Social Reproduction in the Realm of the Intangible

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Introduction

The discourse of intellectual property rights - the arguments about them, for them and against them - demonstrate an almost total marginalisation of questions of social reproduction. This rhetorical aporia in what is already an invisible space has operated to obscure these questions in at least two significant ways. First, it has resulted in a failure to engage with the sublimation of social reproduction in the creation of a range of culturally, politically and economically distinct and significant property relations. Secondly, it operates to obscure the role of social reproduction in legal regimes governing technological innovation. By focusing on the figure of the "author" in copyright law and the "inventor" in patent law, this article aims to sketch the formation of a strategic position in the so-called "intellectual property wars" that is capable of recognising the role of social reproduction in the realm of the intangible.

Primitive Accumulation and the Legal Sacralisation of Property Relations

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The processes by which social reproduction has been marginalised and sublimated in regimes concerned with the allocation of property rights, including intellectual property rights, is a consequence of the relationship between cycles of capital accumulation and the development of legal institutions. As Federici and Fortunati show, these processes are written into the DNA of the capitalist political economy. The period of primitive accumulation that enabled the transformation from a feudal to a capitalist system was marked by four pertinent and interrelated features: first, the redefinition of productive and reproductive relations; secondly, the separation of reproduction from production; thirdly, the use of the wage to discipline labour and define the relations of capitalist production; and, finally, the devaluation of social reproduction as being outside the relations of capitalist production.[1]

This founding process of primitive accumulation was also marked by the legal sacralisation of property relations, which involved the enclosure or privatisation of what was previously held in common. This development, along with the creation of waged labour, became one of the two central pillars of the capitalist system. The construction of these pillars, however, involved a long period of immense turmoil, social dislocation, rebellion and persecution (particularly of women).[2] The emergence in the sixteenth and seventeenth centuries of a philosophical tradition justifying this massive social dislocation is critical to understanding the current role of intellectual property law in the marginalisation of questions of social reproduction.

[1] S Federici & L Fortunati, *Il Grande Calibano, Storia del corpo sociale ribelle nella prima fase del capitale* (Franco Angeli Editore, 1984); S Federici, *Caliban and the Witch: Women, the Body and Primitive Accumulation* (Autonomedia, 2004; rep Penguin Classics, 2021).

[2] Federici and Fortunati, n 1 above; Federici, n 1 above.

The central figure in this tradition was John Locke, famous for his justification of private property rights and an active participant in the debates about private property in intangibles.[3] Locke's influence on discourses justifying the legal sacralisation of private property relations remains strong. In particular, the following passage from his *Second Treatise of Government* continues to be extensively cited in defence of private property rights, especially intellectual property rights:

> Though men as a whole own the earth and all inferior creatures, every individual man has a property in his own person; this is something that nobody else has any right to. The labour of his body and the work of his hands, we may say, are strictly his. So when he takes something from the state that nature has provided and left it in, he mixes his labour with it, thus joining to it something that is his own; and in that way he makes it his property. He has removed the item from the common state that nature has placed it in, and through this labour the item has had annexed to it something that excludes the common right of other men: for this labour is unquestionably the property of the labourer, so no other man can have a right to anything the labour is joined to—at least where there is enough, and as good, left in common for others.[4]

Taken out of context, this passage may suggest that Locke wanted to abolish wage relations and return ownership of land and other tangibles to the labourers. However,

[3] R Deazley, *On the Origin of the Right to Copy: Charting the Movement of Copyright Law in Eighteenth-Century Britain (1695-1775)* (Bloomsbury, 2004), ch 1.

[4] John Locke, *Second Treatise of Government* (Awnsham & Churchill, 1690), ch 5, para 27.

as the discussion below seeks to demonstrate this would be a misreading. On the other hand, taken in context the passage works well to justify a new system of rights over a previously unknown artefact in the form of intangible property, and the consequent enclosure of what has been described as "the commons of the mind".[5] Its basic message is that the person who mixes their labour with the intellectual commons gets the property rights, subject to some exceptions and limitations.

Nobody who celebrates Locke as the founding philosophical father of intellectual property rights cites, however, this passage from the following paragraph:

> Thus when my horse bites off some grass, my servant cuts turf, or I dig up ore, in any place where I have a right to these in common with others, the grass or turf or ore becomes my property, without anyone's giving it to me or consenting to my having it. My labour in removing it out of the common state it was in has established me as its owner.[6]

The attribution of the actions of the servant and the horse to their master makes it clear that the division of property rights is already determined by class, wage and inter-species relations. The relations of intra-species domestic production/social reproduction do not even rate a mention, but it is not hard to imagine how they would fit into this description of the way in which property relations are pre-determined by pre-existing social relations.

[5] See J Boyle, *The Public Domain: Enclosing the Commons of the Mind* (Yale University Press, 2008).
[6] Locke, n 4 above, para 28.

Privatising the (invisible) intellectual commons

The process of primitive accumulation that initiated the transformation from a feudal to a capitalist economy was on a massive social scale. However, it is also the case that capitalism as a phenomenon is characterised by continual and successive cycles of capital accumulation. Drawing on the work of Arrighi in identifying these state-led cycles of accumulation, I suggest that processes of primitive accumulation are triggered by crises in each successive capitalist cycle.[7] These crises arrive at what Arrighi calls a signal point when systemic pressures led to a crisis in accumulation and precipitate, effectively, a move from a focus on trade to a focus on investment.

In the cycle of accumulation led by Great Britain, which finished by the end of the Second World War, and in the current cycle of accumulation led by the United States, crises in the form of signal points have been produced by (or are contemporaneous with), respectively, the industrial revolution and the information revolution. Both of these have led to mini-cycles of primitive accumulation inside the major state-led cycles of capital accumulation. These mini-cycles of primitive accumulation produced new phases of capitalist relations that were marked by the privatisation of the intangible commons and a new version of the relationship between production and reproduction. The legal sacralisation of this process was the emergence and global spread of intellectual property rights. This occurred in the late nineteenth century during the British-led cycle of capital accumulation when the first multilateral treaties governing intellectual property rights, driven in particular by the need to govern rights

[7] G Arrighi, *The Long Twentieth Century: Money, Power, and the Origins of Our Times* (Verso, 1994).

over industrial innovation, were concluded; and again during the US-led cycle, when major new multilaterial treaties were promulgated to update intellectual property protection for the so-called "information age".[8]

The critical thing to note in both cases is that intellectual property rights are inextricably linked with the development of technological processes for the reproduction of "knowledge" artefacts of various types. This means that intellectual property is intrinsically concerned with the way in which forms of cultural and technological production generate the power to control reproduction. But the production/reproduction dynamic of intellectual property comes after the social reproduction/production relationship that gives rise to the two key symbolic figures of intellectual property discourse, the inventor (for patents) and the author (for copyright). Consequently, questions of social reproduction are almost entirely absent from intellectual property discourse. No-one will be surprised by this, of course. However, it is worth noting in relation to intellectual property exactly how social reproduction is divorced from the capacity to control the reproduction of knowledge artefacts circuiting in the industrial, digital and knowledge economies.

Both of the two key "productive" figures in intellectual property law, the inventor and the author, derive their existence from the discourse of the individual genius. The individual genius embodied in the person of the author or the inventor is, however, the person who puts a vast network of "information" into a final or fixed form that can

[8] F Macmillan, "The World Trade Organization & the Turbulent Legacy of International Economic Law-making in the Long Twentieth Century" in J Faundez and C Tan (eds), *International Law, Economic Globalization and Developing Countries* (Edward Elgar, 2010).

be recognised by the law as being a copyright work or a patentable invention. The processes of social reproduction that permit the emergence of the individual genius – historically, and at least stereotypically, male – are of course ignored. Clearly, what is counted as "creative" or "innovative" for the purposes of intellectual property law is determined by the capitalist relations of property, which are already pre-determined by pre-existing social relations that have already side-lined, sublimated and/or ignored processes of social reproduction.

It is also the case that, quite apart from ignoring social reproduction, in distributing rights intellectual property law also ignores vast quantities of productive activity that do not on their own add up to a copyright work or a patentable invention. (If we return to the passage quoted above concerning the labour of servants and horses we can see that, in a sense, Locke describes this perfectly.) Added to the historically gendered identity of the author and the inventor, the extremely underdeveloped concepts of co-authorship and co-inventorship in intellectual property regimes have often militated against the recognition of (usually) women, who have also specifically contributed to the gestation of the intellectual property in question as a result of productive activities undertaken in the domestic sphere alongside the activities of social reproduction.[9] In fact, the mix of production and social reproduction in the context of the allocation of intellectual property rights has frequently been a particularly toxic one for women.[10]

[9] On these questions in relation to copyright, see D Simone, *Copyright and Collective Authorship: Locating the Authors of Collaborative Work* (Cambridge University Press, 2019).

[10] For an instance of this that finished better than it started, see *Kogan v Martin* [2019] EWCA Civ 1645, *Martin v Kogan* [2021] EWHC 24 (Ch), *Martin v Kogan* [2021] EWHC 1242 (IPEC).

There is more, however, because both figures, the author and the inventor, are technically distinct in intellectual property law from the owner of the intellectual property right. Essentially, the two figures are ciphers for the production of property rights; and what intellectual property law is really concerned with in the end is the allocation and management of the property rights. The question of how those property rights are used has generated considerable conflict around intellectual property and its systemic effect on social relations, especially those mediated by so-called Big Tech.

The intellectual property wars

The pervasive interaction of intellectual property rights and information technology means that we live today inside a vast system of private property rights that control or impact upon just about every move we make in the so-called knowledge economy. They impact upon how our own creativity engages with the creativity of others; they impact upon what, when and how we can access information and cultural products; they determine the processes for and direction of innovation of new forms of technology in all sectors. This also means that – even though they are formed in isolation from the processes of social production that enable the "productive" figures of the author and the inventor, which in turn constitute the point of attachment for the property rights that are enjoyed by the owner of those rights - they impact upon all social processes including the processes of social reproduction.

It is this state of affairs, where everything about our environment is controlled by interconnecting networks of intellectual property rights, that is the subject of what are popularly known as the "intellectual property wars" – a skirmish in the much larger

"culture wars". There are four broad camps or strategic positions in the intellectual property wars.[11] The first of these, generally described as the maximalist position, asserts that private property is a fundamental right. This position tends to be most strongly favoured by those who have gained property rights by investing in the creativity of others. The second strategic position argues that intellectual property rights are, or should be, fundamental personal speech rights. This strategic position, while employing the discourse of fundamental rights, travels in the opposite direction to the first one. The third position takes an instrumental rather than fundamental approach, and is based on the claim that intellectual property rights are necessary in order to incentivise creativity and innovation. This position does not necessarily reject the private property paradigm, but it tends to be less ferocious on this point than the first position and its adherents are often relatively minimalist with respect to the property question. The final strategic position rejects the concept of intellectual property rights. Members of this camp often embrace a narrative of "freedom" in support of their position. None of these strategic positions, including the last one, has much (if anything) to say about the role of social reproduction in the formulation of strategic positions in the copyright wars.

One reason for this aporia is that most of these strategic positions focus on intellectual property in the context of capitalist markets rather than in relation to the creativity of embedded communities in which social reproduction typically takes place. This, however, is exactly the context in which Murray, Piper and Robertson's ground-

[11] F Macmillan, *Intellectual and Cultural Property: Between Market and Community* (Routledge, 2021), ch 1.

breaking analysis is located.[12] Their work is focused on understanding how intellectual property functions socially. One interesting aspect of this work is that it is extremely critical of the fundamentally free market and gendered discourse of movements for the abolition of intellectual property rights in the information era. On the discourse of "freedom" that characterises these movements, they observe:

> Surely, after all, freedom is not sufficient in itself to produce creativity. Innovation emerges out of family and community preparation, and out of educational and financial resources. Some of these inputs might be associated with the free market, but others are products of social policy and tax revenue, or nonmarket collaboration and mentoring. As such they may actually be impeded by free trade – insofar as it forbids policies and programs that might be identified as a market subsidy – or free markets, which may destabilize family and community income. All the 'freedoms' do not necessarily pull in the same direction. Often they directly conflict … Free culture discourse obscures other freedoms and other rights …[13]

Amongst those things obscured by free culture discourse, we could also quite reasonably include questions about the role of social reproduction in cultural creativity and technological innovation. This does not mean, of course, that we should be embracing a private proprietary model for the governance of rights over creativity. The problem with the current state of the intellectual property wars is that, with the

[12] L J Murray, S T Piper and K Robertson, *Putting Intellectual Property in its Place: Rights Discourses, Creative Labor, and the Everyday* (Oxford University Press, 2014).

[13] Murray, Piper and Robertson, n 12 above, 18-19.

possible exception of the second strategic position, we have not yet made a place where we can think creatively about processes for information governance that recognise the role of social reproduction and avoid the negative effects of a private property model.[14] It is time to remedy this situation and to find a strategic position in the intellectual property wars that has space for issues around social reproduction. It seems to me to be evident that the maximalist (first) camp has little space for this type of thinking. Similarly, at least some versions of the abolitionist (fourth) camp come from philosophical or political traditions that are antithetical to considerations of the role of social reproduction. So far as the other two camps are concerned, their ability to take account of the role of social reproduction depends on two critical issues. First, it depends upon the extent to which they allow space for re-thinking the figures of the author and inventor, and the way in which they act as points of attachment for exclusive private property rights. Secondly, the utility of these strategic positions depends upon their capacity to move from a proprietary to a personal model of rights. Certainly, on the latter question, the second camp already has the advantage. However, this should not necessarily be seen as concluding the question.

Of course, it may be that technology itself will do away with this issue. We are now in a moment where there is substantial contestation around the question of whether only humans can be authors or inventors for the purpose of intellectual property law. If this is the eventual outcome of legal deliberations around the world,[15] and if generative

[14] See further Macmillan, n 11 above.

[15] As appears to be the case at present: see e.g. *Thaler v Perlmutter*, US District Court (Columbia), 18 August 2023 (copyright); *Thaler v Comptroller General of Patents, Designs and Trademarks*, US Supreme Court, 2 March 2023 (patents).

artificial intelligence continues on its current trajectory, overwhelming human creativity and innovation, intellectual property law may become a technical irrelevancy. If machine production in the realms of creativity and innovation rules, questions of social reproduction will be buried, not by the property relations of intellectual property, but by the gendered world of Big Tech.