

Introduction

Intellectual Property, Neoliberalism, and the Trump-Branded Triple Movement

I began this study as a pirate, but I ended up more of a property abolitionist. I never used Napster, but BitTorrent permanently altered my feelings about intellectual property rights. This perspective was partially self-serving—it is easier to violate the law when you simply do not believe in it. And I did violate the letter of copyright law, although I would assert that the behavior of torrenters is generally closer to its original spirit. The purpose of copyright—at least in the U.S. Constitution—is intended “to promote the progress of science and useful arts.” If you had ever waited hours for a 100MB file to download over a DSL connection (circa 2003), BitTorrent was a revelation. And the behavior itself transformed into a whole underground culture with a new ethic. It was clear that a distributed cultural commons could work; by launching a torrent in a tracker, I joined many others in a swarm to feed each other pieces of the same file—a single file magically exploded into hundreds or thousands of different packets, taking a multitude of different paths through the network, making full use of the distribution of the (then, at least) neutral Internet. It was hard to look at the serious gap between the legacy media rights holders and their integration with the Internet and not believe that the use of copyright was simply a guard against any “progress” if that meant competition to their business model.

My earliest experiences with file sharing over those networks were of people distributing media that media companies were not willing or yet able to distribute: broadcast news, late-night TV (e.g., *The Daily Show*, *The*

Colbert Report, network and basic cable programs with no archive of past episodes or realistic hope of future distribution), BBC documentaries, out-of-print musical recordings (a mainstay of Napster), and of course mashups. This era was before the existence of YouTube or similar streaming sites for sharing video or SoundCloud for sharing music—a time when, once a TV program aired, getting access to a recorded copy was usually an official affair, with forms to complete or telephone calls to make. This system was radically democratized with the advent of digital video recorders (DVRs) to aid in time shifting, new recording standards to retain a program's sound fidelity even when encoded in a very compact file, and of course the Internet and file-sharing sites and technologies. Some of these sharing sites—Pirate Bay being the most famous and long-standing, although many others existed at the time—were also linked up with groups formed to ensure that certain programs were recorded and shared, especially those that might be of political or cultural importance.

In the context of the start of the 2003 U.S. war in Iraq, the legitimacy of the law itself seemed up for discussion: old agreements we had made as a society—like those against surveillance, torture, and war—were now openly violated, apparently as part of the political strategy to shore up U.S. power, domestically and abroad. Not only did breaking property laws seem minor by comparison; distributed file sharing was a way to circulate information about the war, the coverage of the war, and examinations of the politics of the moment—information that often was not being circulated otherwise, on- or offline. Once you become deeply identified with breaking one law, it throws into relief the equivocal legitimacy of all other laws, especially if that legitimacy is already in crisis. The economic crash of 2008—the massive, unpunished financial crimes and bankrupt economic ideologies behind it—then overwhelmed me during what became the first draft of this book.

In short, what started as an examination of the debate about copyright and intellectual property (IP) broadened to consider the entire ideological and institutional apparatus of Western neoliberal capitalism. This mode of production taxes resources of the entire planet for the tremendous benefit of a few; yet even in its moments of crisis, finance capital is bailed out—the valorization of its assets secured—while the majority of the population suffers from the long-term effects of what I call the reified culture of property. The fact that the hegemonic, reified culture of property allowed no radical alternative suggested the extreme likelihood that forces of reaction would step into the fray.

In the first weeks of Donald Trump's presidency, he released a series of executive orders, issued daily to seed the news cycle and make the most of the

media attention that each announcement generated. And while not all of them generated the same amount of interest, the most controversial in the first week of his term was certainly the “Executive Order: Protecting the Nation from Foreign Terrorist Entry into the United States,” colloquially understood as the “Muslim Ban” he had promised throughout his campaign. The policy—rolled out in a haphazard manner with little oversight or discussion with the relevant government agencies charged with reviewing or executing the charge—inspired thousands of protesters to descend on airports across the country. The following Monday, a spokesperson for former president Barack Obama echoed sentiments expressed by commentators across the political spectrum: “Citizens exercising their constitutional right to assemble, organize and have their voices heard by their elected officials is exactly what we expect to see when American values are at stake” (J. Davis 2017).

But what are the “American values” at stake? This book considers this question obliquely by looking at the contemporary conceptualization of and debates over intellectual property rights (IPR) and how they are produced—as a juridical category and as the meaningful precipitate of a much larger cultural process. IP is justified, controlled, enforced, and valorized as simultaneously democratic and capitalist, almost from its first instances in the English Civil War, to our era of cloud-based, networked, global, neoliberal capitalism. But in the balance between liberty and property, property always wins. In the contemporary U.S. context, IPR—like property rights in general—are some of the most important American values; protecting the corporate capitalist oligopolies that currently control American IP is rarely up for debate in the political establishment—certainly far less often than the nearly endless debates about the rights of immigrants, the ability of women to control their own bodies, and the ability of black people to walk down the street without the threat of death or destitution by the police.

By viewing the prehistory of the dominant understanding of intellectual property rights as part of the larger system of capitalist violence, I hope, in the words of Slavoj Žižek, “To step back, to disentangle ourselves from the fascinating lure of this directly visible ‘subjective’ violence, violence performed by a clearly identifiable agent” (2008, p. 8). By stepping back, we direct our attention to the larger system of capitalist expropriation that has bipartisan support, unpacking especially the role of copyrights and trademarks in its struggle for hegemony—and the way the now hegemonic Law and Economics ideology guiding our approach to IPR reifies them as just another form of private property to be ruthlessly protected by the capital-oriented state.

Much of this book was written during the Obama years, when the hegemonic political horizon was a version of what Nancy Fraser (2013a) has

recently termed “progressive neoliberalism.” In that context, I consider several of Obama’s University of Chicago colleagues—Cass Sunstein, who briefly served as “regulatory czar” for Obama (much to TV pundit Glenn Beck’s consternation), and especially Lawrence Lessig, who is most well-known for critiquing copyright and its effect on what he has called the “creative commons.” Lessig honed his approach to IP in an earlier series of legal journal articles, in which he synthesizes progressive conclusions out of the right-wing Law and Economics tradition he took to be a ground truth. He followed the work on copyright and IPR I discuss here by targeting what he saw as the underlying problem of political corruption in Washington (a neoliberal version of what Trump referred to as “draining the swamp”), including an attempt to run for president in 2016 and a brief campaign to deny Trump the electoral college votes (offering pro bono advice for electors who wanted to vote “their conscience” rather than honor the mandate of their states).

Focusing on IPR may seem quaint in the Trump era, when policies appear to be written with the aid of subtly shrouded (or maybe “hooded” is the correct term) white supremacists, including Attorney General Jeff Sessions and one-time White House chief strategist (and former *Breitbart* editor) Steve Bannon. But Obama and Lessig’s liberalism helped pave the way for the Trump ascendancy. As I outline in this book, theirs is a liberalism that cedes the ground of acceptable debate and politics to the resurgent right. According to Ellen Meiksins Wood (1981, 1991, 2002), in this “pristine culture of capitalism,” the economic is separated from the political; the neoliberal ideology asserts that nothing can be done politically to transform the economic problems created by the capitalist mode of production other than to make it slightly more humane or “rational” or “balanced” around the edges.

Thus, in crafting his signature health-care policy, President Obama and his legislative advocates never fundamentally (or, in the end, at all) questioned the idea that health care should be a commodity supplied by a market exchange of some sort. In eventually crafting a plan nearly identical to those proposed by the right-wing Heritage Foundation, liberal legislators claimed that this approach was circumscribed by politics, but it is more accurate to say that they abstained from politics. It was not just that they refrained from fighting the hard political battle for something like a public option or socialized medicine but that they agreed such an option was politically impossible because “the economy” could not sustain it—an argument contradicted by the existence of some form of national health care in nearly every other industrialized country.

This underlying political economic assumption informs the progressive neoliberalism of the Democratic Party, such that even when there was a clear

political will for change in a more socially democratic direction—as evidenced by the primary campaign of Vermont’s senator Bernie Sanders—the party resisted policy changes that would actually be an easy sell to many voters. In the heat of the 2016 presidential campaign, when Trump had made a Mexican border wall and criticisms of free-trade agreements, including the North American Free Trade Agreement (NAFTA) and the Trans-Pacific Partnership, cornerstones of his pitch, Obama penned an op-ed declaring that “building walls to isolate ourselves from the global economy would only isolate us from the incredible opportunities it provides.” With barely a nod to the U.S. Rust Belt that has felt most harmed by these “incredible opportunities,” he declared, “The world has changed” (Obama 2016). All that we can do is try to make the rules work in our favor, for no fundamental change is possible. This opinion was a far cry from Obama’s own campaign rhetoric of hope and change—and a great contrast to the populist promises of Sanders and Trump.

Limiting the range of political economic options is fundamental to the modern, capitalist conception of the state, dating back to John Locke’s *Second Treatise of Government* but rearticulated in the present era in what Chantal Mouffe (2000) calls “the democratic paradox,” which is a hegemonic stabilization of the inherent tension between liberty and equality. Mouffe asserts that “the unchallenged hegemony of neo-liberalism represents a threat for democratic institutions”:

Neo-liberal dogmas about the unviolable [*sic*] rights of property, the all-encompassing virtues of the market and the dangers of interfering with its logics constitute nowadays the “common sense” in liberal-democratic societies and they are having a profound impact on the left, as many left parties are moving to the right and euphemistically redefining themselves as “centre-left.” In a very similar way, Blair’s “third way” and Schroder’s “neue Mitte,” both inspired by Clinton’s strategy of “triangulation,” accept the terrain established by their neo-liberal predecessors. (Ibid., p. 6)

This study focuses especially on the dogma of “the unviolable rights of property” and the ways in which the leaders of the balanced copyright movement—including Lessig and other neoliberal stalwarts—have gone out of their way to affirm what I call the reified culture of property, even as they present evidence of the social production of value that should challenge the moral and philosophical foundations of this dogma. Following Georg Lukács’s (1971) elaboration of the concept, by reification I mean the epistemological fallacy whereby

processes and relations between people are perceived as natural, ahistorical, thingly obstacles to be navigated rather than social constructs to be negotiated or altered. And, as I show herein, since the early days of English capitalism, its advocates have argued that its preferred social property relations are rooted in “natural law,” unchangeable by people, politics, and, especially, the law or the state.

From one perspective then, this book is not about IPR. Instead, it concerns the mainstream debate over IPR and what that debate reveals about what I call the reified culture of property that pervades Western capitalist societies. The debate about IPR is usually centered on the way digitization and globalization have changed how the properties in question are produced and distributed and their owners remunerated, but the rupture created by these global, digital processes should inspire broader questions regarding the social production of value and the liberal (or neoliberal, as it is often discussed) defense of law and the state.

I argue that the opening created by globalization and digitization and evidenced by the debate over IPR allows us to reevaluate this broader culture surrounding property, its social valorization, and the role of the state in its protection. The early rhetoric of globalization and digitization promised amazing, liberatory possibilities: Technological progress! The spread of democratic freedoms! A more humane, environmentally friendly labor and production process! As usual, the myths of the global village and the “end of work” have yet to be realized: this book argues that tugging at the political, economic, cultural, and technological threads woven through the concept, laws, and practices surrounding IPR is an important start toward the creation of a more democratic, humane society, to paraphrase Stuart Hall.

To engage in this evaluation, I argue, we must develop a conceptualization that helps us more deeply understand the relationship between culture—and cultural studies—and the law. Building on recent work (Aksikas and Johnson Andrews 2014, 2016; Johnson Andrews 2016), I approach these questions at different registers simultaneously to consider what cultural studies can, or maybe should, be able to contribute to the conversation about IPR—or indeed the law itself—as a “cultural production.” As Rosemary Coombe (1999) points out, the concept of culture has been uncritically deployed by legal studies scholars at precisely the moment that such fields as anthropology and cultural studies have developed a more nuanced and problematized understanding of that concept. This is especially the case in conversations about IPR, since the collective process of meaning making is more obvious and visible. Audience-focused research on fan/slash fiction, Internet prosumption, Wikipedia, crowdsourcing, and a wide variety of emergent practices has

recalled earlier work by Dick Hebdige, Janice Radway, and especially Henry Jenkins (who, as discussed later, figures centrally in Lessig's book *Remix*), leading legal scholars of copyright to the idealized connotation of culture, in the words of Raymond Williams, "as a noun of process" (2011, p. 77).

The dominant neoliberal ideology articulates this "culture as a process" to the free market, which it sees as the only true source of meaning, power, and value. Economic freedom—meaning the *laissez-faire* limitation of state protections of anything other than property—comes to stand in for formal democratic processes, and the "electronic freedom" of the new information infrastructure presumes democracy as an automatic outcome of the technology. As Jodi Dean puts it, "The proliferation, distribution, acceleration and intensification of communicative access and opportunity, far from enhancing democratic governance or resistance, results in precisely the opposite—the post-political formation of communicative capitalism" (2005, p. 53). But Dean would likely agree that the fantasy of the Internet and Web 2.0 as being essentially democratic is only partially a return of the ever-present myths that Vincent Mosco recounts in *The Digital Sublime* (2004); instead, following Žižek, the fantasy is "directly due to the depoliticization of economics, to the common acceptance of Capital and the market mechanisms as neutral tools/procedures to be exploited" (2000, pp. 353–354).

The politics of cultural representation remain important, but in that framework, the issues of class, labor, and the reproduction of capitalism become themes to discuss and critique alongside an array of others: the norms of race, gender, sexuality, and other categories of identity have presented even more pressing concerns, in theoretical terms and in terms of the social movements of the time. In the words of Mouffe, whose pivotal text *Hegemony and Socialist Strategy* (written with Ernesto Laclau; 2001) helps outline the political and theoretical necessity of this shift, "The driving force behind it was a political question, at a time when both the social-democratic left and traditional marxism seemed incapable of understanding the specificity of the new movements that had developed since 1968, such as feminism, the environmental movement, anti-racist struggles, and against discrimination on the grounds of sexuality" (Mouffe and Errejón 2016, p. 15). While the site of this struggle was often the informal grounds of culture rather than changes in policy or law, the latter eventually began to reflect those concerns.

If scholars of the law were influenced by cultural studies' understanding of culture, there was little reciprocal interest among scholars of cultural studies to reconsider the structuralist questions of determination by law or economics. The work by Austin Sarat and Jonathan Simon (2001), for instance, which attempts to synthesize these fields, offers an important opportunity for cultural

studies to help legal scholars get “Beyond Legal Realism.” The authors rightly point out that cultural studies could help legal scholars consider the way representations of the law influence its function as well as “[widen] the moments of subjectivity that are even considered in the analysis of law and legality” (ibid., p. 12). But their interest in these moments of subjectivity and what they call the “cultural turn” in legal studies has been instigated by what they describe as “the general decline in confidence in virtually every institution, reform movement, and program of knowledge gathering attached to the social” (ibid., p. 6). This “decline of the social” parallels a dramatic increase in exactly the kind of material and economic inequality that legal realists, such as Robert Hale, had hoped to combat. The notion of getting “beyond legal realism” is premised on the existence of a legal realism to get beyond, yet the contemporary Law and Economics movement has been instrumental in fomenting that “general decline in confidence” and has been successfully trying to get us beyond the progressive outlook of legal realism for several decades, a historical context that I explore more fully herein and they barely mention.

Even such scholars as Coombe, who straddles both fields, are more inclined toward what Hall and others would call a culturalist—rather than structuralist—interpretation of the relationship between law and culture: her collection of essays on IPR is infused with the spirit of its epigraph, which features a quote from Michel de Certeau’s *The Practice of Everyday Life* (1998). Certeau, Coombe, and many in the culturalist tradition highlight the dynamic forms of agency that still exist despite (or even because of) the force of the law, the state, and other institutions of seemingly intractable power. David Harvey argues in his *A Brief History of Neoliberalism* that this left-libertarian ethos was easily appropriated by the reactionary right in the service of dismantling the welfare state, an ethos that we can certainly see reaching its pinnacle with Trump and Bannon’s “Deconstruction of the Administrative State” (Harvey 2005; Rucker and Costa 2017). But if it is the pinnacle, it is a deeply contradictory one: the misogynistic, antigay, white-supremacist articulation of Trump’s political discourse is as deviant from the dominant culture as is his protectionist rhetoric on trade and neo-Nazi critique of bankers and the media. Yet the articulation of “progressivism” with neoliberalism in the Bill Clinton and Obama eras made this reaction all too inevitable in the U.S. cultural context.

IPR may seem like a tangential object to this renewal and this critique, yet I would argue that they are an important locus around which we can organize all the above. For one thing, as Naomi Klein has recently observed, “to understand Trump you really have to understand the world that made him what he is, and that, to a very large extent, is the world of branding” (2017, loc. 350).

Trump is a brand: few of the buildings bearing his name are the result of his work as a real estate developer, and, as commentators like John Oliver noted during the presidential campaign, his association with wealth and success is less related to his business prowess than to the fact that “he’s spent decades turning his own name into a brand synonymous with success and quality and he’s made himself the mascot for that brand” (“Donald Trump” 2016). Like the globalized corporations Klein criticizes in *No Space, No Choice, No Jobs, No Logo* (2002),

rather than building and owning the structures himself, as he had earlier in his career, Trump realized that he could make far easier money simply by selling his name to developers around the world, who would use his celebrity to attract buyers and customers for their office buildings, condos, and hotels. The outside developers would do the construction and carry all the liabilities. If the projects failed (as they frequently did), Trump still collected his licensing fee. And the fees were enormous. According to the *Washington Post*, on a single hotel-condo project in Panama, “Trump has earned at least \$50 million on the project on virtually zero investment.” (Klein 2017, loc. 446)

The majority of Trump’s revenue comes from leasing his name—his trademarked brand—which he not only rents to luxury hotel developers but also famously plasters over clothing, steaks, houseware, and even a (now failed) university.

Klein highlights the way this cultural value and power has now intersected with more conventional notions of political and economic power. On the one hand, Trump’s brand is ruthless power and success: achieving control of the U.S. state serves as a validation of the tenets of the brand. On the other hand, the state itself is essential to the security of that brand as IP—a security that is practically difficult to achieve in the era of globalization, but which is facilitated when you are the so-called leader of the free world. Klein cites a *New York Times* report from April 2017 pointing out that Trump’s corporation, “now run by his two adult sons, has 157 trademark applications pending in 36 countries” (Klein 2017, loc. 557).

Meaning, Power, and Value: Cultural Studies, Postindustrial Property, and the Neoliberal Crisis of Sovereignty

In terms of his legal status as a trademarked brand, Trump is the perfect embodiment of the ways in which cultural meaning, political power, and eco-

conomic value are immanent elements, each mutually constituting the other and working together to secure hegemony. By “meaning,” I refer primarily to what others might call the specifically cultural elements: the common set of connotations and signifiers through which communication and the transmission of ideas occur. Trump is unique in this regard because in many cases, as political writer Farhad Manjoo observes, “He is no longer just the message. In many cases, he has become the medium, the ether through which all other stories flow” (Manjoo 2017). In this way, Trump is a synecdoche for the other intellectual properties that now form the medium of our collective consciousness and cultural production. Manjoo realized this by trying to ignore all coverage of Trump in the first week of February 2017, finding it increasingly hard to find any message not using him as a springboard for some argument, observation, or product pitch. While we could chalk this observation up to Trump’s ability to stir up controversy, it is also the result of a media system that aims for the largest possible audience, a tendency that creates a self-sustaining cycle: encoding messages using the dominant, hegemonic frameworks and signifiers simultaneously produces meanings and interpellates viewers who feel compelled to know those meanings (even if they do not agree with them). For legacy media, this cycle means more advertising dollars; for social media, it means more likes and shares, which can also mean a great deal of money. Some of the amateur purveyors of fake news in the run up to the 2016 election were making \$10,000 per month in ad revenue (Dewey 2016), many of them primarily targeting Trump voters with false stories about Hillary Clinton.

This information reveals the other two elements that are directly intertwined with the first: economic value and political power. One metric of economic value is Trump’s “earned media,” which helped him tremendously in the primary and the presidential election but was even more valuable during his first month in office. Manjoo cites data from the advertising analytics firm mediaQuant, which

counts every mention of a particular brand or personality in just about any outlet, from blogs to Twitter to the evening news to *The New York Times*. Then it estimates how much the mentions would cost if someone were to pay for them as advertising. In January, Mr. Trump broke mediaQuant’s records. In a single month, he received \$817 million in coverage, higher than any single person has ever received in the four years that mediaQuant has been analyzing the media. [. . .] In fact, Mr. Trump gets about \$100 million more in coverage than the next 1,000 famous people put together. (Manjoo 2017)

Although it is true that much of this coverage and these mentions were negative from the perspective of the dominant culture—related to the massive demonstrations following his inauguration, the botched travel ban and protests at airports across the country, and the incidents of white-supremacist terror that the Southern Poverty Law Center reported were spiking in the early days of his presidency—they were fully in line with his brand image and therefore served to reinforce the political power among his supporters.

Jason Read, following Louis Althusser, develops the concept of immanence to describe the ways in which what I call meaning, power, and value are mutually constituted by one another in contemporary capitalism:

It is no longer possible to separate capital, as the producer of goods and commodities, from what used to be called the superstructure: the production of ideas, beliefs, perceptions, and tastes. Capitalist production has today either directly appropriated the production of culture, beliefs, and desires or it has indirectly linked them to the production and circulation of commodities. [. . .] If everything is immanent, both cause and effect, then it is no longer possible to understand the superstructure, the ideas and production of consciousness, as simple effects emanating from, or reflecting, the conflict between forces and relations of production. They must be understood as causes as well, as the constitutive conditions of the reproduction and the dissolution of a particular economy, or mode of production. (2003, pp. 2, 8)

In my most recent book (Johnson Andrews 2016), I outline the immanent relationships between meaning, power, and value more extensively, especially in terms of how they relate to the concept of hegemony.

Cultural studies scholars primarily look at hegemony in the dimensions of meaning and power: how does ideology help cement political power by establishing the legitimate common sense? Most critiques of IP within the field begin from this perspective: copyright, trademark, and other restrictions on our common semiotic materials serve to limit democratic conversation and demotic cultural production, particularly in an era when it is more possible than ever to be a one-person mass culture start-up. As I discuss in Chapter 2, this position is also a good reason to look at the origins of copyright in the era of the English Civil War, when the main purpose of copyright was to crack down on pirate publishers peddling proto-Communist Protestant pamphlets advocating political and economic “Levelling.” Of course, then as now, the most dangerous of these populist alternative visions threatened the legitimacy of dominant capitalist order. The cultural legitimacy of the dominant

economic model is essential: the state can use force to compel its subjects to take their place in that order for only so long before it threatens the legitimacy of the law and the state itself. It is not a coincidence that Trump has emerged at a moment when #BlackLivesMatter, #Occupy, and other movements are challenging decades-long expansions of the police and prison-industrial complex. Loïc Wacquant (2009) and others have described this expansion of the carceral state as “punishing the poor.” Thomas Piketty (2014) argues that all these forms of resistance are predictable since, when inequality is on the rise, the potential for political insurrection rises as well. The proportion of the population we would need to lock away to maintain order grows exponentially, and soon the poor have, quite literally, nothing to lose but their chains.

Property as a social relationship relies on a state that is seen as legitimate, and the sovereignty of the liberal state is simultaneously legitimated and limited by an ideology that articulates how the value of property is produced and should be defended. Central to this liberal state is the Lockean understanding of natural law, and central to Locke’s model is a particular conception of value and its relation to property, the division of labor, and the state. The debate over IPR potentially undermines this culture of property because the metaphorical extension of property rights to immaterial objects illuminates the inadequacy (and malleability) of this concept of value and the state charged with protecting it. The debate about IP is therefore really a debate about how value is produced and distributed relative to the legal owners of property—which is the central debate of the capitalist economic model from its inception.

The very notion that “the economy” exists is itself an ideological commonplace of what Ellen Meiksins Wood (1991) calls the “pristine culture” of capitalism. In presenting the “economy” as disembodied from society, this discourse pretends it is a natural phenomenon that no political action could fundamentally alter. And in our present, postindustrial, neoliberal era, even an analytical distinction between culture, politics, and the economy is difficult to maintain. The ideological apparatus itself is a source of economic value. Hegemony is therefore not only about the cultural suture articulating antagonistic political economic property relationships; insofar as those property relationships are hegemonic, the cultural content can itself become a source of value qua profits. Indeed, since the economy itself is said to be “cultural,” it means that IPR increasingly serve as enclosures around the means of production in much the same way as the fences of Early Modern England.

But the parallels to that earlier era also alert us to something that early practitioners of cultural studies saw as fundamental to their project: the role

of labor in producing meaning, value, and ultimately power. In their early incarnation, cultural studies and the New Left framed questions of labor in relation to the way automation, deskilling, and incorporated unions had robbed workers of their creative potential. Realizing that the economic also had an ideological component, early cultural studies scholars, born as they were from the New Left, assumed that the gains of the unionized workplace and social democratic welfare state would easily muffle the potential political power of the working class. So the argument shifted: postwar industrial capitalism had sheared the mental and manual capacities from one another not only through the social division of labor but even within the workers themselves. As Andrew Ross (2009, 2010) has recently argued, the search for “meaning in work” is valid, and we should not let it go even as the current generation is offered precarity in exchange for the demand to, in the words of Angela McRobbie (2016), “be creative.” Forced into the fissured workplace (Weil 2014) by the increasingly disembedded market, these skilled mental laborers see the value they produce expropriated in the same ways in which factory workers of yore did, but this time facilitated with legal contracts assigning the IP they create to the companies that hire them (A. Ross 2000). In short, the problems faced by contemporary mental and manual laborers are more similar than they have been in a century, in part because of IPR and the ways in which these rights help intensify capitalist social relations in the face of digital and global disruption.

In the spirit of Michael Denning’s (2004) recent call for a “labor theory of culture,” I aim to employ this immanent understanding of meaning, power, and value to understand the complex articulation of IPR—in law and practice—and how these rights operate in and explain the current crisis of neoliberalism. If Trump as a brand embodies many of the important trends and contradictions of globalization, as a populist leader, he opposes many features of globalization and its liberal democratic notions of sovereignty. As we will see, although the ideology of neoliberalism claims that the state should have less power—the political should be separate from the economic—the legitimacy of the state is ultimately based on its exceptionally strong protection of property. And the latter is bound up with the Lockean assumption that the *owner* of that property did the work—the labor—to create its value, an assumption that Trump has exploited to build his political, economic, and cultural career. At the same time, in opposing the tenets of progressive politics, Trump’s political appeal points to the uneven alliances that cultural studies scholars have made since the advent of neoliberalism and suggests the need for a more direct attack on the culture of property he still represents.

Progressive Neoliberalism and the Triple Movement

Other scholars, including Mouffe and Fraser, discuss elements of what I call a reified culture of property using the concept of neoliberalism. Neoliberalism is a useful concept because it points to the ways in which this culture of property has been articulated—and rearticulated—in the postindustrial era. Neoliberalism is haunted by what Jefferson Cowie and others have termed the “great exception” of the New Deal in the United States and the rise of social democracy in Europe (Cowie 2016). These midcentury breaches of this long-standing “culture of property” were driven by what Karl Polanyi (2001) calls a “double movement,” whereby society rises up to demand protection by the state from the ravages caused by the disembedded market.

In turn, neoliberalism can be seen as what Mark Blyth (2002) calls a “*counter* double movement.” Central to the neoliberal movement is a theoretical and philosophical imperative to recommodify what have increasingly become social wages or social goods—in short, by reasserting the political, economic, and ultimately cultural and moral legitimacy of the culture of property. Blyth convincingly argues that, while the double movement that pressed for the New Deal and the counter double movement of neoliberalism had specific social interests behind them, the key to their hegemonic rise was the coherence of their economic ideas at the time of their ascendancy. Thus, in the 1970s, there were alternatives—for instance, the Regulationist Economics School in France and other leftist critiques of corporate capitalism—to the theories of Milton Friedman, Friedrich von Hayek, supply-side economics, rational choice theory, and the Laffer curve. But the leftist critics of embedded capitalism were less successful in defining the crisis of stagflation and proscribing a solution that would be attractive politically. This political-ideological crisis was compounded by what Fraser (2013a, 2013b) has termed a “triple movement” for emancipation.

In her most recent collection of essays, Fraser outlines her concept of “the triple movement,” which “conceptualizes capitalist crisis as a three-sided conflict among forces of marketization, social protection, and emancipation” (2013a, loc. 5342). If Polanyi sees the double movement as being a demand for social protection against “the disintegrative effects of marketization,” the triple movement of emancipation is a reaction against “the entrenching domination” of the social protection provided by the welfare state. The concept of the triple movement is triply useful: first, it helps categorize the social movements of the 1950s, 1960s, and 1970s in relation to the dominant culture and political economy, which helps explain the particular political and theoretical direction of cultural studies and their ancillary fields; and, I would argue,

insofar as the concept of the triple movement helps us understand the ways in which progressive, emancipatory politics relates to the midcentury double movement and the counter double movement of neoliberalism, it explains the most reactionary tendencies of Trump and other populist leaders as a *counter* triple movement.

Fraser uses the “triple movement” to categorize the “vast array of social struggles that do not find any place within the scheme of the double movement”:

I am thinking of the extraordinary range of emancipatory movements that erupted on the scene in the 1960s and spread rapidly across the world in the years that followed: anti-racism, anti-imperialism, anti-war, the New Left, second-wave feminism, LGBT liberation, multiculturalism, and so on. Often focused more on recognition than redistribution, these movements were highly critical of the forms of social protection that were institutionalized in the welfare and developmental states of the postwar era. (Fraser 2013b)

The development of cultural studies as a field emerged from the New Left and was infused with the political and theoretical precipitates of these related movements. The (official) site of labor was incorporated into the system via the alliance between corporate capitalism, large unions, and the state, so critical focus shifted to culture and representation as sites of struggle and emancipation (Aksikas and Johnson Andrews 2014; Johnson Andrews 2016). As C. Wright Mills argues in his “Letter to the New Left,” it appeared that the earlier reliance on labor as the source of revolutionary progress should be abandoned: “Such a labour metaphysic, I think, is a legacy from Victorian Marxism that is now quite unrealistic” (1960, p. 22). Instead, the New Left should think about the role of the cultural apparatus, which was seen as “manufacturing consent” to the political economic order and, in the words of Althusser, reproducing the relations of production (Althusser 2014; Hall 1982).

The crisis of progressive liberalism should take us back to the bread-and-butter issues of labor, class, and social protection that have largely been left to one side in favor of the emancipatory socialist strategy advocated by such theorists as Laclau and Mouffe (2001)—although not without recognizing the very real need to continue those emancipatory struggles as such. As Mouffe observes, “Nowadays we have to defend the social-democratic institutions we previously criticised for not being radical enough. We could have never imagined that the working-class victories of social democracy and the welfare state could be rolled back. In 1985 we said ‘we need to radicalise democracy’; now

we first need to restore democracy, so we can then radicalise it; the task is far more difficult” (Mouffe and Errejón 2016, pp. 22–23).

Scholars have come to some broad, if still ambivalent, agreement on the failures of the New Left and cultural studies in the neoliberal era. In looking at the different movements to radicalize social democracy, Fraser notes that “in each case, the movement disclosed a type of domination and raised a corresponding claim for emancipation. In each case, too, however, the movement’s claims for emancipation were ambivalent—they could line up in principle either with marketization or social protection” (2013a, loc. 5388). In the event, she argues, in most of these movements—including the feminist movement and the New Left:

The ambivalence has been resolved in recent years in favour of marketization. Insufficiently attuned to the rise of free-market forces, the hegemonic currents of emancipatory struggle have formed a “dangerous liaison” with neoliberalism, supplying a portion of the “new spirit” or charismatic rationale for a new mode of capital accumulation, touted as “flexible,” “difference-friendly,” “encouraging of creativity from below.” As a result, the emancipatory critique of oppressive protection has converged with the neoliberal critique of protection *per se*. In the conflict zone of the triple movement, emancipation has joined forces with marketization to double-team social protection. (Fraser 2013b, p. 130)

McRobbie (2008) has recently reflected on this miscalculation in her earlier work, where she had argued that consumer feminism was a space of liberation; in reality, that liberation was inherently premised on reproducing young women’s neoliberal subjectivity. On the other hand, McRobbie (2016)—along with many other cultural studies scholars—has also been well attuned to the insidious emergence of precarious, immaterial, largely feminized, and unpaid labor that is central to the “creative economy” and the ways in which this affective meaning making creates not only power but also value.

In short, well before the emergence of Trump and the wave of other populist movements around the world, critics on the left were awake to the limits of marketization. But in many cases, as with the liberal critics of IPR I discussed throughout this book, most recent leftist critics see something unique about the political economy of immaterial or digital or affective labor rather than focus their attention on the larger culture of property that helps the capitalist class siphon surplus value across the system.

It would be obtuse to suggest that there are not differences between material and immaterial property, as the Motion Picture Association of America (MPAA) did in its infamous antipiracy campaign, comparing the “theft” of a movie to stealing a car or a purse. But campaigns like that one are the precipitate of a larger ideological struggle, led by capitalist conglomerates that have invested hundreds of billions of dollars in purchasing (and occasionally producing) cultural commodities. These immaterial property owners would like the state to protect their property with the same vigor as it protects real property, particularly in a global, digital economy where IP is often a more fundamental asset than retail real estate or factory equipment. In this context, it is essential to not only protect but to extend the reified culture of property.

By a culture of property, I mean a culture whose social relations are ever more deeply commodified; where the ultimate goal is to subject *all* social interaction (not just those of commerce) to the market system’s individualistic understanding of the social process of valorization, geared as it is toward the accumulation of privately held properties; where the primary role of the state is held to be the protection of that process—and especially the value it produces—according to the already existing ownership and distribution patterns; where the owners of property are presumed to have created the value protected by the state; where the state protection of this property is held to be natural and/or scientifically necessary and thus beyond democratic reorientation; and, finally, where this formal legal environment helps determine a culture such that individuals respond to the functional discipline of the market as if it were a force of nature rather than a historically contingent social relation.

The staunchest defenders of this reified culture of property paradoxically argue the state is ultimately unnecessary. They rely on the unquestioned cultural efficacy—a deep and determining cultural belief—of the value and legitimacy of private productive property, assuming the neoliberal model of society as a universal set of norms so guaranteed of hegemonic, political stability that the state is unnecessary. They assume the legitimacy of the status-quo distribution; overlook previous rounds of coercive, state-led primitive accumulation and the direct disciplinary force of the state in preserving the property acquired in that process; and deny the political function of the state and the law in crafting a social order and population that more closely resemble the pure model that they argue is a natural state of affairs.

The efficacy of this culture is tied to an ideal subject: *homo economicus*, or what Paul Smith (2007) has referred to as “the subject of value.” This subject features centrally in Hayek’s (1945) mythical understanding of how the

market should operate as a communication mechanism: transmitting prices *qua* information to buyers and sellers through a nonhierarchical, unplanned, global network and helping them make decisions about where to place their investments. This rationally calculating, self-organizing subject is best served by deregulation and recommodification: regulations are futile attempts at state planning that will never be as efficient at communicating actual supply and demand as the market. But the market can communicate accurate information only if everything—including Polanyi's fictitious commodities of labor, land, and money, along with air, water, health, life, the past, the present, and the future—is given a price and sold to the highest bidder. In our present era, "everything" especially includes immaterial, cultural property that is covered by patents, trademarks, and copyrights. The latter are central to the global capitalist regime of accumulation, facilitating the offshore production, commodity chains, financial arbitrage, and tax havens that make the hegemonic model of globalization possible and profitable.

So in a sense, this book is not really about IPR, or at least not *only* about them. Instead, it is about the ways in which the debates about IPR are so focused on the marginal trees of media that they miss looking at the neoliberal forest floor that nurtures them. It considers what the debates about copyright, trademarks, patents, and other varieties of IP tell us about property in relation to what I describe above as meanings, power, and value in the early twenty-first century. The bulk of this study is spent conceptualizing the relationship between hegemony, law, and culture; historicizing the hegemonic struggle over the Lockean culture of property, which legitimates the capitalist protection of "real" and intellectual property; and positing the ways in which the debate over IPR, labor, and the creative commons can be extended to what seem to be settled understandings of real property rights and the state. It seeks to uncover the political, economic, and ideological roots that make the culture of property so fundamental—and then argues that it might be best to tear them out of the ground.

With the emergence of what Henry Jenkins (2006) calls the "convergence culture" of new media, and the extension of these rights in tangible and intangible property to other cultures through globalization, this reified foundation is fracturing. The forceful projection of IPR onto other countries through such treaties as the now-defunct Trans-Pacific Partnership and such institutions as the World Trade Organization (WTO) shows the narrow cultural relevance and specific cultural history of the general concept of property and the political institution that protects it—namely, the liberal state. Likewise, the exciting discovery of the participatory, social production of value around so-called IP—especially in the crowdsourced, social factories of Web 2.0—has

given new life to the Marxist observation that all value is produced socially. I ultimately argue that it is in this temporal, technological, and spatial opening, facilitated by the uneven distribution and development of globalization and digitization, that we can see the already vibrant alternatives to the current configuration of property and intellectual property rights.

IPR is an attempt to secure decisive rights to the otherwise fluid cultural properties at the national and international levels. But this attempt serves only to highlight the amorphous nature of these rights—especially the possibility of fair use and public domain—and the massive primitive accumulation of our cultural patrimony and the power entailed by the unequal access to legal resources between major corporate owners and the average users. Insofar as the law and the state protect these unequally distributed rights, the law and the state themselves risk losing their legitimacy, a possibility productively explored in the recent work of Eduardo M. Peñalver and Sonia Katyal (2007, 2010). And the more aspects of the culture—and cultural practices—that fall under the protection of these policies, the more opportunities there will be to encourage “property outlaws” of all kinds, opening up ever more generalized threats not only to ownership but also to the sovereignty of the state that protects it.

Indeed, as I have argued elsewhere, the dramatic return of the quintessential bad subject—the pirate—in myth and reality, the high seas and the dark web, should reignite our discussions about the liberal state and its relationship to property, primitive accumulation, labor, and culture (Johnson Andrews 2014, 2018). After all, the original copyright pirates (discussed in Chapter 2) were ultimately challenging the enclosure of the commons, the imposition of capitalist social relations, and the newly hewn political ideologies and institutions shoring up this new hegemonic consensus. In our own era, one can draw a fairly straight line from Napster to #Occupy to Trump—or at least to a version of the populist character Trump played on the campaign trail. Each of these points has challenged the fundamental culture of property for which neoliberal politicians and economists have long claimed that “there is no alternative.” As Angela Nagle (2017) argues in her recent account of the rise of the alt-right on Internet chatrooms and social media, part of the appeal of Trump—particularly among young white men—is in the ways in which his campaign and the culture around it were framed as transgressions of the dominant social and cultural norms, a framing that is normally associated with the left but was adroitly appropriated by the right.

The xenophobic character of Trump’s populism is indisputable, as it is in the political appeals of Marine Le Pen and *Rassemblement National* in France, Nigel Farage and the UK Independence Party in the United King-

dom, and elsewhere. But this character is articulated with a rhetorical turn toward autarky and protectionism that is indicative of a politics of the double movement akin to Polanyi's original concept. Adolf Hitler and the Nazis are most often coded in terms of their white-supremacist and anti-Semitic appeals. But for Polanyi, as an economic anthropologist, the more important feature of the rise of fascism in the 1930s was the centralization of state authority in a leader that promised to provide social protection from the ravages of the market. Polanyi finds the rise of a form of authoritarian populism in Russia, Germany, and the United States to be similar in important ways: "the purport of fascism or socialism or new deal is part of the story itself," but "the origins of the cataclysm lay in the utopian endeavor of economic liberalism to set up a self-regulating market system" (2001, loc. 1320). In short, as in that earlier emergence of the double movement, Trump and his cohort are clearly drawing on angst in response to neoliberalism—shuttered factories, laid-off workers, precarity, misery, and "deaths of despair" (Monnat 2016).

The difference is that, just as neoliberalism was a counter response to the earlier double movement for social protection against the ravages of the market, Trump and company have articulated their politics as a response to what Fraser calls the "triple movement" for emancipation—the cultural movements pressing for the expansion of civil rights and liberties, particularly along lines of race, gender, and sexuality. Because these movements for emancipation were articulated with the "Third Way" neoliberal politics of Clinton, Tony Blair, and others, Trump's reactionary articulation represents what we might call a "counter triple movement" against the identity politics, egalitarianism, and pleas for tolerance and inclusion that have become prominent features of not only the academic and cultural left but also neoliberal capitalism itself.

While there were massive protests against the travel ban at the end of his first week, Trump's executive order pulling the United States out of the Trans-Pacific Partnership and his demand to renegotiate the terms of NAFTA earlier in the week were all but uncontroversial. Right or wrong, these neoliberal policies have long been blamed for the erosion of jobs and livelihoods. And despite the fact that the U.S. Democratic Party has long made peace with neoliberalism as the dominant hegemonic ideology, it was the radical right—from Hayek and Friedman to Barry Goldwater, Ronald Reagan, and Margaret Thatcher—that instantiated the fundamentalist culture of property, often by implicitly and explicitly articulating their policies as a form of resistance to the progressive movements for liberation.