export the product." *See* D.G. Shah, *Impact of India's Patent Law on the Generics Industry*, BRIDGES MONTHLY REV., Apr. 2005, at 19, *available at* <http://www.ictsd.org/monthly/bridges/BRIDGES9-4.pdf>.

The overriding concern is that the statute may freeze the developing world to the medical know-how of 2004 and also disable the ability of India's generics industry to supply the developing world. Given the uncertainty of the legality of producing a generic, the incentives for India's pharmaceutical industry will likely shift as well to innovating drugs rather than producing generic versions of existing drugs. There are some salutary aspects of this—it brings the Indian pharmaceutical industry into knowledge production, not just its circulation. But the hope that this industry may better address developing world diseases may be overly optimistic. Indian pharmaceutical companies will face the same market pressures as Western pharmaceutical companies: to produce drugs for the markets that can pay the largest sums—often likely to be developed world markets.²¹⁷

In immediate terms, the added delays and demanding criteria for creating generics on new drugs will mean that AIDS patients who develop resistance to the older drugs will not have cheap access to newer AIDS drugs as they become available. The result, humanitarians fear, is that access to generics of new drugs may be out of the poor's reach for the period of the patent, that is, twenty years.²¹⁸ And while, consistent with TRIPS, the Patent Act permits an immediate compulsory license in cases of national emergency or public health crisis such as those involving AIDS, tuberculosis, or malaria, thus far no country has formally made use of this exception for compulsory licenses to service even its domestic market.²¹⁹ There is real concern that economic, political, and even social pressures will continue to prevent countries from exercising this provision. India, for example, has been less forthcoming about its AIDS problem than have other countries, such as Brazil.²²⁰

217. Finding new incentives and methods for producing drugs for the developing world thus becomes an increasingly central concern. See Stephen M. Maurer et al., *Finding Cures for Tropical Diseases: Is Open Source an Answer?*, PLOS MEDICINE, Dec. 2004, at 183; The Secretariat, World Health Organization, *supra* note 197; Press Release, Bill and Melinda Gates Foundation, Gates Foundation Commits \$258.3 Million for Malaria Research and Development (Oct. 30, 2005), available at http://www.gatesfoundation.org/GlobalHealth/Pri_Diseases/Malaria/Announcements/Announce-051030.htm.

218. See Shah, *supra* note 216, at 19 (concluding that “[t]he dice seem loaded against the working of the compulsory license provision, but time alone will prove it”).

219. See World Trade Organization, Notifications by Exporting Members, *supra* note 204. Ironically, the initial position of the United States resisting compulsory licensing of pharmaceutical imports was greatly undermined when it threatened to break the European pharmaceutical company Bayer's patent in the drug Cipro after facing an anthrax attack in the fall of 2001. See Richard W. Stevenson, *Reconciling the Demands of War and the Market*, N.Y. TIMES, Oct. 28, 2001, at B1 (reporting Secretary of Health and Human Services Tommy G. Thompson's statement before Congress that “he was prepared to break Bayer's patent on the anthrax-fighting drug Cipro”).

220. The Brazilian government has received worldwide recognition for its public health program to combat AIDS: since 1986, the government has provided free AIDS treatment to all who need it. An estimated 600,000 Brazilians are infected with the AIDS virus; Brazil's program helps maintain the life of some 170,000 AIDS patients annually, and it has increased the life expectancy of AIDS patients in that country twelve-fold. See

I offer *State v. Shack* as an important precedent, but not as a perfect analogue.²²¹ Furthermore, I recognize that in intellectual property law circles there is understandable discomfort with the property metaphor. Property rights are relative in theory but absolute in the popular consciousness. But as TRIPS-style and, indeed, “TRIPS-plus” patent laws such as the one now adopted by India suggest, intellectual property rights may be limited in theory, but they are succumbing to a more absolutist conception in fact.²²² The social movement to limit intellectual property rights to serve human values confronts the increasing absolutism of intellectual property rights. The movement also calls attention to the need to analyze intellectual property in various contexts: when a life depends on essential medicines to live now, for example, twenty-year patents *are* perpetual. Most importantly, the social movement to bring essential medicines to the poor harbors all the same basic insights of *Shack*: it recognizes that the poor are disparately affected by intellectual property rights, the exacerbation of real conflict between competing fundamental rights to health and to property with intellectual property’s international growth, and the prescription that intellectual property rights may be respected without sacrificing other fundamental values.

4. *Geographical indications*

Developing countries focus simultaneously on a defensive intellectual property policy, limiting rights in the context of essential medicines, and an offensive intellectual property policy, seeking to expand intellectual property

National STD/AIDS Program: The Government Declares Anti-Retroviral Kaletra To Be of Public Interest and Will Produce It in Brazil, PRNEWswire, June 24, 2005, available at <http://www.aegis.com/NEWS/PR/2005/PR050651.html>. Brazil has effectively used the threat of compulsory licenses to negotiate lower prices for essential AIDS drugs to help pay for this expensive program, which costs approximately \$400 million annually. See Matt Moffett & Heather Won Tesoriero, *Brazil Issues AIDS-Drug Ultimatum: Generic Production To Begin if Abbott Won't Lower Price; Bristol's African Initiative*, WALL ST. J., June 27, 2005, at B4.

221. To begin with, the property owner in *Shack* had more of a relationship with the migrant workers: he employed them and even housed them. Merck and W.R. Grace, of course, have no specific relationship with millions who are sick but too poor to pay full price for essential drugs.

222. See, e.g., S. D. Naik, *New Patent Regime: Discovering New Challenges*, HINDU BUS. LINE, Apr. 12, 2005, available at <http://www.blonnet.com/2005/04/12/stories/2005041200060800.htm>; see also Editorial, *Better Now, But*, BUS. STANDARD, Mar. 24, 2005, at 9 (“The general perception is that the flexibilities on drugs patenting and manufacturing, allowed under [TRIPS], have not been fully used.”). The blame cannot be laid entirely on TRIPS. The India of 1970 was decidedly not the India of today. Following its independence, India went the socialist way, relying on the public sector at the expense of the private. But this experiment failed in India as it did elsewhere in the world. By the 1990s, India had a new mindset—its focus shifted to building its private sector. By the mid-1990s, the combination of TRIPS obligations and the country’s own desire to bolster its corporate sector and attract foreign direct investment together worked to begin slowly changing the country’s course on intellectual property rights.

protection for “poor people’s knowledge” through mechanisms to protect biological diversity, traditional knowledge, and geographical indications.²²³ In the WTO, attention to the latter is viewed as necessary to make TRIPS more balanced.²²⁴ In these contexts, developing countries seek to bring the attention of TRIPS to developing-world citizens as *producers* of cultural knowledge, not just as *consumers* of the knowledge of the West.

This Part focuses on India’s efforts to step up geographical indication protection for its handicrafts and agricultural products. Indeed, the front pages chronicle a rising tide of applications for intellectual property rights filed with a national registry established pursuant to the Geographical Indication of Goods (Registration and Protection) Act of 1999.²²⁵ When I visited India last year, farmers and artisans from across the country were getting in line to register their wares, from Darjeeling tea to Alfonso mangoes, Kolhapuri chappals, Mysore silk and sandalwood, and the uniquely woven sarees from the village of Pochampally in the shadow of high-tech Hyderabad.²²⁶ Not even the makers of the famous *laddus* in Tirupati, who prepare these sweets for worshippers to offer to God at this popular Hindu pilgrimage site, have been immune to the frenzy.²²⁷

The GI Act was required by TRIPS²²⁸ originally as a means to protect French makers of wines and champagnes, and gives trademark-like protection

223. See, e.g., Maureen Liebl & Tirthankar Roy, *Handmade in India: Traditional Craft Skills in a Changing World*, in POOR PEOPLE’S KNOWLEDGE, *supra* note 87, at 53, 56 (“The full potential of the role craft traditions can play in the development process, and specifically in the generation of income . . . has only recently begun to be appreciated.”); Int’l Chamber of Commerce, Comm’n on Intellectual Prop., *Protecting Traditional Knowledge 2* (Discussion Paper 2006), available at http://www.iccwbo.org/uploadedFiles/ICC/policy/intellectual_property/Statements/Protecting_Traditional_Knowledge.pdf (“[The] ICC supports initiatives to help holders of indigenous knowledge use the existing intellectual property system, including through education and studies of ways in which traditional knowledge can be protected by existing rights.”).

224. Thomas Cottier & Marion Panizzon, *Legal Perspectives on Traditional Knowledge: The Case for Intellectual Property Protection*, 7 J. INT’L ECON. L. 371, 399 (2004); see also *id.* at 381 (“[T]he introduction of new types of IPRs specifically aimed at developing countries could constitute a step towards a more balanced WTO.”).

225. The Geographical Indication of Goods (Registration and Protection) Act, 1999, No. 48, Acts of Parliament, 1999 [hereinafter GI Act].

226. See *Pochampally Paves the Way for Local IP Protection*, BSNL PORTAL, Dec. 19, 2004, <http://bsnl.in/business.asp?intNewsId=44417&intDaysBefore=3>.

227. See *Tirupati Laddu, Nagpur Orange to Get Protection from Copycats*, HINDU BUS. LINE, Dec. 18, 2004, available at <http://www.thehindubusinessline.com/bline/2004/12/19/stories/2004121901300200.htm>.

228. TRIPS defines GIs as “indications which identify a good as originating in the territory of a Member . . . where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.” TRIPS, *supra* note 15, art. 22(1). “Champagne,” “Tequila,” and “Roquefort” present examples of the types of goods recognized as GIs. Under TRIPS, member states must provide legal means to prevent uses of a designated GI that either mislead the public as to the geographical origin of the good, or which constitute “unfair competition” under article 10*bis* of the Paris Convention.

to distinctive goods or services whose quality and reputation derive from the geographical area in which they are produced. In a country such as India, which has a vast cultural heritage and a store of traditional knowledge dating back to the Vedas,²²⁹ the GI Act is seen as a potentially important source of recognition²³⁰ and income for India's rural poor.²³¹ There is also hope that GI protection will allow cultural diversity to thrive and artisans to remain in their villages, resisting the pull of city industry. Return, for example, to the Mysore

Id. art. 22(2).

In addition, TRIPS article 23 mandates that further protection be extended to GIs for “wines and spirits,” which must be protected even in the absence of consumer confusion. *Id.* art. 23(1) (prohibiting use of the GI when the product does not originate “in the place indicated by the geographical indication . . . even where the true origin of the goods is indicated or the geographical indication is used in translation or accompanied by expressions such as ‘kind,’ ‘type,’ ‘style,’ ‘imitation’ or the like”). The designation “Napa Valley Champagne,” for example, even when truthful as to the indication of the product's origin, would be impermissible under the heightened level of protection mandated by TRIPS for wines and spirits alone.

229. Historians believe that the Vedas, a vast collection of scientific, spiritual, and literary texts, first appeared in written form sometime between 2500 BCE to 1200 BCE. The most recent texts appeared no later than 500 BCE. The oral tradition of the texts, however, is said to predate the written forms by “several generations of poets and seers.” See AN ANTHOLOGY OF INDIAN LITERATURE 13, 15 (John B. Alphonso-Karkala ed., Penguin Books 1971); 1 MORIZ WINTERNITZ, HISTORY OF INDIAN LITERATURE 310 (S. Ketkar trans., Russell & Russell 1971) (1927).

230. Kal Raustiala & Stephen R. Munzer, *The Global Struggle Over Geographic Indications* 3 (UCLA Sch. of Law, Pub. Law & Legal Theory Research Paper Series No. 06-32, 2006), available at <http://ssrn.com/abstract=925751> (“While economic concerns plainly loom large, the effort to entrench GI protection in international law also draws strength from more diffuse concerns about authenticity, diversity, culture, and locality in a rapidly integrating world.”). Raustiala and Munzer conclude that “some modest legal protection of GIs is defensible under a mix of various justifications,” including but not limited to utilitarian incentive-based rationales. *Id.* at 15-16.

231. This is why the current two-tiered protection for GIs in TRIPS—a higher level of protection for wines and spirits and a lower one for everything else—has been a source of continuing conflict between Europe and the developing world. A handful of India's submissions in the WTO relating to TRIPS since 2000 document the dispute. See, e.g., Council for Trade-Related Aspects of Intellectual Property Rights, *Communication from Bulgaria, Cuba, Cyprus, the Czech Republic, the European Communities and their Member States, Georgia, Hungary, Iceland, India, Kenya, Liechtenstein, Malta, Mauritius, Pakistan, Romania, the Slovak Republic, Slovenia, Sri Lanka, Switzerland, Thailand and Turkey*, IP/C/W/353 (June 24, 2002), available at http://commerce.nic.in/wto_sub/TRIPS/sub_Trips-ipcw353.htm (focusing on “protecting all geographical indications equally”); Council for Trade-Related Aspects of Intellectual Property Rights, *Proposal from Bulgaria, Cuba, the Czech Republic, Egypt, Iceland, India, Jamaica, Kenya, Liechtenstein, Mauritius, Nigeria, Pakistan, Slovenia, Sri Lanka, Switzerland, Turkey, and Venezuela*, IP/C/W/247/Rev.1 (May 17, 2001), available at http://commerce.nic.in/wto_sub/TRIPS/sub_Trips-ipcw247R1.htm (“The TRIPS Agreement does not provide sufficient protection for geographical indications of products other than wines and spirits.”); Council for Trade-Related Aspects of Intellectual Property Rights, *Communication from India*, IP/C/W/196 (July 12, 2000), available at http://commerce.nic.in/wto_sub/TRIPS/sub_Trips-ipcw196.htm (“[A]dditional protection for geographical indications must be extended for products other than wines and spirits.”).

silk sarees. Obtaining a geographical indication recently prompted a “makeover” for the “grand old queen” of Indian silk.²³² Its makers updated the sarees’ look with trendy new (but interestingly, *natural*) colors—“lilac, coffee-brown and elephant-grey”—and “contemporary” designs inspired by temple architecture and tribal jewelry.²³³ Tradition is hard work. Revamping the designs without losing the sheen of the silk took “months of painstaking research” and trials.²³⁴ As an executive producer of Mysore silk sarees explained, “[W]e realised that we have to move with the times, adapt to change [T]his is a way of capturing a larger segment of the market.”²³⁵ Tradition is cultivated, not discovered. Developing marketable uses for Third World cultural products is “ultimately perhaps the most effective way to protect their traditions”²³⁶

There is significant economic value here, although just how much is unclear.²³⁷ Handicrafts alone were estimated at close to \$2 billion in value annually on the export market and \$1 billion in the domestic market in 2000.²³⁸ The United Nations estimates that developing countries lose about \$5 billion in royalties annually from unauthorized use of traditional knowledge.²³⁹ But the turn to intellectual property for the poor is not simply another instance of a

232. Aruna Chandaraju, *Modern MYSURU*, HINDU, Mar. 1, 2005, <http://www.hinduonnet.com/thehindu/mp/2005/03/01/stories/2005030100860100.htm>.

233. *Id.*

234. *Id.*

235. *Id.*

236. Liebl & Roy, *supra* note 223, at 70.

237. Graham Dutfield argues that “estimating the full value of TK in monetary terms is difficult if not impossible” because traditional knowledge “is often an essential component in the development of other products”; many products derived from traditional knowledge never enter modern markets, and thus are not included in GNP calculations; the replacement cost of traditional knowledge would be “quite high”; and the spiritual value of some traditional knowledge cannot be quantified. Graham Dutfield, *Developing and Implementing National Systems for Protecting Traditional Knowledge: A Review of Experiences in Selected Developing Countries* 7 (Oct. 30–Nov. 1, 2000) (unpublished manuscript), available at http://www.unctad.org/trade_env/docs/dutfield.pdf. Compare Graham Dutfield, *Legal and Economic Aspects of Traditional Knowledge*, in INTERNATIONAL PUBLIC GOODS AND TRANSFER OF TECHNOLOGY UNDER A GLOBALIZED INTELLECTUAL PROPERTY REGIME 495, 505 (Keith E. Maskus & Jerome H. Reichman eds., 2005) (suggesting that “the global value added to rice yields by use of [Indian] landraces can be estimated at \$400 million per year”), with Stephen B. Brush, *Farmers’ Rights and Protection of Traditional Agricultural Knowledge* 26 (CAPRI Working Paper No. 36, 2005), available at <http://www.capri.cgiar.org/pdf/capriwp36.pdf> (noting there is “no estimate of value or widely accepted method to estimate value of crop genetic resources” developed by farmers).

238. See Liebl & Roy, *supra* note 223, at 54, 56 (“Crafts show tremendous potential in terms of employment generation and poverty alleviation in India. Handicrafts provide a livelihood, albeit modest, to large numbers of poor people in India, and especially to the rural poor.”).

239. Coenraad J. Visser, *Making Intellectual Property Laws Work for Traditional Knowledge*, in POOR PEOPLE’S KNOWLEDGE, *supra* note 87, at 207, 213.

misguided “if value, then right”²⁴⁰ mentality. Dismissing these claims on such grounds obscures the ways in which poor people’s intellectual property claims present a broader understanding of the purposes and effects of intellectual property law, beyond traditional renderings of intellectual property as incentives alone.²⁴¹ I suggest that poor people’s turn to property is surely about economics, but is about social and cultural values as well. These claims recognize that the relationship between intellectual property and development goes beyond GDP. People, rich and poor alike, want recognition of their creativity and contributions to science and culture. This capacity for innovation, work, and cultural sharing is part of what makes us human.²⁴²

While the patent provisions of TRIPS have posed clear challenges for developing countries, which typically lack manufacturing capacity or capital for R&D intensive breakthroughs, GIs, in contrast, are hailed as the poor people’s intellectual property rights, recognizing the knowledge of weavers, farmers, and craftspeople rather than just the high technology contributions of MNCs. The structure of GIs also makes them particularly well-suited to poor people’s knowledge. First, GIs recognize collective intellectual property rights; under the Indian GI Act, multiple associations of artisans may be recognized as the authorized producers or users of a GI.²⁴³ GI applications are also relatively cheap, at least for a group of artisans working together. Under the Indian GI Act, it costs a modest five thousand rupees to apply (little more than \$100).²⁴⁴

But while GIs certainly hold promise for the poor, they have their own limits. The Indian GI Act protects goods whose quality or reputation are shown

240. See Mark A. Lemley, *Ex Ante Versus Ex Post Justifications for Intellectual Property*, 71 U. CHI. L. REV. 129, 131 (2004); see also Rochelle Cooper Dreyfuss, *Expressive Genericity: Trademarks as Language in the Pepsi Generation*, 65 NOTRE DAME L. REV. 397, 405 (1990).

241. See discussion *infra* Part IV.

242. In a related article, I argue that while WIPO and TRIPS have focused on teaching the poor how to protect the intellectual property of the West, we need to now turn our attention to helping the poor to use intellectual property to protect their own inventions as well. See Sunder, *supra* note 5 (manuscript at 15-17, on file with authors).

243. The Indian GI Act defines “geographical indication” in relation to goods as an “indication which identifies such goods as agricultural goods, natural goods or manufactured goods as originating, or manufactured in the territory of a country, or a region or locality in that territory, where a given quality, reputation or other characteristic of such goods is essentially attributable to its geographical origin and in case where such goods are manufactured goods one of the activities of either the production or of processing or preparation of the goods concerned takes place in such territory, region or locality, as the case may be.” GI Act, *supra* note 225, § 1(3)(e).

244. The cost to renew a GI is three thousand rupees. See The Geographical Indications of Goods (Registration and Protection) Rules, 2002, Gazette of India, Part II, Section 3, Sub-section (i) 29-31, available at http://www.patentoffice.nic.in/ipr/gi/geo_ind.htm [hereinafter GI Rules] (Rule 10(1), First Schedule). Once approved, GIs and all producers and authorized users of the GIs are listed in a national Register. GI Act, *supra* note 225, § 6(1). Registration lasts for ten years and is renewable “from time to time” for periods of an additional ten years. *Id.* §§ 18(1)-(3).

to be “due exclusively or essentially to the geographical, environment, with its inherent natural and human factors.”²⁴⁵ GI applications require “proof of origin” and “historical records”²⁴⁶ of continuous use of the goods.²⁴⁷ Registrants obtain the exclusive right to use the GI,²⁴⁸ and licensing of GIs is prohibited.²⁴⁹ Such requirements and restrictions take a narrow view of traditional knowledge, linking culture to land. The rule against alienability poses special concerns. While this approach may, as I have argued, enable people to remain within their communities (and preserve the physical environment as well), what if they move? What rights do traditional weavers from Mysore have if they move to North India—or the U.K.?²⁵⁰ Of course, there are good reasons to prevent the alienation of the GI from the particular geographical community. It prevents the scenario where a large foreign corporation hires a member of that community away and then begins to produce “authentic” work elsewhere, using that GI—and decimating the livelihoods of the traditional community left behind. At the same time, such a restriction could stifle opportunities for some individuals, as they remain within a traditional community by economic necessity, not choice. People move, intermarry, and change jobs. Culture flows with them. The GI Act does not recognize this dynamic nature of culture, ossifying authentic production in *today’s* localities.²⁵¹

There are other potential problems. Within a recognized “association,” traditional leaders may impose their will on members, reifying traditional hierarchies.²⁵² Elizabeth Povinelli notes that cultural rights often lead to the ironic production of authenticity or indigeneity, which conforms to traditional structures from the past,²⁵³ rather than celebrating cultures as diachronic

245. GI Act, *supra* note 225, § 11(2)(a).

246. GI Rules, *supra* note 244, at 45.

247. *Id.*

248. GI Act, *supra* note 225, § 21(1)(b).

249. *Id.* § 24.

250. Put another way: “And what happens when a weaver from another part of India moves to Kanjeevaram?” Liebl & Roy, *supra* note 223, at 65. Kanjeevaram is famous for its silk sarees.

251. See generally Raustiala & Munzer, *supra* note 230, at 18 (“The more a desert rationale for GI protection hangs on human improvements and inputs, the less central a given locality is to product quality. There is a fundamental tension between the claims of desert based on subsequent human improvement and maintenance and the underlying concept of geographic indications.”).

252. See, e.g., Sunder, *Cultural Dissent*, *supra* note 29, at 540-41; Sunder, *Playing With Fire*, *supra* note 66, at 94.

253. An interesting article by Christina Grasseni describes the pressures on cheese farmers in the Italian mountain regions to commodify not simply cheese itself, but rather the idea of local, authentically produced cheese. See Christina Grasseni, *Packaging Skills: Calibrating Cheese to the Global Market*, in *COMMODIFYING EVERYTHING: RELATIONSHIPS OF THE MARKET* 259, 260 (Susan Strasser ed., 2003) (quoting a local dairy farmer saying, “I don’t sell my cheese because it’s good. I sell it saying, ‘Look at where we live, look at our landscape.’”). Grasseni concludes that the “alpine landscape, or rather its well-chosen

peoples who are dynamic and heterogeneous.²⁵⁴ GIs also pose economic concerns. While GIs protect Darjeeling tea, for example, they also prohibit the Indian manufacture of Scotch whiskey, driving up the cost of Scotch in India. It is possible that the poor may reap greater economic rewards in a system with fewer production constraints.²⁵⁵ Yet, it is clear that GIs do potentially offer a range of benefits, from recognizing the innovation of collectives to preserving geographic diversity and stimulating some redistribution of wealth.

5. *Fan fiction, mash-ups, machinima*

The explosive creativity shared among millions on the Internet, from musical and video mash-ups to fan fiction and machinima, puts obvious strain on the incentive theory of intellectual property. Here we see the emergence of hordes of new creative works developing not only without the promise of intellectual property rights but in defiance of them. IP³ powers a new Participation Age, a peoples' movement that democratically declares everyone, not just the sacred few, a creator.

Perhaps the most critically acclaimed of the new digital *auteurs* is DJ Danger Mouse. Turning the tables on the traditional modalities of cultural production and reception, this disc jockey digitally “mashed” The Beatles’ *The White Album* with hip-hop artist Jay-Z’s *The Black Album* to create *The Grey Album*. Danger Mouse celebrates copying, declaring that his album “uses the full vocal content of Jay-Z’s Black Album” and that “[e]very kick, snare, and chord is taken from the Beatles White Album and is in their original recording somewhere.” He even “insists he can explain and prove that all the music on the Grey Album can be traced back.”²⁵⁶ Despite its pointedly derivative nature, the album drew critical acclaim as one of the best albums of 2004.²⁵⁷ Culling

representations, is the actual commodity underlying the marketing of cheese, the fabrication of authenticity, and the pinpointing of locality to specifically certified geographic areas.” *Id.*

254. See Povinelli, *supra* note 100, at 193 (describing pressure on indigenous peoples to present their communities as “a synchronic structure” that comports to legal requirements for land based on colonial notions of authentic difference).

255. See COMM’N ON INTELLECTUAL PROP. RIGHTS, INTEGRATING INTELLECTUAL PROPERTY RIGHTS AND DEVELOPMENT POLICY 22 (2002), available at http://www.iprcommission.org/papers/pdfs/final_report/CIPRfullfinal.pdf (finding that “rapid growth is more often associated with weaker IP protection”).

256. Danger Mouse quickly took down the controversial description; the text offered here was copied from his website (<http://www.dangermousesite.com>) in early 2004.

257. See David Browne, *The 10 Best*, ENT. WKLY., available at http://www.ew.com/ew/article/commentary/0,6115,1009259_4_0_,00.html (selecting *The Grey Album* as the best album of 2004); Renee Graham, *supra* note 23, at E1 (describing Danger Mouse’s *The Grey Album* as “the most intriguing hip-hop album in recent memory”); cf. Sasha Frere-Jones, *1+1+1=1: The New Math of Mash-ups*, NEW YORKER, Jan. 10, 2005, at 85 (citing another mash-up album in the Billboard Top Ten).

from the past, he created music that *Rolling Stone* hailed as “ahead of its time.”²⁵⁸

In the hip-hop music world, this *modus operandi* is not new. Indeed, Jay-Z intentionally facilitated mash-ups by releasing an a capella version of *The Black Album*.²⁵⁹ The sound recordings of The Beatles, in contrast, have never been successfully licensed. Indeed, EMI, which claims ownership in *The White Album*,²⁶⁰ issued a cease-and-desist letter to Danger Mouse, to which he quickly complied, removing it from his website. But by then the cat was out of the bag. The work quickly became a cult hit in underground hip-hop clubs, shared via peer-to-peer file sharing services and other Internet-based protocols. On a single day declared “Grey Tuesday,”²⁶¹ more than a hundred websites distributed 100,000 copies of the work, making *The Grey Album*, “if only for a day, the #1 release in the country.”²⁶²

Grey Tuesday was widely reported as a coordinated act of civil disobedience against an excessively restrictive copyright law.²⁶³ Suddenly, the copyright law of the last century appeared too obedient to traditional cultural, technical, and legal authorities, stifling an emergent social movement for “free culture”—a claim to deploy technology to access and critique existing cultural authorities. Technically, sampling is “a digital process in which pre-recorded

258. Lauren Gitlin, *DJ Makes Jay-Z Meet Beatles*, ROLLING STONE, Feb. 19, 2004, at 18 (citing *The Grey Album* as “the ultimate remix record . . . an ingenious hip-hop record that sounds oddly ahead of its time”).

259. Jay-Z’s a cappella release, which coincided with his retirement, was his parting gift to the world, an invitation to make derivative works. Copyright law reserves for the owners of a copyright in musical compositions and sound recordings the exclusive right “to prepare derivative works based upon the copyrighted work.” Copyright Act, 17 U.S.C. § 106(2) (2006); see also 17 U.S.C. §§ 102(2), 102(7), 114 (2006). The author, of course, is free to waive that right through a license. Jay-Z has raised no objection to the myriad mash-ups of his work, including musical arrangements as far flung as classical to country. See, e.g., DJ RESET, FRONTIN’ ON DEBRA (DJ RESET MASH-UP) (Geffen Records 2004); Bass 211, *Encore Blitz*, available at <http://64.105.15.105:9900/encoreblitz.mp3>. A question remains as to whether the release of the a cappella version of the album itself amounts to an implied waiver of the derivative work right. The new Creative Commons sampling licenses make plain the author’s intention. See Creative Commons, Choose Your Sampling License Options, <http://creativecommons.org/license/sampling> (the Sampling Deed 1.0, for example, expressly grants the right to “sample, mash-up, or otherwise creatively transform [the] work for commercial or noncommercial purposes” under certain enumerated conditions).

260. EMI’s copyright claim to *The White Album*, which was released in 1968, is questionable, at least under U.S. law, where federal copyrights in sound recordings before 1972 were not recognized. However, state law protections could apply here. See generally Electronic Frontier Foundation, Grey Tuesday: A Quick Overview of the Legal Terrain, http://www.eff.org/IP/grey_tuesday.php.

261. See Grey Tuesday, <http://www.greytuesday.org/>.

262. Carly Carioli, *Black + White = The Grey Album*, PORTLAND PHOENIX, Mar. 5-11, 2004, available at http://www.portlandphoenix.com/music/other_stories/documents/03650069.asp.

263. See, e.g., Bill Werde, *Defiant Downloads Rise from Underground*, N.Y. TIMES, Feb. 25, 2004, at E3.

sounds are incorporated into the sonic fabric of a new song.”²⁶⁴ Sampling reveals its social side in precisely such re-iterations of tradition. Far from simple mimesis, rappers practice an art that cultural theorists call signification.²⁶⁵ the exercise of cultural agency within a context of discursive hegemony.²⁶⁶ Individuals express themselves through critique, comment, or parody of cultural authorities, all the while seeking to represent themselves within a cultural context that had previously overlooked or worse, oppressed them. Stated differently, the mash-up is often a form of cultural dissent.²⁶⁷ The sample is used to evoke the past and to create a “lineage” between authors, thus claiming a place for oneself within a culture’s historical narrative.²⁶⁸ *Sampling signals that an artist is working within a tradition, not without it.* At the same time, as Walter Benjamin has described, the proliferation of copies contributes to the “shattering of tradition”; it debunks the mythical cult of the original, questioning the very existence of a singular text or cultural authority.²⁶⁹

264. Joanna Demers, *Sampling the 1970s in Hip-Hop*, 22 *POPULAR MUSIC* 41, 41 (2003). A digitally stored sound can be played back either as an exact reproduction of the original, or, as is more common, can be manipulated through electronic editing. A common practice in rap and hip-hop music, for example, is to “extract a fragment of sound from one context and place it in a new one.” Thomas Porcello, *The Ethics of Digital Audio-Sampling: Engineers’ Discourse*, 10 *POPULAR MUSIC* 69, 69 (1991).

265. See HENRY LOUIS GATES, JR., *FIGURES IN BLACK: WORDS, SIGNS, AND THE “RACIAL” SELF* 235-36 (1987) (“Signification is a theory of reading that arises from Afro-American culture; learning how to signify is often part of our adolescent education.”); see also Thomas G. Schumacher, *‘This Is a Sampling Sport’: Digital Sampling, Rap Music and the Law in Cultural Production*, 17 *MEDIA, CULTURE & SOC’Y* 253, 267 (1995); Joanna Demers, *Sampling as Lineage in Hip-Hop* (2002) (unpublished Ph.D. dissertation, Princeton University) (on file with author) (“Hip-hop’s need to create lineage can be understood as a form of Signifyin(g), in which well-known musical materials are quoted, critiqued, and parodied.”).

266. See JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 185 (1999). Butler seems to hold that freedom can only be exercised in this way—that is, from within existing cultural discourses rather than outside of them. Writes Butler: “To enter into the repetitive practices of this terrain of signification is not a choice, for the ‘I’ that might enter is always already inside: there is no possibility of agency or reality outside of the discursive practices that give those terms the intelligibility they have.” *Id.* at 189. The “task” of the individual, continues Butler, “is not whether to repeat, but how to repeat or, indeed, to repeat and, through a radical proliferation of [meaning], to *displace* the very . . . norms that enable the repetition itself.” *Id.*

267. Sunder, *Cultural Dissent*, *supra* note 29, at 498 (“[C]ultures now more than ever are characterized by *cultural dissent*: challenges by individuals within a community to modernize, or broaden, the traditional terms of cultural membership. Today, more and more individuals are claiming a right to dissent from traditional cultural norms and to make new cultural meanings—that is, to reinterpret cultural norms in ways more favorable to them.”).

268. “Musical borrowings, or samples, have long been a means of creating lineage between hip-hop and older genres of African-American music such as funk, soul, and rhythm and blues. DJs who sample from this so-called ‘Old School’ attempt to link hip-hop to older, venerable traditions of black popular music.” Demers, *supra* note 264, at 41.

269. WALTER BENJAMIN, *The Work of Art in the Age of Mechanical Reproduction*, in *ILLUMINATIONS* 219, 223 (Hannah Arendt ed., Harry Zohn trans., 1969).

Revealing the multivocality of the text invites the question of what other worlds exist and are possible.²⁷⁰ The Age of Mechanical Reproduction is yielding to the Age of Electronic Participation. Unmasking cultural autocracy makes way for cultural democracy. This approach recognizes that creativity is derivative: the only way to make gray is to mix black and white.

The literary genre called fan fiction evidences further the emerging Participation Age. Here, IP³ allows marginalized individuals, in particular, to bring their stories to the front and center of cultural production.²⁷¹ Witness stories retelling Harry Potter from the perspective of his sidekick, Hermione Granger,²⁷² or a novel putting Harry on his broom and sending him to Kolkata, India.²⁷³ One fan introduces a female member of the officially all-male fellowship of the ring.²⁷⁴ In slash fan fiction, straight characters are gay. Yet other fan fiction stories highlight class issues, presenting, for example, a Star Wars tale through the eyes of Senator Padme's body double.²⁷⁵ The practice of fan fiction authors creating character stand-ins for themselves—typically in the form of characters not previously represented in the “canon”—is known as the “Mary Sue.”²⁷⁶ While men may already feel themselves well-represented in

270. Schumacher, *supra* note 265, at 267 (“[S]ampling technology challenges the concept of the singular artist as the only embodied voice in the text.”).

271. See Diane Werts, *Really Stranger than Fiction; Legions of Serious Fans Take to the Internet to Let Their Imaginations Run Wild Writing Scenarios for Their Favorite Shows*, NEWSDAY, May 1, 2005, at C16; see also Meredith McCardle, *Fan Fiction, Fandom, and Fanfare: What's all the Fuss?*, 9 B.U. J. SCI. & TECH. L. 433 (2003). See generally HENRY JENKINS, TEXTUAL POACHERS: TELEVISION FANS & PARTICIPATORY CULTURE 35 (1992).

272. See, e.g., Posting of wolfgirlami, *The OFA Series: Book One: The Miraculous Miracle* (Aug. 7, 2005), <http://www.fanfiction.net/s/2523593/1/> (imagining Hermione's home life); see also Neva Chonin, *If You're an Obsessed Harry Potter Fan, Voldemort Isn't the Problem. It's Hermione Versus Ginny*, S.F. CHRON., Aug. 3, 2005, at E1.

273. See Manjira Majumdar, *When Harry Met Kali*, OUTLOOKINDIA.COM, July 7, 2003, <http://www.outlookindia.com/full.asp?fodname=20030707&fname=Cover+Story&sid=4> (describing Uttam Ghosh's *Harry Potter Kolkataye*—Harry Potter in Kolkata). In Ghosh's story, Harry meets fictional characters from Bengali literature, including Professor Shanku, a protagonist in science fiction stories by Satyajit Ray. See Priyanjali Mitra, *Bengali Babu*, INDIAN EXPRESS, Apr. 20, 2003, available at http://www.indianexpress.com/full_story.php?content_id=22323. Harry also meets historical figures, such as Ray's father. *Id.*

274. Posting of greendaychica365, *Friends til the End*, <http://www.lotrfanfiction.com/viewstory.php?sid=5770>; cf. Posting of MasterSareBabe, *Daughter of Kenobi* (July 24, 2005), <http://www.fanfiction.net/s/2500645/1/> (introducing the daughter of Obi-Wan Kenobi).

275. See Posting of Pandora26, *Cordé's Story*, http://boards.theforce.net/The_Saga/b10476/19735339/ (May 16, 2005) (offering Star Wars fan fiction from the perspective of one of Senator Padme's body doubles; the doubles are frequently put in the line of danger to protect the life of the Senator).

276. The name comes from a famous series of stories by a female writer of Star Trek fan fiction more than twenty-five years ago (back then, the fan fiction was published in fan magazines known as “zines”). In those stories, an idealized Starfleet officer named Mary Sue steals the hearts of nearly all of the men on board—and takes over the stories as well. See Anupam Chander & Madhavi Sunder, *Everyone's a Superhero: “Mary Sue” Fan Fiction as Fair Use*, 95 CAL. L. REV. (forthcoming 2007).

mass media, women, it seems, feel the need to write themselves into prime time.²⁷⁷ (My three-year-old daughter already does this, routinely inserting herself into the Hundred Acre Wood, populated by Winnie the Pooh and his assorted friends, all male except for Kanga, the mother of young Roo.²⁷⁸)

The recent phenomenon known as “machinima,” which refers to movies created by fan *auteurs* within the 3-D universes of animated video games, takes the Mary Sue to a whole new level. Using mod software, individuals can re-skin characters to look like themselves—boy or girl, brown or yellow—before taking off on their own adventures within the fantasyland created by game copyright owners. The enhanced ability to Mary Sue digitally offers a powerful new take on Legos and action figures. In the near future, our children will demand the virtual building blocks to fantasy cultural universes.

I call this the New Enlightenment. Increasingly, the culturally unrepresented (or misrepresented) are asserting themselves as authors in their own right, rather than as the passive receptors of culture from above. Fan fiction authors seek to represent themselves not outside of cultural communities, but within them. Fan fiction writers’ object is to work through existing stories, or the “canon.”

But current law, premised on a narrow utilitarian understanding of cultural production, fails to capture fully the value in these activities. The economic approach would focus on the effect of the fan fiction on the copyright holder’s market for derivatives,²⁷⁹ and on maximizing cultural production in the aggregate. But this approach fails to appreciate the value of semiotic democracy, a society in which everyone may participate in the processes of cultural production and dialogue.

Furthermore, the traditional economic approach does not consider the distribution of the material benefits of cultural production. Law is content to condemn mash-ups, fan fiction, and machinima to a legal grey zone,²⁸⁰ in

277. Because Mary Sue becomes the star of fans’ favorite programs, displacing the original heroes, Mary Sues are often criticized by fan fiction readers as “self-indulgent.” But the fact that so many Mary Sues—or fan fiction writers—are women should make us question the claim of self-indulgence. Is it not, perhaps, mainstream media that is self-indulgent, repeatedly offering the same stories of white male characters as the heroes? (Wasn’t Captain Kirk’s interterrestrial philandering “self-indulgent?”) Anupam Chander and I develop an analysis of the Mary Sue in another paper. *See id.*

278. Near the end of 2005, Disney announced that it would revise its most lucrative story, *Winnie the Pooh*, by replacing Christopher Robin with a six-year-old tomboy girl. *See* Marco R. della Cava, *Disney Lets Girl into Winnie’s World*, USA TODAY, Dec. 7, 2005, at D1.

279. *See* Paul Goldstein, *Derivative Rights and Derivative Works in Copyright*, 30 J. COPYRIGHT SOC’Y USA 209 (1983); Naomi Abe Voegtli, *Rethinking Derivative Rights*, 63 BROOK. L. REV. 1213 (1997).

280. Some of the underlying work of fan fiction is in the public domain. *See, e.g.*, Nina Paley, *Sita Sings the Blues*, Apr. 21, 2005, <http://www.sepiamutiny.com/sepia/archives/001393.html>. Paley uses the blues and her beautiful animations to retell the ancient Hindu epic, the Ramayana, from the perspective of Rama’s ill-treated wife, Sita. In Paley’s

which they create in the shadow of the threat of lawsuits²⁸¹ and they dare not commercialize their work.²⁸² DJ Danger Mouse could not profit from the critically acclaimed *Grey Album*.²⁸³ While many fan fiction writers enjoy participating in a non-commercial culture in which fans freely share and critique one another's work—arguing that a non-proprietary space allows for the development of more experimental creative products and communities—some may seek, understandably, to profit from their creations. Alice Randall, for example, commercialized her compelling book, *The Wind Done Gone*, which appropriated the characters, plot, and settings of the classic Margaret Mitchell

version, Sita is the only character with a speaking part; the great Hindu god, Rama, is depicted as a muscle man of small brain. But Paley's Sita does not tread too far from the original inspiration; through the blues she pines for her man.

But much that inspires fan fiction is protected by copyright. Under the Copyright Act of 1976, the copyright holder is vested with exclusive rights to not only reproduce and distribute the copyrighted work but also to create derivative works based on the original. Copyright Act, 17 U.S.C. § 106(1) (2006) (exclusive right to reproduce the work); *id.* § 106(2) (exclusive right to prepare derivative works based upon the copyrighted work); *id.* § 106(3) (exclusive right to distribute copies of the work). Fan fiction authors' act of reproducing characters from a copyrighted work and publishing the resulting derivative story may violate any or all of these rights under the Act. *See* Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 *LOY. L.A. ENT. L. REV.* 651, 655-68 (1997).

281. Fan fiction authors have two potential affirmative defenses. First, they may assert implied consent of the copyright holder when the canon creator holds a public, positive attitude towards the fan fiction. J.K. Rowling, for example, says she is flattered by the extraordinary collection of Harry Potter fan fiction and, generally speaking, has allowed it without complaint. There are more than 200,000 entries of Harry Potter-inspired fan fiction available on the popular site, <http://www.fanfiction.com>. While these seem to be tacitly approved by the author, Rowling has expressed disapproval of possibly obscene or sexually explicit Harry Potter fan fiction available at slash sites, arguing that these stories may be harmful to young fans. *See* Darren Waters, *Rowling Backs Potter Fan Fiction*, BBC NEWS ONLINE, May 27, 2004, <http://news.bbc.co.uk/1/hi/entertainment/arts/3753001.stm>. Many authors and creators, such as Anne Rice, George Lucas, and Disney, object to the practice and have sought to stop it through cease-and-desist letters, and even lawsuits. *See, e.g.*, BOB LEVIN, *THE PIRATES AND THE MOUSE: DISNEY'S WAR AGAINST THE COUNTERCULTURE* (2003) (chronicling a lawsuit by Disney against the Air Pirates, a group of underground cartoonists who put out a comic book parody of Disney cartoons in 1971, in which Mickey Mouse, Goofy, Bucky Bug and others get high, have sex, and swear).

282. Because fan fiction is typically noncommercial, acknowledges the source of its characters, and is highly transformative, it may be absolved under copyright's fair use doctrine. Limiting use to canon characters further bolsters the fair use defense. But fair use is famously unpredictable and expensive to determine.

283. Not so with respect to his latest creation. DJ Danger Mouse's latest musical project, Gnarls Barkley, made musical history in April 2006 when its single, "Crazy," climbed to the top of British singles charts on digital downloads alone: in the week prior to the single's record store release, internet music sites recorded over 31,000 downloads of the song. One week after the single arrived in stores, the song had sold 121,000 physical copies and 147,000 downloads. *See Crazy Song Makes Musical History*, BBC NEWS ONLINE, Apr. 2, 2006, <http://news.bbc.co.uk/1/hi/entertainment/4870150.stm>; Neil McCormick, *The Single Is Dead, Long Live the Single*, DAILY TELEGRAPH (London), Apr. 13, 2006, at 34.

novel, *Gone with the Wind*, to retell the iconic story through the eyes of a black slave woman on Scarlett O'Hara's plantation.²⁸⁴

Randall's work was found to be a parody of the original, and thus, its copyright infringement was excused as "fair use."²⁸⁵ But not all potentially profitable fan fiction will clearly fall within the narrow purview of parody. *The Grey Album* is more likely to be understood as paying homage to the original works, rather than as a critique of them. In the machinima known as "Red vs. Blue," a series of short film clips set inside the popular computer game, *Halo*, the soldier "characters" stand around talking about the meaninglessness of war and their general boredom with life, much as the Generation X workers do in the cult film, *Clerks*.²⁸⁶ While some of the dialogue reflects on the video game itself,²⁸⁷ much of the film's content is likely to be characterized as satire rather than parody—the filmmakers use the game as a vehicle for more satirical social commentary.²⁸⁸ But satire is not generally protected under current versions of fair use. While private arrangements may sometimes strike in favor of the new *auteurs*, the default rules themselves offer little predictability or comfort for those fan fiction creators who either seek to profit from their work or express their identities by *inhabiting*, or working through the canon, without necessarily critiquing or writing against the original.²⁸⁹ The current legal regime would either chill such creative efforts, or drive cultural democracy and equality underground.

6. A2K: Access to knowledge

In October 2004, the WIPO General Assembly declared that intellectual property law must incorporate a "development agenda."²⁹⁰ WIPO responded in

284. See *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1269 (11th Cir. 2001) (characterizing Randall's work as an unauthorized parody that qualifies as fair use, despite the novel's "for-profit status").

285. See *id.* at 1276-77.

286. See Thompson, *supra* note 25, at 23.

287. See *id.* (describing machinima as a way "to comment directly on the pop culture" that game players "so devotedly consume").

288. See *id.* (characterizing the soldiers' dialogue as "existential").

289. "Red vs. Blue" has become lucrative for the filmmakers; well beyond a hobby, producing the series is now a full-time job. Thus far, *Halo*'s copyright owner, the Microsoft subsidiary Bungie, has not sought any licensing fees, saying that it admires the "Red vs. Blue" series and is grateful for the attention—and new players—that the machinima has brought to the company. Bungie even hired the makers of "Red vs. Blue" to create advertisements for the game. See *id.* at 23-24; cf. Frere-Jones, *supra* note 257, at 85-86 (describing growing number of authorized remixes).

290. World Intellectual Property Organization, *Report of the WIPO General Assembly*, 31st Sess., ¶ 218, WO/GA/31/15 (Oct. 5, 2005). The call is an about-face for an institution which, for the past half-century, has spread the gospel of utilitarian intellectual property law. Since 1967, WIPO's mandate has been "to promote the protection of intellectual property"—it has done this through a philosophy many have criticized as "more is better,"

part to the Geneva Declaration, a call from hundreds of scientists, scholars, and activists to reorient intellectual property law in favor of the “[l]ong-neglected concerns of the poor, the sick, the visually impaired and others.”²⁹¹ But while there is growing consensus that this law ought to have a “development agenda,” there is not much agreement yet about what such a broad agenda for intellectual property and development would require.

Presently, a vast coalition of intellectual property activists from around the world is drafting what they call a Treaty on Access to Knowledge, or A2K. The draft treaty brings to the table free culture advocates and indigenous peoples, representatives of the developed world and the developing world. Focused on freedom and equality, it promises to be a Universal Declaration of Human Rights for intellectual property in the Knowledge Age. A2K seeks “to enhance participation in cultural, civic and educational affairs” and share “the benefits of scientific advancement.”²⁹² It recognizes the relationship between knowledge and development, and “the opportunities arising from technological progress particularly the Internet.”²⁹³ “Mindful of the need to overcome disparities in wealth, development, and access to knowledge resources,” A2K aspires “to create the broadest opportunities to participate in the development of knowledge resources.”²⁹⁴ It would address this goal by focusing on preserving the public domain, controlling anticompetitive practices, and restricting the use of technological measures that would limit access to knowledge goods.²⁹⁵ The treaty makes special note of the needs of society’s weakest, such as disabled persons and indigenous peoples.²⁹⁶

To these ends, A2K proposes significant reforms in copyright²⁹⁷ and patent laws.²⁹⁸ Copyright laws, for example, would permit fair use for purposes “including but not limited to parody”;²⁹⁹ the reverse engineering of works;³⁰⁰

seeking upward harmonization of intellectual property rights around the globe. *See* WIPO, Convention Establishing the World Intellectual Property Organization, July 14, 1967, 21 U.S.T. 1749, 828 U.N.T.S. 3.

291. *See* Geneva Declaration on the Future of the World Intellectual Property Organization, at 2, Sept. 29, 2004, available at <http://www.cptech.org/ip/wipo/futureofwipodeclaration.pdf> (seeking to broaden intellectual property to include concerns for “fairness, development and innovation”); *see also* World Intellectual Property Organization, *Proposal by Argentina and Brazil for the Establishment of a Development Agenda for WIPO*, WO/GA/31/11 (Aug. 27, 2004).

292. Draft Treaty on Access to Knowledge, pmb., May 9, 2005, available at <http://www.cptech.org/a2k/>.

293. *Id.*

294. *Id.*

295. *Id.*

296. *Id.*

297. *See id.* art. 3-1 (presenting “General Limitations and Exceptions to Copyrights”).

298. *See id.* art. 4-1 (offering limitations and exceptions to patent laws).

299. *See id.* art. 3-1(a)(ii).

300. *See id.* art. 3-1(a)(vi).

the use of works by disabled persons,³⁰¹ and the use of work “by educational institutions [sic], as primary instructional materials, if those materials are not made readily available by right holders at a reasonable price; provided that in case of such use the right holder shall be entitled to equitable remuneration.”³⁰² While the DevNat License offers a voluntary mechanism for donating works to the Third World, A2K suggests a “new protocol for access to copyrighted works in developing countries” through compulsory licenses.³⁰³ Finally, in addition to specific limitations, the treaty includes a “general exception to copyright law, applicable in special cases where the social, cultural, educational or other developmental benefit of a use outweighs the costs imposed by it on private parties, (and providing for equitable remuneration to the copyright owner in appropriate circumstances).”³⁰⁴

Limitations and exceptions to patent laws included in the draft A2K include allowing experimental uses of the patented invention, “including commercial research, on or with the covered invention.”³⁰⁵ A2K would condition the granting of a patent upon “disclosure of the source or origin of any biological material utilized in the invention.”³⁰⁶ Finally, the treaty would disable patent holders from preventing “the distribution of medicines or other medical technologies that are manufactured and distributed for compassionate use,” when (1) “the use is temporary, and addresses an urgent health care need;” (2) “there is no alternative method of obtaining the product at an affordable price;” and (3) “the product is distributed at no profit [free].”³⁰⁷

A2K recognizes and responds to diverse concerns well beyond those of traditional intellectual property law. It acknowledges existing differences in power and incomes and the disparate social effects of intellectual property on local and global social relations. Going further, A2K would restructure rights—not just through voluntary mechanisms, but by reforming default rules—to redress the maldistribution of resources and to re-strike the balance between intellectual property and the public domain that many of A2K’s framers believe existed in earlier times.

But A2K is both revolutionary and conservative at the same time. A2K addresses the promise of new technologies, for example, not by exploiting the potential of the law to enhance semiotic democracy, but to return to the balance that earlier existed between producers and consumers.³⁰⁸ And while it would redistribute knowledge products, in its current state A2K does little to address

301. *See id.* arts. 3-1(a)(vii), 3-3.

302. *Id.* art. 3-1(a)(iv).

303. *Id.* art. 3-12.

304. *Id.* art. 3-1(d).

305. *Id.* art. 4-1(b)(i).

306. *Id.* art. 4-1(c)(ii).

307. *Id.* art. 4-1(b)(iv).

308. *See id.* art. 3-6(i) (expressing concern that DRMs “may undermine traditional limitations and exceptions to exclusive rights”).

the need for enhancing poor people's capacity to produce knowledge themselves, which is considered increasingly important for realizing the developmental goals of the new millennium. A2K's lofty aspirations, I suggest, need to be grounded in a new theory. I begin this project in the final Part.

IV. TOWARD A CULTURAL ANALYSIS OF INTELLECTUAL PROPERTY

Utilitarian theory may not ask about intellectual property's effects on different kinds of individuals and on social relations, but people across the world do. Developing countries in WIPO and the WTO ask how intellectual property laws might affect the poor differently from the rich. Women ask how the failure to protect traditional knowledge affects them differently from men.³⁰⁹ American student activists ask what has happened to our "free culture"—who is capable of exercising freedom in our culture, and who is not.³¹⁰ An AIDS patient in India asks whether he will live.³¹¹

How should we understand these descriptions of how people are deploying and critiquing intellectual property in this new millennium?

I turn to three moral theories as guides: theories of *development*, *property*, and *culture*, respectively. These three theories elaborate on the insights and connections offered by the metonym IP³. My earlier discussion and case studies show that IP³ explains current intellectual property law where traditional incentives analysis does not. Today individuals are harnessing technology to participate democratically in culture and to reform social relations. They challenge existing intellectual property rights that threaten cultural development and participation (e.g., Grokster, DevNat, Doctors Without Borders, A2K) and simultaneously seek new intellectual property rights in their cultural contributions, hoping to benefit materially from their creations (e.g., GIs, mash-up, fan fiction, and machinima). Where the incentive theory considers intellectual products in the abstract and ignores the social effects of

309. See, e.g., RESEARCH FOUND. FOR SCI., TECH. & ECOLOGY, IMPACT OF WTO ON WOMEN IN AGRICULTURE (2005), available at [http://ncw.nic.in/pdfreports/Impact of WTO Women in Agriculture.pdf](http://ncw.nic.in/pdfreports/Impact%20of%20WTO%20Women%20in%20Agriculture.pdf) (commissioned by the National Commission for Women, an Indian government agency); see also PAUKTUUTIT INUIT WOMEN'S ASS'N, INUIT WOMEN'S TRADITIONAL KNOWLEDGE WORKSHOP ON THE AMAUTI AND INTELLECTUAL PROPERTY RIGHTS (2002), available at http://www.pauktuutit.ca/pdf/publications/pauktuutit/Amauti_e.pdf; INDIGENOUS WOMEN'S CONT'L NETWORK, PROTECTING INDIGENOUS WOMEN'S INTELLECTUAL PROPERTY: TOOLS FOR THOUGHT AND ACTION WITH REGARD TO PROTECTING THE TRADITIONAL DESIGNS AND PATTERNS OF INDIGENOUS WOMEN (2000), available at <http://www.ichrdd.ca/english/commdoc/publications/indigenous/introEnglish.html>.

310. See FreeCulture.org, Free Culture Manifesto, <http://www.freeculture.org/manifesto.php>; FreeCulture.org, What Is Free Culture?, http://freeculture.org/wiki/index.php/What_is_free_culture%3F.

311. See McNeil, *supra* note 196 (quoting Loon Gangte, an AIDS activist in India: "I am using generic AIDS drugs because I can afford the price. Since the bill has passed, when I need new drugs, I won't be able to afford them. I could become one of the casualties.").

intellectual property, IP³ reveals the interpenetration of culture, technology, and economics.

For the most part, the theories upon which I draw are social and cultural rather than economic. They recognize not just efficiency, but a number of incommensurable values: from the right to health, to the freedom to create, to democracy, equality, and distributive justice. To be sure, adding values for consideration complicates decision-making, but ignoring important values may lead to erroneous decisions. My discussion below begins to elaborate how a cultural analysis of intellectual property law might offer normative guidance for resolving disputes over property rights in culture and knowledge such as those I have considered above.

A. *Development as Freedom*

The “capabilities approach” to development pioneered by Amartya Sen³¹² and Martha Nussbaum³¹³ offers a critique of the utilitarian account of development as measured by GDP or technological advancement alone.³¹⁴ Sen’s vision of “development as freedom” is pluralist, measuring development by assessing an individual’s ability to exercise many freedoms, including market-oriented freedom.³¹⁵ As Nussbaum further articulated, central human freedoms range from basic needs, such as the right to life and health, to more expansive freedoms of movement, creative work, and participation in social, economic, and cultural institutions.³¹⁶

312. See generally SEN, *Equality of What?*, *supra* note 148 (highlighting limitations of the prevailing utilitarian and Rawlsian models of measuring inequality and proposing a new model founded on basic capabilities).

313. See NUSSBAUM, *supra* note 151, at 12 (describing her project as going beyond Sen’s “to articulate an account of how capabilities, together with the idea of a threshold level of capabilities, can provide a basis for central constitutional principles that citizens have a right to demand from their governments”).

314. See AMARTYA SEN, *DEVELOPMENT AS FREEDOM* 3 (1999) (“Development can be seen, it is argued here, as a process of expanding the real freedoms that people enjoy. Focusing on human freedoms contrasts with narrower views of development, such as identifying development with the growth of gross national product, or with the rise in personal incomes, or with industrialization, or with technological advance, or with social modernization.”); see also AMARTYA SEN, *INEQUALITY REEXAMINED* 37 (1992) (emphasizing “the gap between *resources that help* us to achieve freedom and the extent of *freedom itself*”).

315. NUSSBAUM, *supra* note 151, at 5 (defining capability as “what people are actually able to do and to be” in a given society); see also SEN, *Equality of What?*, *supra* note 148, at 367 (defining “basic capabilities” as “a person being able to do certain basic things”).

316. Nussbaum’s central capabilities include: the right to life, good health, and avoiding premature death; political, social, and cultural freedoms, such as the capability “to imagine, think, and reason”; the ability to receive “an adequate education, including . . . basic . . . scientific training”; and the ability “to search for the ultimate meaning of life in one’s own way.” NUSSBAUM, *supra* note 151, at 78-79. Finally, Nussbaum would have every individual be capable of holding property because it is necessary to have

Intellectual property law is, of course, essential to all of these freedoms. We can readily see intellectual property law as a means of development (and implicitly as a means of thwarting development) in the health context. Patents and copyrights determine our access to drugs and education, while trademarks and rights of publicity define the contours of freedom of speech and the ability to play with cultural icons.³¹⁷ As Sen has written, however, when assessing development as freedom, we must begin with the question, “what is development for?”³¹⁸ Development must entail not only economic growth, but also a life that is culturally fulfilling.³¹⁹ My earlier discussion of geographical indications, mash-ups, fan fiction, and machinima begins to illustrate how intellectual property ownership may also be central to more advanced cultural and economic development. Recognizing people’s humanity requires acknowledging their production of knowledge of the world. This recognition, in turn, fuels remuneration to new creators.³²⁰ The United Nations’ conception of a “Knowledge Society” articulates this understanding of development. As a U.N. report puts it, “at its best, the Knowledge Society involves all members of a community in knowledge creation and utilization.”³²¹ Hence, “the Knowledge Society is not only about technological innovations, but also about human beings, their personal growth, and their individual creativity, experience and participation.”³²²

Focusing on development as freedom and agency provides a metric with which to assess intellectual property rights, such as those presented by the Indian GI Act. For one thing, a geographical indication works by denying many people the ability to identify a good with a particular name. But in so doing, it recognizes the quality and reputation cultivated by particular communities, and, like traditional trademarks, prohibits others from free-riding off that reputation. It thereby empowers local communities, which can continue to commercialize their products without fearing displacement by global mass production. Of course, GIs might circumscribe freedom if those within the community are forced to play defined roles in the production process or are prevented from leaving. As Sen writes, an economy premised upon agency and freedom will value “free labor contract and unrestrained physical movement” in contrast to the “bonded labor and forced work” characteristic of traditional economies.³²³

“[c]ontrol over [o]ne’s [e]nvironment.” *Id.* at 80.

317. On playing with cultural icons, see Chander & Sunder, *supra* note 276.

318. Sen, *supra* note 30, at 39.

319. *See id.* (“The freedom and opportunity for cultural activities are among the basic freedoms the enhancement of which can be seen to be constitutive of development.”).

320. *See id.* (recognizing economic value in cultural activity from music and art to tourism).

321. U.N. DEP’T OF ECON. & SOC. AFFAIRS, *supra* note 20, at xi (describing the principal assets of a Knowledge Society as “people . . . as creative beings and carriers of tacit knowledge” and “information . . . that triggers people’s creative reflection”).

322. *Id.* at xiv.

323. SEN, DEVELOPMENT AS FREEDOM, *supra* note 314, at 28. Advocates of traditional

A core value of Sen's development as freedom approach is that "the people must be allowed to decide freely what traditions they wish or not wish to follow."³²⁴

B. *Intellectual Property as Social Relations*

Traditionally, real property rights have been considered perpetual and unqualified; they do not automatically expire within a term of years and, for the most part, they were thought to advance private interests in autonomy, efficiency, and sovereignty, not public interests in community and human rights. Intellectual property rights, on the other hand, were foundationally understood as limited exclusive rights, and offered by the state not to reward private persons but to promote the public interest in art and science. Real property rights were conceptually absolute and private; intellectual property rights were qualified and public-minded.

The last century, however, has seen a reversal in the fundamental properties of these core legal rights. During this time, real property rights have come to be understood not as absolute rights, but as a set of "social relations" among various actors that require limited rights so as to respect competing private and public interests,³²⁵ including human rights and the dignity of persons. Indeed, at the turn of the century, modern property rights balance myriad values, from efficiency to personhood, human health, dignity, liberty, fairness, and distributive justice.³²⁶ The scope and duration of intellectual property rights, in contrast, have grown substantially, so that today many of these rights have become virtually perpetual and unqualified.³²⁷ Furthermore, we have moved far away from an understanding of intellectual property as serving the public interest, toward a regime that conceptualizes rights almost exclusively as the private economic rights of creators. The irony now is that, while multiple owners may carry different sticks in the bundle of rights that comprises full ownership of real property, intellectual property rights, or rights in public goods that can, in fact, be shared by many are concentrated in the hands of a few.

knowledge protection increasingly recognize the need to approach traditions critically.

324. *Id.* at 32.

325. During the last quarter century, in particular, property law has been reconceived from the static terms of absolute ownership to a "web of social relations," a complex and dynamic set of legal rights and responsibilities among various social actors. *See* Munzer, *supra* note 3, at 36-75 (outlining various arguments for a social relations theory of property).

326. *See* Frank I. Michelman, *Possession vs. Distribution in the Constitutional Idea of Property*, 72 IOWA L. REV. 1319, 1329 (1987) (arguing that from the beginning the constitutional understanding of property recognized the fair distribution of property as essential to democracy).

327. *Cf.* Clarisa Long, *Dilution*, 106 COLUM. L. REV. 1029 (2006) (finding that, contrary to current wisdom, trademark infringement claims based on the relatively new dilution theory are neither frequent nor robust).

But increasingly, this conception of intellectual property law is being challenged. From the disaggregation of intellectual property rights through Creative Commons licenses to the Doha Declaration's assertion that intellectual property rights serve human values, intellectual property is being re-envisioned as limited by the property and personal rights of others, not just by economic incentive theory alone. *Intellectual property rights are increasingly being understood as property rights that structure social relations.*

This should not be surprising, let alone alarming. Despite laypersons' conceptions of property law as individualistic, economic, and absolute, in fact, real property law is today one of the most venerable, robust, and important mechanisms we have for organizing complex social life.³²⁸ "Property is one of the most sociable institutions that human beings have created, depending as it does on mutual forbearance and on the recognition of and respect for the claims of others," Carol Rose writes.³²⁹ And while property and intellectual property remain distinct domains, there is in fact much that intellectual property can gain from the social relations approach to property.³³⁰ The expansion of intellectual property rights around the world, touching billions of diverse people of all levels of economic and cultural development, brings intellectual property's social effects to the foreground and begs for a deeper analysis of how this law ought to accommodate its diverse effects. The quest of traditional knowledge-holders for respect and recognition of their cultural authorship, the claims of developing nations for more equitable economic and social relations, and public concern for the health of the poor require that intellectual property decision-makers pay heed to the following lessons of the social relations theory of property:

Property rights have social effects. As American society became more densely populated, commercial, and interconnected, the absolute rights conception of property rights gave way to a "social relations" view that imposes limits on property owners in recognition of the social effects of property ownership. As Joseph Singer, a leading social relations theorist, describes, modern property law recognizes that "owners do not live alone. Both ownership and the use of property affect others—for good and for ill."³³¹ Property law's focus on social effects goes beyond mere description to prescription, offering normative justification for judges and legislators to take social effects into account when creating, limiting, and distributing property

328. SINGER, *supra* note 3, at xxv ("Property law is one of the ways we organize social life; it embodies some of the deepest and most cherished values we possess.").

329. Carol M. Rose, *Property in All the Wrong Places?*, 114 YALE L.J. 991, 1019 (2005) (book review).

330. For a thoughtful analysis of how intellectual property could reclaim balance and limits by adopting wholeheartedly the paradigm of property, see Michael A. Carrier, *Cabining Intellectual Property Through a Property Paradigm*, 54 DUKE L.J. 1 (2004).

331. SINGER, *supra* note 3, at xxv; see also Munzer, *supra* note 3, at 41 (describing property as "a matter of constant pushing and shoving").

rights.³³² The result is a rich and complex body of law, from nuisance law to antidiscrimination law to landlord/tenant law, which limits property rights to protect property interests (for example, the right to quiet enjoyment), personal interests in health and dignity, and the public interest (such as a clean environment).³³³

Property law distributes rights in shared resources. The social relations view takes a disaggregated view of property; its famous metaphor is property as a “bundle of sticks,” used by first-year law professors and Supreme Court justices alike³³⁴ to describe how ownership of property is divided among many people and over time. The bundle of sticks metaphor helps to imagine real property not as absolute but as a set of rights—sticks—that can be shared.³³⁵

Property rights balance incommensurable values. In contrast to current intellectual property law, which claims its justification derives from utilitarianism alone, modern property law is founded upon a variety of normative theories from Lockean labor theory to economic reasoning to theories of personhood.³³⁶ While there is conflict over which of these theories may reign supreme,³³⁷ it is generally conceded that modern property law balances a number of incommensurable values, which derive from these theories.³³⁸ The goal in recognizing a variety of values is not to prioritize one over others, but to maximize each value where possible.³³⁹

Property law recognizes unequal power relations. Property as social relations recognizes that unequal distributions of power and wealth enable some persons to coerce others in property relations and inhibit them from realizing the multiple values that property rights should promote, from autonomy to health and dignity.³⁴⁰ Social relations theory would rectify this

332. See, e.g., Munzer, *supra* note 3, at 13-16.

333. *Id.* at 3-4.

334. See *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979) (describing the right to exclude others as “one of the most essential sticks in the bundle of rights that are commonly characterized as property”).

335. See SINGER, *supra* note 3, at xxv-xxvi (“Because others are entitled to limit what owners can do with their property, no property rights are absolute. Indeed, our property system confers, not absolute ownership, but *shared* ownership—with legal rights in a particular valued resource divided among several, or even many, people.”).

336. *Id.* at 13 (“Both scholars and judges have adopted a variety of normative approaches to debating what the rules of property law are and should be.”).

337. See MARGARET JANE RADIN, *REINTERPRETING PROPERTY* 15-16 (1993) (challenging the dominance of the economic theory of property rights).

338. See SINGER, *supra* note 3, at 13-19.

339. *Id.* at 12.

340. See Munzer, *supra* note 3, at 41 (writing that social relations theory recognizes that “[d]ifferences in power influence the relations among human beings and the property rights that result”). On property and power, see DUNCAN KENNEDY, *SEXY DRESSING ETC.* 103-04 (1993) (discussing how legal rules influence the relative bargaining power of men and women).

imbalance, prescribing rules that would maximize the ability of all persons to exercise their property and personal rights.³⁴¹

Property rights structure social relations. While an economic analysis of property tailors law to maximize individual pleasure or welfare, a social relations analysis of property seeks laws that structure better social relations, respecting the health and dignity of all people.

The state is not neutral. Property as social relations recognizes that the state actively structures certain social relations as it distributes and enforces property rights.³⁴²

Property rights mediate relations between the individual and community. Building on the work of Hegel, Margaret Jane Radin argued that property rights ought to provide individuals both freedom and community. “[T]o be a person,” Radin wrote, “an individual needs some control over resources in the external environment.”³⁴³ But Radin was concerned about “object-fetishism.”³⁴⁴ She recognized that just because persons regard objects as constitutive of their identity, all forms of this identification may not be good and ought not to be encouraged or legitimized by law.³⁴⁵ Property law must recognize that humans need both roots and wings, she argued, acknowledging the need for both community and autonomy.³⁴⁶ Jennifer Nedelsky has been similarly concerned that property rights should neither isolate the individual nor reify the community.³⁴⁷ Nedelsky and Radin sought for property rights to enable one to constitute a stable, socially grounded, historicized, and autonomous self in the world.

We need similar visions for intellectual property. Social movements have turned our attention to the cultural and material effects of intellectual property law. Theorists have alerted us to the potential benefits and dangers of the new technological architectures for facilitating personal and community flourishing. The conclusions are clear: improved social relations, measured by every individual’s maximization of numerous moral values, from freedom to equality to health and efficiency, are not inevitable; they require the attention and active

341. See SINGER, *supra* note 3, at 15.

342. See Munzer, *supra* note 3, at 49.

343. Radin, *supra* note 1, at 957.

344. *Id.* at 961.

345. *Id.* (“If there is a traditional understanding that a well-developed person must invest herself to some extent in external objects, there is no less a traditional understanding that one should not invest oneself *in the wrong way* or *to too great an extent* in external objects.” (emphasis added)).

346. Radin advocated the use of community standards to judge which property relationships are healthy and normatively admirable, and which are not. *Id.* at 978-79.

347. Jennifer Nedelsky, *Law, Boundaries and the Bounded Self*, REPRESENTATIONS, Spring 1990, at 162, 168 (“The central question for inquiries into autonomy . . . [is] how to structure relationships so that they foster rather than undermine autonomy.”).

promotion of law. We must attentively design the legal and communications architecture in accordance with the kinds of social relations we want.³⁴⁸

C. *The New Enlightenment*

What I call the “New Enlightenment” suggests a vision of the normative society I believe modern intellectual property laws ought to promote.

The Enlightenment ushered in modernity by denouncing political imposition and promoting the exercise of reason, democracy, and freedom of expression in the political sphere. Yet, it paradoxically left the private spheres of culture and religion in the Dark Ages of imposition and unreason. “Enlightenment,” Kant wrote, “is man’s exit from his self-incurred minority. Minority is the incapacity to use one’s intelligence without the guidance of another.”³⁴⁹ For Kant, Enlightenment required the individual to “think for himself”³⁵⁰ rather than accept imposed political orthodoxy. But while Kant railed against irrationality and authoritarianism, religious and cultural institutions largely escaped his critique. Rather, Enlightenment would live cheek-to-jowl with culture, rather than replacing it, by limiting itself to *the public sphere*. “The *public use* of a man’s reason must be free at all times . . . this alone can bring enlightenment among men,” Kant wrote, “while the private use of a man’s reason may often be restricted.”³⁵¹

Today, claims for a New Enlightenment go the next mile, calling for enlightened approaches to *culture* as well. Scoutleaders seek rights to be openly gay *within* the normative association of the Boy Scouts of America.³⁵² Muslim women claim rights to equality *within* Islam.³⁵³ And in the field of intellectual property, fans of music, literature, and video games assert themselves as auteurs *within* existing cultural canons. Traditional knowledge holders assert a right to recognition and participation in global markets in cultural commodities. Netizens propose an Access to Knowledge Treaty that envisions access to basic literary and scientific knowledge as necessary to empower each individual to create new cultural knowledge.

The old Enlightenment understood freedom and equality as developed in *opposition* to culture. The Romantic movement exalted the artist above others as someone who created truth and meaning for themselves, unlike those for

348. See Yochai Benkler, *There Is No Spoon*, in *THE STATE OF PLAY: LAW AND VIRTUAL WORLDS* (Jack M. Balkin & Beth Simone Noveck eds., forthcoming 2006) (arguing that designing a communications architecture “requires that we define a range of social relations that we believe the platform will enable, and a normative belief about how those relations should go”).

349. KANT, *supra* note 28, at 135.

350. *Id.* at 136.

351. *Id.* at 136-37.

352. See Sunder, *Cultural Dissent*, *supra* note 29, at 496.

353. See Sunder, *Piercing the Veil*, *supra* note 29, at 1404.

whom knowledge came from religious and cultural authorities from above.³⁵⁴ But the proliferation of authorship *alongside* cultural rights at the turn of the century has confounded expectations that Enlightenment would triumph over culture. Increasingly we now understand that we develop our autonomous selves through and within a cultural discourse, “inhabit[ing]” tradition, not just resisting it.³⁵⁵ Enlightenment has lately fallen out of favor among contemporary post-structuralists, who blame Enlightenment’s antagonism to religion and culture for enabling colonialism.³⁵⁶ At the same time, scholars recognize Enlightenment as indispensable to the fight against tyranny.³⁵⁷ The New Enlightenment recognizes that liberty demands autonomy within culture, and simultaneously understands that equality requires the capability to participate equally in the social and economic processes of cultural creation.³⁵⁸ The freedom and equality battles of this new century will not only be about access to physical space, but also to *discursive space*. The crucial question will be: who will have power to make our cultural world? A libertarian may argue

354. For the first time, the term “creator” was used to describe not only God, but the human artist. Paul Oskar Kristeller, “*Creativity*” and “*Tradition*,” 44 J. HIST. IDEAS 105, 107 (1983). By the nineteenth century, conceptions of “originality” and “creativity” more fully embodied the Enlightenment’s increasingly rationalized, bureaucratized, and individualized understanding of the self as fully developed outside of and against the confines of culture. Enlightenment sought “to free modern man (and woman) completely from all rules, restrictions, and tradition.” *Id.* at 107. To be sure, the pursuit of art and truth against tradition was more aspiration than fact. Much art supported and paid reverence to the establishment, including the religious establishment. *See id.* at 113 (citing the Italian Renaissance as “evidence that creativity is not always stifled by tradition and must not always assert itself by denying the value of all tradition”). The advent of photography in the early twentieth century also contributed to an evolving “culture of novelty,” or in Stephen Jay Gould’s words, the “cult of novelty.” Conversely, artistic movements from the sixteenth century followed a “developmental” model in which each new artistic “movement” drew upon and reacted to the movements that preceded it—from the Impressionism of Monet who represented the world as actually seen by the eye, with all of the eye’s imperfections (depending upon light, shadows, etc.), to the Expressionism of Jackson Pollack, who didn’t focus on literal representation, but rather on the internal world of feelings. *See* Daniel J. Gifford, *Innovation and Creativity in the Fine Arts: The Relevance and Irrelevance of Copyright*, 18 CARDOZO ARTS & ENT. L.J. 569, 581 (2000). Photography freed artists in the twentieth century once and for all from established standards. *Id.* at 585.

355. SABA MAHMOUD, *POLITICS OF PIETY: ISLAMIC REVIVAL AND THE FEMINIST SUBJECT* 15 (2005).

356. *See* DAVID SCOTT, *CONSCRIPTS OF MODERNITY: THE TRAGEDY OF COLONIAL ENLIGHTENMENT* 177 (2004).

357. *See id.* at 176; DIPESH CHAKRABARTY, *PROVINCIALIZING EUROPE: POSTCOLONIAL THOUGHT AND HISTORICAL DIFFERENCE* (2000).

358. *See* MICHEL FOUCAULT, *What Is an Author?*, in *LANGUAGE, COUNTER-MEMORY, PRACTICE: SELECTED ESSAYS AND INTERVIEWS* 113 (Donald F. Bouchard ed., 1977). Foucault opined that while we ought to be suspicious of the alleged “sovereignty of the author,” *id.* at 126, and the “problematic nature of the word ‘work’ and the unity it designates,” *id.* at 119, that “the subject should not be entirely abandoned,” *id.* at 137. Rather, Foucault argued that authorship “should be reconsidered . . . to seize its functions, its intervention in discourse, and its system of dependencies.” *Id.* (emphasis added).

that we may find more freedom by exiting restrictive cultures rather than remaining within them. Indeed, this notion underlies traditional copyright law, which envisions creativity as taking place either against culture (praised as parody) or wholly outside of it (hailed as “original”). But this traditional binary option of culture (on the terms of the powerful) or freedom (without culture) is disfavored today.³⁵⁹ In the modern world, individuals want both: they demand their autonomy, but often within the cultural communities in which we live and grow.³⁶⁰

D. Foundations and Applications of a Cultural Theory

In intellectual property scholarship, “culture” is a word on everybody’s lips. James Boyle spurs a “cultural environmentalism” movement to counter the privatization of our intellectual heritage.³⁶¹ Larry Lessig warns that legal code and computer code together are morphing our once “free culture” into a “permission culture.”³⁶² Yochai Benkler explores how commons-based methods of production “provide more opportunities for participating in the creation of culture.”³⁶³ Jack Balkin says the First Amendment and intellectual property ought to be concerned about “cultural democracy,”³⁶⁴ and William Fisher asks what kind of laws would promote “semiotic democracy.”³⁶⁵ All of these scholars seek to protect our cultural commons and the processes of cultural innovation. Yet there is resistance in the intellectual property academy to the elaboration of a cultural theory of intellectual property that would stand beside the economic account, and none of these theorists has offered such an account.³⁶⁶

In this Article, I have argued that the intellectual-property-as-incentives approach fails to account for the wide range of values at stake in global intellectual production today. Even the well-intentioned critics of maximalist intellectual property cannot address the giant-sized values implicit in current debates, from development to democracy, purely from within the traditional economic framework.³⁶⁷ The fundamental value of the intellectual-property-as-

359. See Sunder, *Piercing the Veil*, *supra* note 29, at 1409; Sunder, *Cultural Dissent*, *supra* note 29, at 508-09.

360. See generally WIRED, July 2005, available at <http://www.wired.com/wired/archive/13.07> (providing several articles under the heading of “remix planet”).

361. In March 2006, a conference honoring Boyle as the founder of the “cultural environmentalism” movement was held at Stanford Law School. See <http://cyberlaw.stanford.edu/conferences/cultural>.

362. LESSIG, *supra* note 126.

363. BENKLER, *supra* note 105, at 285.

364. Balkin, *supra* note 126, at 39.

365. Fisher, *supra* note 8.

366. To be sure, the decision to critique intellectual property from within the utilitarian framework reflects a pragmatic need to confront rights maximalists on their own terms.

367. Many of the leading scholars do recognize more and more the need for broader

incentives approach is maximizing cultural production. This narrow intellectual property utilitarian theory presumes that maximizing cultural production in the aggregate will lead to the greatest good for the greatest number of people. We may assess this theory on its own terms—both from a narrow and from a broader utilitarian analysis.³⁶⁸ But this is not my project. My goal is to broaden the descriptive and prescriptive framework for understanding intellectual property. In articulating a cultural approach *I do not seek to displace the economic utilitarian analysis of intellectual property but rather to complement it*. In Part III, I sought to fill the gaps where economic theory does not fully explain modern intellectual property cases and conflicts. I showed that concerns about equality, social relations, and democracy also animate both contemporary intellectual property law and efforts to reform it. In this Part, I have called upon theories of development, property, and culture to posit an intellectual property law that comprehends and rejoins the interpenetration of economics, law, and culture in the contemporary world.

My cultural approach is informed by several late twentieth century phenomena that converged at the start of the new millennium. The postcolonial turn to identity and culture in social movements has shone light on cultural misrepresentation as a form of dispossession, with grave consequences for individual and communal well-being. The impact of cultural misrecognition promises to be even more profound in the future, as social and economic power increasingly derive from knowledge industries. At the same time that identity politics has turned its attention to questions of development through the capacity to produce and participate in culture, the new technologies of the Internet Protocol make such cultural democracy more possible. In the Participation Age, people with access to a computer and relatively cheap but powerful digital hardware challenge the hegemony of traditional cultural authorities and create new cultural meanings from the bottom up.

Make no mistake: intellectual property law is no mere bystander in this culture war. It both empowers and disempowers individuals and groups when recognizing (or misrecognizing) authors and inventors, pirates and thieves. Intellectual property *governs*. It can operationalize either semiotic democracy or technocracy.

In this final Part, I outline briefly some of the normative assumptions and aspirations of a cultural theory of intellectual property. The theory draws from

perspectives in intellectual property law. In an important new book, Yochai Benkler argues that “[l]iberal political theory needs a theory of culture and agency.” BENKLER, *supra* note 105, at 276 (“Culture is a social-psychological-cognitive fact of human existence. Ignoring it, as rights-based and utilitarian versions of liberalism tend to do, disables political theory from commenting on central characteristics of a society and its institutional frameworks.”); *see also* Fisher & Syed, *supra* note 146; Jack Balkin, Remarks at the Access to Knowledge Conference at Yale Law School (Apr. 2006) (transcript available at <http://balkin.blogspot.com/2006/04/what-is-access-to-knowledge.html>) (arguing that A2K is “a big topic, and there is no one single rhetoric that captures all of it”).

368. *See, e.g.*, Fisher & Syed, *supra* note 146.

the case studies in the earlier part but goes beyond them, from articulating *what people feel* about intellectual property to positing *what is really at stake* in modern conflicts. A cultural theory of intellectual property offers a complementary account of intellectual production, at times supplying answers different to those supplied by the traditional utilitarian account to questions such as: What are the purposes and effects of intellectual production and intellectual property law? Why and how do we create culture? What values ought we to promote through intellectual property law? From where do we derive limits on intellectual property? I lay the groundwork for considering these questions here.

What are the purposes and effects of intellectual production and intellectual property law? Traditional intellectual property theory posits a limited purpose for this law—to incentivize creativity. But where the economic approach sees value in maximizing cultural *products*, a cultural approach makes paramount peoples' participation in the *processes* of cultural production. Cultural theory takes as a starting point that human beings are creative and cultural, continually seeking to make and remake our world, contributing to commerce and culture, science and spirituality. Individuals demand and deserve both recognition and remuneration for their intellectual production.

But intellectual property does not merely incentivize and reward creators. Intellectual property structures social relations. Intellectual property governs the production of life-saving medicines or work-saving machines, but also disciplines their distribution. The relationship between intellectual property and development goes well beyond GDP. Economic remuneration from cultural production will be an important source of revenue and stimulus for development in the Knowledge Age. Economic, social, and cultural rights are interconnected and mutually reinforcing: as in the case of Solomon Linda, intellectual property rights affect one's social standing, health, and overall well-being.

A theory of intellectual-property-as-social-relations recognizes that, in our increasingly complex and interrelated world, one person's intellectual property rights may interfere with another's intellectual property rights, or yet another's personal rights to health, or to speech. Modern intellectual property law must manage these conflicts. Furthermore, profound inequalities in the world render individuals with unequal capacity to participate in intellectual production more vulnerable to exploitation of their rights. A cultural approach to intellectual property recognizes existing disparities in cultural capabilities resulting from economic, social, and cultural inequalities, and seeks intellectual property laws that accommodate difference, just as the Doha Declaration would have TRIPS account for the inability of some countries to exercise effectively compulsory licenses for life-saving drugs.

Why do we create culture? Both the cultural and economic approaches agree that rights through markets incentivize cultural production and dynamism, as we see in the GI example. But economic incentive does not fully

explain cultural production, as examples as diverse as open source software, the developing nations license, fan fiction, and GIs themselves illustrate. I have suggested that concerns ranging from the compulsion to represent oneself historically (within and against community) to a commitment to preserve and share cultural knowledge spur individuals and communities to participate in creative industry.

How do we create culture? Traditional intellectual property theory posits creators working in isolation; the theory romanticizes originality as taking place either outside of or against culture.³⁶⁹ Cultural theory, in contrast, situates authors and inventors as working within and through existing discourses. A cultural approach would recognize the interdependence of cultures and would foster opportunities for learning and sharing within and among cultures. At the same time, a cultural approach would be aware that global asymmetries of power and wealth threaten cultural sharing. As I discuss in the example of the proposed “cultural heritage license” below, a cultural approach should seek to promote free cultural exchange on fair terms. A central concern of a cultural approach to intellectual property should be how to facilitate cultural production that involves inter- and intra-cultural borrowing in a socially-just manner.

What values should intellectual property law promote? A cultural approach to intellectual property is pluralist, emphasizing multiple values beyond just efficiency. Some of these “giant-sized” (and often interrelated) values include:

- *Autonomy*: Intellectual property law must support the capacity to author one’s own life and to develop one’s identity.³⁷⁰ Autonomy must include the capacity to live a dignified, healthful life.
- *Culture*: Individuals seek to develop their autonomous selves historically, within their communities and traditions and in dialogue with exogenous communities and traditions.³⁷¹ Cultures

369. For an insightful critique of economic intellectual property’s failure to understand creators as situated within particular cultural contexts, see Julie Cohen, *Culture and Creativity in Copyright*, 40 U.C. DAVIS L. REV. (forthcoming Feb. 2007).

370. My conception of autonomy overlaps with the continental concept of a moral right, or *droit moral*, but it remains distinct from this right. While the moral right emphasizes the creator’s personal control over her work (affording a right of attribution and of integrity against the modification or mutilation of the work), autonomy in my cultural sense emphasizes the dynamic relationship between the individual and the community—the individual is inspired by the culture of the community, and in turn creates artifacts that take on meaning for others in the community. Cf. Adolf Dietz, *The Moral Right of the Author: Moral Rights and the Civil Law Countries*, 19 COLUM.-VLA J.L. & ARTS 199 (1994-95) (describing the moral right as individualist).

371. Cf. Fisher, *Theories of Intellectual Property*, *supra* note 5, at 193 (“An attractive society is one rich in ‘communities of memory.’ Persons’ capacity to construct rewarding lives will be enhanced if they have access to a variety of ‘constitutive’ groups—in ‘real’ space and in ‘virtual’ space.”).

are understood to be dynamic, comprised of individuals who continually re-create their culture's meaning. Cultures are not hermetically sealed, but rather continuously interact with the world around them.

- *Democracy*: Where the old Enlightenment envisioned political democracy, the New Enlightenment heralds a *cultural democracy*, defined as the right to participate in and shape one's culture.³⁷²
- *Equality*: The structuring of intellectual property law affects the distribution of power, wealth, and resources. Policymakers must keep in mind the differential impact of intellectual property rules across society and the globe. While any rule will have unequal effects, we should at a minimum avoid rules that further disadvantage the least well off.
- *Development*: Economic remuneration from cultural production will be an important source of revenue and stimulus for development in the Knowledge Age. At the same time, royalty demands from intellectual property owners may at times retard development.

From where do we derive limits on intellectual property law? Viewing intellectual property as a regime for structuring social and cultural relations requires not only expanding our conception of when intellectual property is needed, but also delimiting intellectual property when it undermines the central values outlined above. Thus, the cultural theory I offer would simultaneously justify and critique various aspects of the exponential growth of intellectual property today. Indeed, the limits on intellectual property will go well beyond those ascribed by the incentives rationale—which would justify intellectual property as long as it spurred more creation. A cultural approach, on the other hand, would recognize intellectual property's relationship to autonomy, culture, democracy, equality, and development, and would shape intellectual property rights to these ends. This multiplicity of values would, of course, complicate the instrumental calculus defining the boundaries—but this is the byproduct of a theory that acknowledges intellectual property's true role in society, rather than a theory that finds a simpler answer by neglecting a broad range of human concerns.

How would cultural theory guide intellectual property conflicts? I conclude by applying a cultural approach to two hot button issues for the new “K” millennium: “TK” and “A2K”—traditional knowledge and access to knowledge. Where the DevNat license focuses largely on relations between the First and Third Worlds, a proposed new “cultural heritage license” would mediate between First World university researchers and first nations as holders

372. We may also call this a semiotic democracy, or the right “to participate in the process of making cultural meaning” in the world. *Id.*; see also Balkin, *supra* note 126.

of traditional knowledge. This license, a collaboration of iCommons, the Alexandria Archive Institute, and the Electronic Frontier Foundation, responds to indigenous peoples' concern that an open-access public domain in their knowledge may lead to exploitation and misappropriation.³⁷³ License architects acknowledge that many indigenous peoples, who have earlier encountered exploitation by Western researchers, often resist sharing traditional knowledge.³⁷⁴ "We currently face a binary decision between extremes," the proponents of this license write, "either leaving culture vulnerable to exploitation and appropriation or creating legal and technical barriers that hermetically seal bodies of knowledge."³⁷⁵ The license seeks to offer a "third option" facilitating communication under terms reasonably acceptable to both open knowledge and traditional knowledge constituencies.³⁷⁶

The turn to intellectual property and contract here is spurred out of concerns for respect, community, and cultural participation, not just efficiency. The license would reserve some rights to indigenous peoples—even when positive intellectual property law may not—as incentives to encourage cultural sharing and communication, not abstract cultural production. Recognizing the tribes' continuing interests in their knowledge for attribution and some control of use, the cultural heritage license reflects and advances existing social relations.³⁷⁷ The proponents of the license acknowledge that these goals may be in tension with the traditional goals of groups such as the Creative Commons, which "focuses largely on advancing individual freedoms of expression, and seeks to maximize the personal freedom of people to take, use,

373. The license architects recognize that the "benefits of cultural heritage . . . are not shared equitably. Powerful groups often take and appropriate the cultural achievements of disadvantaged communities, without sharing rewards and recognition. Such abuses create incentives for secrecy, withdraw[al], and hiding information. Abuses inhibit cross-cultural communication and understanding and ultimately hurt everyone." Eric Kansa & Jason Schultz, Alexandria Archive Institute: Perspectives on Cultural Heritage and Intellectual Property 1 (Aug. 1, 2004), available at www.alexandriaarchive.org/AAI%20IP%20Whitepaper.pdf [hereinafter Kansa & Schultz, Perspectives on Cultural Heritage]. For an academic analysis of the disparate effects of an open-access public domain on the poor, see generally Chander & Sunder, *supra* note 5.

374. See Eric C. Kansa et al., *Protecting Traditional Knowledge and Expanding Access to Scientific Data: Juxtaposing Intellectual Property Agendas via a "Some Rights Reserved" Model*, 12 INT'L J. CULTURAL PROP. 285, 289 (2005) [hereinafter Kansa et al., *Protecting Traditional Knowledge*] ("Inequitable sharing of these benefits creates disincentives for indigenous communities to grant researcher access and collaboration.").

375. *Id.* at 305.

376. *Id.* ("[A] 'some rights reserved' approach works better to encourage communication than the public domain, a context in where people feel (justifiably so) vulnerable to exploitation.").

377. Eric Kansa & Jason Schultz, 'Some Rights Reserved' and Traditional Knowledge: A Potential Strategy for Recognizing Indigenous Intellectual Property Rights (2004) [hereinafter Kansa & Schultz, 'Some Rights Reserved'] (summary of the AAI-sponsored workshop on "Cultural Heritage Licenses" on Nov. 19, 2004) (on file with author). I was one of almost two dozen participants at this workshop in San Francisco.

and create culture.”³⁷⁸ But while the license recognizes the dignitary and authorial interests of traditional communities, the license simultaneously facilitates access to knowledge of the past, in order for individuals to “explore, understand, and build upon the past as they choose.”³⁷⁹ In this way, the license does not endorse any community’s claims to exclusive rights in cultural artifacts; rather, the license recognizes intellectual property rights as mediating between diverse peoples’ access to a shared cultural past, and the interests in current and future generations in building upon that cultural knowledge as historical and culturally engaged beings.

These concerns may translate into novel license terms. Brewster Kahle, the founder and creator of the Internet Archive and a participant in meetings to develop a cultural heritage license, spoke of the need to build respect and good social relationships, and suggested that archivists might implement a “take down” policy where information deemed inappropriate or objectionable by indigenous groups would be removed from the Internet. He further suggested that communities who have shared their information could opt out of the archive at a later date. Other terms under consideration are:

- Cultural integrity . . . in which the user agrees to maintain the integrity of the information or object, agreeing that the information not be changed in any way that is inconsistent with the values of the culture from which it came.
- Reporting back. Licensee would agree to periodically report back to licensor regarding public uses of the information.
- Cultural identity/attribution term. Licensee agrees to always identify the complete cultural origins of the information or object.
- Required translation term. Licensee agrees to provide a native translation to the licensor of subsequent publications using the information or objects covered under the license.³⁸⁰

In describing this license, my goal is not to endorse it—indeed, it remains a work in progress and, as such, its terms are being debated.³⁸¹ But a cultural approach along the lines outlined here could usefully guide the development of this license and similar efforts to balance calls for both free culture and fair culture. Focusing on development as freedom, we might ask: does the license

378. Meeting Agenda, Cultural Heritage License Working Group (Nov. 19, 2004) (prepared by Eric Kansa, Executive Director, Alexandria Archive Institute) (on file with author).

379. Kansa & Schultz, Perspectives on Cultural Heritage, *supra* note 373, at 1 (“Our cultural heritage should be more than the domain of a narrow elite of scholars, but a shared birthright enjoyed and used by all.”).

380. Kansa & Schultz, ‘Some Rights Reserved,’ *supra* note 377 (internal quotations omitted).

381. I have been personally involved in the development of this license and am reflecting on these terms.

facilitate equal capacity for involvement in cultural and scientific creation? As I have written elsewhere, frequently the creators of “traditional knowledge” go unacknowledged, not because we cannot identify individual innovators in poor communities but because traditional knowledge is presumed to be the work of anonymous authors working in communities.³⁸² And remarkably, this knowledge is considered to be static over millennia.³⁸³ Networks such as the Honey Bee Network in India seek to combat these myths.³⁸⁴ This network identifies individual producers of innovative and protectable knowledge in poor communities,³⁸⁵ contending that too often Westerners overlook “the tradition of invention” in these communities.³⁸⁶

But even when authors and inventors are identified as intellectual property holders, unequal power relations and fear of exploitation may stymie cultural exchanges. A social relations approach to intellectual property would consider asymmetries in power and ask how we may facilitate fair cultural exchange. The cultural heritage license would construct license terms that advance both the dignitary and monetary interests of poor communities. Cultural heritage licenses might also include a “share back” term, requiring those who learn from

382. Sunder, *supra* note 5 (manuscript at 4-5, available at <http://ssrn.com/abstract=890657>).

383. *See id.*; *see also* Anil Gupta, *Intellectual Property, Traditional Knowledge and Genetic Resources Conserving Biodiversity and Rewarding Associated Knowledge and Innovation Systems: Honey Bee Perspective*, WIPO/ECTK/SOF/01/3.8, May 2001, at 11 (“Not all the knowledge held by people in biodiversity rich economically poor regions and communities is (a) traditional, (b) carried forward in fossilized form from one generation to another but has been improvised by successive generations, (c) collective in nature, and (d) even if known to communities, is reproduced by everybody.”).

384. *See* National Innnovation Found., *Innovations, Incentives and Institutions: Honey Bee Network*, http://www.nifindia.org/secondaward/hbn_background.html. *See generally* Gupta, *supra* note 383. Interestingly, the impetus for the Honey Bee Network and the Cultural Heritage License have been similar: both arose from the concerns of academics that they themselves unfairly benefited from local knowledge. *See id.* at 5-6 (Gupta explaining his personal anxiety about failing to share the benefits of his research with the sources of that work).

385. *See, e.g.*, ANIL K. GUPTA, WIPO-UNEP STUDY ON THE ROLE OF INTELLECTUAL PROPERTY RIGHTS IN THE SHARING OF BENEFITS ARISING FROM THE USE OF BIOLOGICAL RESOURCES AND ASSOCIATED TRADITIONAL KNOWLEDGE 13 (2004), *available at* http://www.wipo.org/tk/en/publications/769e_unep_tk.pdf.

386. *Id.* at 35. Gupta writes of Honey Bee’s founding in 1989. Gupta, *supra* note 383, at 11. Honey Bee was spurred by the “belief in the correlation between science and local innovations.” GUPTA, *supra* note 385, at 28. “The scientific nature of much TK formed the basis and philosophy of grassroots innovators’ own initiatives for benefit-sharing in their TK.” *Id.* Gupta continues,

Researchers have often tried to portray TK systems as quite different and sometimes in opposition to so-called “modern” (i.e. western) knowledge systems. Nothing could be further from the truth. Many aspects of TK systems contain at least some of the elements that make a “modern” scientific proposition valid. At the same time, many scientific institutions use traditional cultural symbols and practices to generate an extra ounce of confidence or certainty.

Id.

the knowledge of poor communities to share their findings with the local group in the language of that group,³⁸⁷ and a “grant back” license, which would require a non-exclusive royalty-free license to the provider of the genetic resource in any patents derived from the traditional knowledge.

At the same time, a New Enlightenment view of culture would require critically probing claims by cultural groups to exclude uses of knowledge or new users, weighing the autonomy of individuals within groups and the importance of cross-cultural engagement. This is already happening. Professor Anil Gupta, a founder of the Honey Bee Network, writes, “There are . . . cases where the State may outlaw certain dysfunctional and socially repugnant traditional practices.”³⁸⁸ He concludes that “[o]ne therefore should not romanticize TK, but take an empathetic yet critical look at the TK system.”³⁸⁹

A cultural approach to traditional knowledge converges with the traditional economic approach to intellectual property on the following point: intellectual property rights in poor people’s knowledge can provide the incentives needed for the preservation, cultivation, and exchange of resources and knowledge.³⁹⁰ Yet the utility in the cultural approach goes beyond the creation of beneficial products. As Gupta writes, “Once this knowledge becomes a basis for livelihood, conservation, lateral learning and social networking, a knowledge society starts emerging.”³⁹¹

Similar insights can help guide the contemporary movement for Access to Knowledge (A2K). Recognizing access to knowledge as consisting in both *products* and *processes* is essential as we craft a “development agenda” for intellectual property. We may ask first how intellectual property law might enhance access to knowledge *products*—for example, by not making textbooks and pharmaceuticals cost-prohibitive to people who live on two dollars a day. One such mechanism is DevNat, which allows copyright holders to distribute their work freely in the Third World but demand market prices in the developed world. Similarly, the draft A2K Treaty would permit countries where urgently needed medicines are unaffordable at market prices to

387. The Honey Bee Network advocates this approach. See GUPTA, *supra* note 385, at 13 (“[T]he Honey Bee philosophy requires sharing by outsiders of any gain that may accrue to them from commercial or non-commercial dissemination of the raw or value added knowledge provided by the communities or individuals.”).

388. *Id.* at 26.

389. *Id.*

390. *Id.* at 28 (bemoaning a “*lack of incentives* for creative people at the local level, and, most importantly in this context, inadequate intellectual property (IP) rights for local communities, informal innovators, etc.”) (emphasis added). Gupta writes, “[I]t is possible that through flexibility, modification and mutual respect and trust, traditional knowledge experts can and may work with experts from modern scientific institutions to generate more effective solutions for contemporary problems.” *Id.* at 29. One particular problem is that knowledge held in poor communities is not passed down to current generations because the knowledge is not considered lucrative. *Id.* at 26 (“Young people are not acquiring the skills of local experts because of a *lack of incentives.*”) (emphasis added).

391. *Id.* at 13.

temporarily distribute these medicines at cost for “compassionate use.”³⁹² Both the developing nations license and the draft A2K provision act as mechanisms for wealth distribution from the richer to the poorer parts of the world.

At the same time, we must consider how intellectual property law and policy may enhance the *capacity* for participating in the *processes* of knowledge creation. The Indian GI Act, for example, effectively *recognizes the poor as producers of knowledge and promotes their participation in global markets*. Rather than seeking to stimulate the reception of knowledge goods by the poor, the rights granted under the GI Act and a campaign by NGOs to teach poor people about them help the poor recognize and market their own knowledge production.

E. IP Originalists’ Demurral

Intellectual property originalists will demur. Defenders of the public domain understandably may be alarmed by the addition of new rationales for intellectual property. If there are new ways to understand intellectual property, will that not lead to the even speedier destruction of the public domain? But this concern stems from a misreading of the implications of my argument. Rather than shrinking the public domain, my argument is likely to expand it. Recognizing the diversity of values underlying intellectual property should lead us to share certain rights in intellectual products, rather than reserve them more closely. Recall that new theories of property, from personhood to social relations, enhanced our ability to explain and justify legal limits on property, even while they served to bolster some property claimants, such as tenants.

Intellectual property originalism presumes that the historic demarcations of intellectual property and the public domain were optimal and fair.³⁹³ Larry Lessig, for example, argues not that intellectual property law should evolve to encompass modern needs, but rather that it should return to its “tradition” in order to more perfectly strike a balance between property rights and the invention of new technologies.³⁹⁴ Mark Lemley would found intellectual property purely on the incentive rationale—as *ex ante* spurs for artistic and scientific creation—and argues that alternative conceptions of intellectual

392. Draft Treaty on Access to Knowledge, *supra* note 292, art. 4-1(b)(iv).

393. See Chander & Sunder, *supra* note 5, at 1340.

394. LESSIG, *supra* note 126, at xiv, 118 (“[I]f creative property owners were given the same rights as all other property owners, that would effect a radical, and radically undesirable, change in our tradition.”); see also James Boyle, *A Manifesto on WIPO and the Future of Intellectual Property*, 2004 DUKE L. & TECH. REV. 0009, 11 (2004), <http://www.law.duke.edu/journals/dltr/articles/2004dltr0009.html> (“The ideas proposed here are not radical. If anything they have a conservative strand—a return to the rational roots of intellectual property”); LESSIG, *supra* note 126, at 118 (“We have always treated rights in creative property differently from the rights resident in all other property owners. They have never been the same. And they should never be the same”).

property (such as the analogy to real property) are misguided.³⁹⁵ Longing for a mythical and glorious past characterized by the freedom to create,³⁹⁶ intellectual property originalists neglect the democracy and equality-minded questions of who has intellectual property and on what terms. But viewed through the lens of IP³, new understandings of intellectual property are not the end of the world. They signal a new one. Intellectual property originalists looking backwards miss the revolutionary social and technological changes afoot in this century. We are witnessing historic changes in our traditional notions of who the creators and innovators of culture are, or ought to be. IP³ challenges traditional social relations and begs for law to recognize and promote new relations based on respect for one another as authors and equal participants in our shared cultures.

The resistance to elaborating a cultural account of intellectual property might also lie in the concept of culture itself. In the lay view, “culture” refers to hermetically sealed groups embodying wholly distinct values. Under this view, property rights in culture would ossify these enclaves further. Is this not exactly opposite to our goal of using intellectual property to power a dynamic culture? I believe that if we keep this risk in mind, we can avoid it. I have sought to show that, on the ground, conceptions of culture in intellectual property activism are more sophisticated. Increasingly, “culture” is understood as dynamic, subject to both endogenous and exogenous influences. Today, “interactions within and between groups have to be at the core of any culturally informed analysis.”³⁹⁷ Cultural exchange is constant and inevitable; a central question for law is how to manage the flow of free culture on fair terms.³⁹⁸

CONCLUSION

Intellectual property is about social relations and should serve human values. Traditional economic theory depicts intellectual property rights as tools to offer incentives to create. Emerging social and cultural theory, in contrast, suggests a broader normative purpose for intellectual property. These distinct theories would guide intellectual property regulation differently. Under the economic theory, the public domain serves only the instrumental purpose of

395. Lemley, *supra* note 4, at 1075 (concluding that intellectual property law does not “need an analogy at all [as we] have a well-developed body of intellectual property law, and a large and developing body of economic scholarship devoted specifically to intellectual property”).

396. See, e.g., LESSIG, *CODE*, *supra* note 135, at 139 (expressing aspiration to “re-create the original space for liberty” that the Founding Fathers provided).

397. Vijayendra Rao & Michael Walton, *Conclusion: Implications of a Cultural Lens for Public Policy and Development Thought*, in *CULTURE AND PUBLIC ACTION*, *supra* note 30, at 359, 368.

398. As Amartya Sen writes, “one of the most important roles of culture lies in the possibility of learning from each other” while, at the same time, accounting for “the asymmetry of power in the contemporary world.” Sen, *supra* note 30, at 38.

ensuring cheap raw materials for more creation and more propertization. But under a cultural analysis, law would want to ensure that all individuals—not just the most powerful—would have access to the channels of making cultural meaning. A cultural theory of intellectual property recognizes not only the symbiotic relationship between technology and intellectual property, but also views intellectual property—including its technology policy—within a context of cultural development and social movements, from the rise of identity politics to the elaboration of Knowledge Societies and the rumblings of a New Enlightenment. We should not fear the rise of new theoretical justifications for creating intellectual property rights—or for limiting them. There is much to be gained from articulating competing descriptive and normative visions of intellectual property, particularly those that challenge the historical distribution of the power to make and control cultural meaning. Rather than cling dogmatically to our tradition, we ought to be willing to remix intellectual property's past with its present and future; we should engage intellectual property's history but not be controlled by the dead hand of the past.