Journal of Cultural Economy
Publication details, including instructions for authors and subscription information:
http://www.informaworld.com/smpp/title~content=t778865598

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Cori Hayden

Online publication date: 06 April 2010

To cite this Article Hayden, Cori(2010) 'THE PROPER COPY', Journal of Cultural Economy, 3: 1, 85 — 102
To link to this Article: DOI: 10.1080/17530351003617602
URL: http://dx.doi.org/10.1080/17530351003617602

THE PROPER COPY
The insides and outsides of domains made public

Cori Hayden

Efforts to make (and keep) knowledge public have provided a powerful counter-model to the recent expansion of exclusive intellectual property rights in such arenas as information technology, digital media, biological research, and pharmaceutical access. While sympathetic to the impulse to counteract the new 'enclosures' with knowledge made public, this essay critically interrogates some of the constitutive limits – in fact, the constitutive outsides – to these counter formulations. Paying particular attention to how public domain initiatives, like their strict intellectual property counterparts, also police the line between the proper and the improper copy, I argue that mechanisms for keeping knowledge public do not just circle the wagons against the predations of the Monsantos and Microsofts of the world. In their rhetorical and normative commitments to the proper copy, they also risk reproducing some of the same constrictions and exclusions that we tend to associate with (privatized) acts of enclosure itself. I explore this argument first in reference to creative commons and copyright, which can reproduce a strong ideological commitment to improvement – 'innovation' or 'creativity' – against the mere copy. What is the cost, I ask, of making the idea of improvement the price of admission not just to intellectual property claims, but to participation in newly 'democratic' public and common spaces of knowledge production? Second, I look to global pharmaceutical politics – specifically, regulatory efforts to improve access to cheaper copied and generic drugs in Argentina – to raise questions about the public domain's normative place in the continued expansion and harmonization of intellectual property regimes in the so-called global South. Together, these discussions suggest how the public domain and the commons, like their IP counterparts, can rhetorically and normatively expand and be secured against the improper copy.

KEYWORDS: intellectual property; pharmaceuticals; public domain; commons; copy; innovation

From the Shrinking Public Domain to the Expanding Public Domain

It has become difficult, these days, to think or talk about developments in the biological sciences without talking about platforms for making, and keeping, biological things and knowledge *public*. In the wake of the successful, publicly funded Human Genome Project based in the United Kingdom, initiatives such as PIPRA (Public Intellectual Property for Agriculture, based at University of California, Davis),[1] the 'Science Commons' movements (see Cook-Deegan 2007), MIT's Synthetic Biology project,[2] the Australia-based

Journal of Cultural Economy, Vol. 3, No. 1, March 2010
ISSN 1753-0350 print/1753-0369 online/10/010085-18
 DOI: 10.1080/17530351003617602

BiOS initiative (Biological Innovation for an Open Society), the fledgling DIY (Do it yourself) Biology movement, and the Public Library of Science (PLoS), figure among the many experimental platforms attempting to redesign how research is done, and how results circulate. Seeking to make and keep knowledge 'public' or in the 'commons', variably defined, these initiatives are both symptom and extension of a rise in public domain initiatives and access-to-knowledge activism more broadly (Boyle 2008; Kapczynski 2008, 2010).

Indeed new platforms intended to make and keep biological knowledge public build directly on the technical tools and normative commitments developed in the free and open source software and Creative Commons movements (see Kelty 2008, Lessig 2004). The borrowings are deliberate, and not always seamless: Richard Jefferson, of the BiOS Initiative, hints at the challenges to come as his project aims to '[port] the concepts, philosophies, normative behaviors, legal mechanisms and public enthusiasm for Open Source into the vastly more challenging area of patents, and biological research and development'.[3] But easily translated or not, open source's commitments to openness, freedom (Coleman 2004), collaboration (Benkler 2002), and collective governance have indeed captured the imagination of many people looking for counterweights to the extension of strong copyright and patent regimes which so prominently defined late twentieth century US intellectual property (IP) law and its consequential expansions through global trade mechanisms. Those expansions have generated powerful critiques from both the global South and the global North about the spectre of a world in which the little that remained of the public domain and the commons would be finally devoured by voracious neoliberal property regimes.

But with the rise and proliferation of commons-based or public domain-based alternatives, I am brought up short by the force with which the laments of the shrinking commons – diagnosed with such pointed terms as biopiracy (Shiva 1997), or information feudalism (Drahos & Braithwaite 2002) – have morphed into or enabled something quite unimaginable in that earlier moment: a sense of the commons' newly expansive possibilities. While, for many critical commentators in the 1980s and 1990s, it seemed as though the public domain or 'the information commons' could only diminish against this new wave of enclosure, we now read legal scholars puzzling over the best mechanisms or models to use to *secure* an 'expanding commons' in biological things and knowledge (see Rai & Boyle 2007, p. 0391).

I admit to being compelled by the promise of these new publics and commons. But I am also troubled by the idea of a utopian counterspace that, in an eery and overdetermined echo of their foil, also expands and must be secured. This essay explores some of the implications of this formulation, with a particular focus on the public domain's or the commons' constitutive outsides. Against what do these expanding commons/domains expand, and against whom must they be secured? On what do they encroach and against whom do they erect their fences?

The answers to those questions depend in large part on the idea of the public domain and the commons that animate the initiatives in question. The public domain is often used in these discussions to refer to that which is not under some kind of exclusive property protection. Things in this public domain – folk songs, books no longer under copyright, drugs whose patents have expired – are thus understood to be available without restriction for use, as-is, or as raw material for making further 'derivative' works, though presumably they cannot be patented or placed under copyright as-is. This is what

I will call, in the final section of the paper, the residual public domain. But, precisely to combat the fact that putting things or knowledge in the public domain can often be the first step to making them available as raw material for further, exclusive industrial appropriation (see Chander & Sunder 2004, p. 1335; Christen 2005, p. 334), open source and creative commons advocates have developed the notion of the deliberate, protected commons (or a 'protected' public domain). These arrangements are secured through the redeployments of intellectual property rights such as the General Public License – the basis of copyleft – in which users agree to farm source code or other ideas, objects, and expressions back out into a community of users, rather than, as Lévi-Strauss (and Microsoft) might say wistfully, *keeping to oneself* (Levi-Strauss 1969, p. 497). It is this tactic and variations thereof that are most often used to create, and secure, 'expanding commons'.

On their architects' own terms, then, these initiatives are meant to carve out a space in which ideas, inventions, even new forms of life (this is what Synthetic Biology invents, after all) may circulate and remain available for tinkering and use, at least, to a designated community of interested parties. Such collaborative, 'open' research and circulation is set against a corporate model that would keep new inventions and knowledge under the exclusive restrictions authorized by strong IP protection. In this sense, protected commons and re-engineered public domains erect their fences against the privatization of knowledge, in the strict and exclusive sense.

But, ultimately, I will argue that some of these mechanisms for keeping knowledge public do not just circle the wagons against the predations of the Monsantos and Microsofts of the world. In their rhetorical and normative commitments, they also risk reproducing some of the very same constrictions and exclusions that we tend to associate with (privatized) acts of enclosure itself.[4] In other words, intellectual property systems and public or commons systems share more than we might like to think, and attending to their constitutive outsides helps us identify some of these commonalities.

The essay develops this argument by means of a few juxtapositions, looking beyond the biocommons, strictly speaking, in order to pose some broader questions that are worth keeping in mind as we consider the increasing appeal of the idea of the public domain and the commons in the biological sciences and beyond. First, I am interested in discussions regarding the commons and copyright which reproduce a strong ideological commitment to *improvement*, in the form of a rather constant invocation of 'innovation' or 'creativity'. A consequence of this vigorous commitment to improvement – ironically, of course, one of the most powerful justifications for 'enclosure' and private property itself – is the reinscription of the person who merely copies or appropriates (and does not innovate or create), as pirate and thief. We see this most clearly in the context of discussions over global media piracy and U.S. debates over fair use and the authorized reproduction of copyrighted material, in which some public domain and 'free culture' advocates reproduce the hierarchies that animate IP itself: 'creativity' becomes an axis through which to differentiate the good copy from the bad copy. What is the cost, I ask here, of making the idea of improvement – innovation, creativity – the price of admission *not just* to intellectual property claims, but to participation in newly 'democratic' public and common spaces of knowledge production?

Second, I draw briefly on recent turns in global pharmaceutical politics – specifically, regulatory efforts to improve access to cheaper copied and generic drugs in Argentina – to raise some broader questions about the public domain's normative place in the continued

expansion and harmonization of intellectual property regimes in the so-called global South. Latin American practices and taxonomies of copied drugs remind us that the pharmaceutical public domain is not just an undifferentiated space of enhanced access and flow; it comes into force not *against* restrictive pharmaceutical patent regimes, but bundled neatly with them. As such, the pharmaceutical public domain too has its 'pirates' and illicit outsides. This discussion will explore a second mode through which the public domain rhetorically and normatively expands and is secured against the improper copy.

In drawing our attention to the public domain's and commons' constitutive outsides and outsiders, my questions bear the echoes of a robust critical conversation on public and private in legal, feminist, anthropological, queer, and postcolonial theory. These interventions, particularly those developed in feminist work in a number of fields, have long taught us to trouble the line between public and private (see Scott & Keates 2005) and to refuse the easy territorialization of these terms, as if they are mutually exclusive *places* rather than complex domaining effects (Strathern 1988). But, as if proving linguist Susan Gal's apt observation (Gal 2002, pp. 77–78) that no matter how often or how well we argue this point, the public-private divide is not easily dismantled (we know very well but . . .), the rise of public domain activism has prompted a wave of legal scholarship revisiting precisely this question (see Boyle 2003, 2008; Litman 1999). As Anupam Chander and Madhavi Sunder note, it is folly to imagine the public domain as the opposite of, or mutually exclusive to, private intellectual property rights. They pointedly remind us that the terms are 'not other to each other; they are made for each other' (2004, p. 1346).

Insofar as they place 'the public domain' inside of the terrain of intellectual property, these arguments provide the essential scaffolding for my intervention here. But, these discussions seldom give us a way to think about those things, people, and practices that are constitutively ruled out of bounds; that is, those practices that are deemed not properly public or common at all. I am thus deeply interested in the criteria with which the boundaries of the public or commons are drawn. As the arguments introduced above suggest, those criteria bring us directly to the question of the *proper copy*.

The Proper Copy

The politics (and counter-politics) of intellectual property are fundamentally a politics of the copy. In the global North, broadly defined, we do not, often enough, lead with this foot when explaining what patent and copyright *do*; more often, we begin by talking about how patent and copyright define protectable innovation or creativity. But, we could just as easily define these terms by saying that patent and copyright first and foremost delineate what shall count as a proper or legal copy (or reproduction, or appropriation) of things and ideas – and consequently, what will count as an improper copy. Consider that one of the most immediate effects of the introduction and enforcement of intellectual property regimes in new regulatory contexts – as with the entry into force of pharmaceutical patents in Mexico in the 1980s, in Brazil in 1996, or in India in 2005 – is that forms of copying, such as reverse-engineering pharmaceuticals, that previously had been legal in national regulatory terms were suddenly named acts of piracy or theft.

It is precisely the ever-expanding criminalization of copying to which public domain activists and other critics of IP's rampant extension have been vociferously drawing our attention. Lawrence Lessig, founder of Creative Commons, puts the case to his publics

repeatedly that ever-stronger IP protection criminalizes acts of creative appropriation that should, in fact, be considered the right of (just about) everyone. (More on this point below.) But it is not just restrictive intellectual property that draws consequential lines between the good and the bad copy. Public domain initiatives and protected commons arrangements too are fundamentally animated by the need to produce, in order to secure, a notion of the good or proper copy against its illicit counterpart. Debates over free and open source software, creative commons, music file sharing, fair use, and Google Books are shot through with variously-configured anxieties about piracy, and more specifically, about the line between copy and theft. That line is not a narrow technical one but a politically charged symbol of everything from commitments to freedom (see Coleman 2004; Kapczynski 2010), to friendliness to commerce and, as I will suggest below, general moral uprightness. On the first two points, consider the frequency with which Lessig, and Bruce Perens, who not very democratically credits himself with sole authorship of the Open Source definition, feel that they need to defend themselves against the charge that keeping things circulating in public is tantamount to 'communism', that rather unimaginative, persistent demon that animates U.S. political and economic imaginations. In answer to this charge, many architects of the new 'commons' – biological, textual, or otherwise – regularly reaffirm their affirmation of intellectual property, specifically, and capitalism, more broadly (see Lessig 2008; Cook-Deegan 2007). We should note from the outset, in fact, that most of these open source-inspired platforms rely on (and redeploy) intellectual property forms. As Chris Kelty points out, these platforms are explicitly not anti-commercial or anti-intellectual property: '... they rely on the existence of IP [intellectual property] to create and maintain the commons even as they occupy a position of challenge or resistance to the dominant forms of IP in circulation today' (Kelty 2004, p. 547). The ways in which these techniques 'port' intellectual property into the commons has implications for the kinds of subjects, objects, and practices considered to be part of a properly public domain – specifically, for how we authorize some acts of appropriation and delegitimate others, in the name of increasing access to knowledge, things, information. The point becomes clear when we consider how initiatives undertaken in the name of the commons – and hence against enclosure – tend rhetorically to call up, in their own name, some of the justifications of enclosure itself.

Platforms and their Entailments: Copying the Commons

The 'commons' is itself, a copy: it is an idiom which has been cut and pasted into discussions of the knowledge economy from debates about the enclosures and privatization of common lands in the English countryside in the sixteenth and seventeenth centuries. Legal scholars including Yochai Benkler (1999) and Peter Drahos and John Braithwaite (2002) made an early case for thinking about the parallels between the historic enclosure of 'real property' (land) and the increasing privatization of an intangible commons – 'products of the mind' – via the expanding scope of copyright and patent laws. (U.S. law was particularly expansive on this front). James Boyle's 2003 essay 'The Second Enclosure Movement and the Construction of the Public Domain' (Boyle 2003) crystallized and further popularized the analogy that had been percolating in legal circles for several years. Boyle's language was pointed:

> We are in the middle of a second enclosure movement. It sounds grandiloquent to call it 'the enclosure of the intangible commons of the mind', but in a very real sense that is just what it is. True, the new state-created property rights may be 'intellectual' rather than 'real', but once again things that were formerly thought of as either common property or uncommodifiable are being covered with new, or newly extendable property rights. (2003, p. 37)

The commons have, as is well known, long played a central role in debates over either the propriety or the violence of private property, specifically, and of capitalism, more broadly. For Marx, the enclosure of common lands was one of the founding violences of industrial capitalism. The enclosures not only transformed what had been common to many into the exclusive dominion of the few; they also effected a violent transformation of commoners into a dispossessed class who could (only) then either assent to a new lot as wage laborers, or become, in Polanyi's terms, beggars and thieves (see Boyle 2003, p. 38; Linebaugh 2008). The English enclosure acts thus created new rights (for some) and hence new categories of trespass (for others). And crucially, of course, they did so in the name of economic efficiency, or improvement: the argument for improvement held that without the rights and responsibilities that come with private ownership, natural resources held in common would not be exploited or managed to their fullest.

This history and its continuation through debates over Garrett Hardin's (1968) 'tragedy of the commons;' rejoinders over the tragedy of the anticommons and the comedy of the commons (Heller & Eisenberg 1998, Rose 1986); and work on the management of common property regimes (Ostrom 1990) are explicitly part of the story of public domain and protected commons initiatives. Creative commons and public domain activists deliberately turn the idioms of fences, securitization, and territory on their head in order to counter exclusive monopoly claims over ideas, biological matter, and other inventive and invented material. Drahos, Boyle, Lessig, and others are eloquent about the many ways in which commons in ideas are being fenced in via the radical late twentieth century expansion and extension of intellectual property rights, and the ways in which we – mere commoners? – are thus increasingly criminalized for using intellectual goods that have been and should remain common resources. The public domain and the new commons are meant to come to the rescue against the new enclosures.

But, just like borrowing and adapting technical platforms across domains, copying the commons also has some complex ideological entailments. Paradoxically, perhaps, among them is a powerful commitment to improvement in the form of 'innovation'. Structurally speaking, this commitment brings with it a corresponding commitment to the trespasser and the thief as the commons' constitutive outsider.

Improvement, Revisited

In the realm of the biological sciences, as with open source's approach to writing code and creative commons' approaches to publishing and circulating text and media forms, new commons platforms are explicitly put to work in the service of 'fostering innovation'. The argument is that we can build a better mousetrap by keeping things and inventive processes in circulation – in some form – rather than enticing firms and people with the promise of monopoly rights over the fruits of their creative labor. These arguments are often made in the name of intellectual and economic efficiency; thus,

Robert Cook-Deegan, in his thoughtful account of how and why a 'science commons' in health research is necessary, notes that 'knowledge is more likely to advance, and to be applied, if it is available at little or no expense to a broad array of scientists and innovators' (Cook-Deegan 2007, p. 134). The Public Intellectual Property Resource for Agriculture (PIPRA) seeks to reduce barriers to access to technologies, such as new crop varieties, for developing country and public sector actors. PIPRA's online self-description describes these actors as 'prolific inventors', and the initiative seeks to facilitate these inventors' innovative capacities (http://www.pipra.org/en/about.enhtml#purpose). A primary goal of the Biological Innovation for Open Society (BiOS) initiative is 'to empower diverse innovators and engage the creative spirit of many more people in crafting their own solutions to their own challenges in food and agriculture, natural resource management, public health, or medicine' (http://www/bios/net/daisy/bios/g2/2442/404.html). One of the tools BiOS's CEO, Richard Jefferson, proposes for so doing is the BioForge, a web portal that deliberately mimics the mechanisms of creative commons and open source:

> To foster innovation that can be improved and used, the BioForge aims to build a protected commons in which you may share your ideas and data so that you and others can continue to build on them and improve them, but no user appropriates them and prevents other members of the BioForge community from building on them. By their agreement to a contract to protect the commons for use by all who agree, the BioForge community sets up a way for any member to create new intellectual property within a protected commons. . . . Thus, users may patent improvements that they invent, but must agree not to enforce those patents against other members of the BioForge community.[5]

From the point of view of making the world a nicer, more equitable, and perhaps more democratically creative place, there seems little to quarrel with in these commitments to keeping innovation(s) *in public*. If the choice is between the 'old model' of innovating 'in private' (that is, under an understanding of intellectual property as monopolistic incentive) and the new mantra of innovating in public, I have to confess to liking the new version quite a bit better. But are these our only choices? I do not simply mean to ask, are 'public' and 'private' our only choices? I also mean, at what cost do we calibrate these initiatives to the requirement to be 'innovative'? I would suggest that calls to *innovate in public* are also leaving some critical lacunae in their wake. In other words, grounding a vision of participation in the project of allowing ever more people to lay claim to the hallowed ground of 'innovation' is a familiar promise, with familiar limitations.

These limitations came to the fore, in slightly different form, at the height of the bioprospecting and biopiracy wars of the 1990s. In that context, the renewed project of scouring the natural world for promising pharmaceutical leads came with a new promise of inclusion for indigenous and other developing country collaborators: Southern participants would be able to lay some claims to the benefits generated through pharmaceutical research and development based, often, on the degree to which they contributed to, or participated in, processes of pharmaceutical innovation – for example, by providing access to medicinal plants or knowledge about their uses. Those of us tracking such contracts have noted how critics and participants often tried to re-orient the grounds on which participation – and a refusal to participate – could be framed (see Brown 2003; Coombe 2005; Greene 2002; Hayden 2003; see also Christen 2005). Such alternate idioms of refusal or accession have included rights to territory, self-determination, and reparation

for historical dispossession. The implications of grounding indigenous claims of enfranchisement in these demands made clear the limitations – not just practical, but ideological – of an imagination of inclusion framed through the narrow lens of innovation and contributions to value production.

In the context of current efforts to make and keep knowledge-things public, or to protect an expanding biological or knowledge commons, I would frame the question this way: at what cost do we make 'innovation' or 'creativity' the price of admission *not just to intellectual property claims,* but now, also, to participation in these newly vigorous, 'counter' public domains?

Critical work on trends in copyright, digital media, fair use, and information technology provide us with some concrete answers to this question in the terrain of copyright. These arenas are rife with constitutive anxieties over the difference between the (proper) copy and theft. Moreover, as Lawrence Liang has argued persuasively, U.S. and European public domain and creative commons architects often sound remarkably similar to advocates of strong copyright protection in the manner in which they too attempt to differentiate the good from the bad copy (Liang 2010). As in the ubiquitous incitement to 'remix!' (the clarion call issued by Lawrence Lessig [2008]), creativity, inventiveness, and, in copyright parlance, 'transformative use' have become increasingly sedimented – on all sides of the battles over copyright 'reform' – as the benchmarks separating proper copying from piracy or theft.

Copyright and Fair Use: The Proper Copy versus the Mere Copy

One arena in which to contemplate the implications of the sedimentation of creativity is the threshold for copying in recent U.S. jurisprudence on 'fair use'. This doctrine has, since the passage of the U.S. Copyright Act of 1976, provided a 'safety valve' to copyright law by allowing the reproduction of protected material, within limits (Tushnet 2004, p. 544). To be clear, fair use is not precisely about a distinction between copyrighted material and that which is no longer protected and thus circulates in the public domain. Rather, it refers to still-copyrighted material and allowable exceptions to the restrictions on its use, such as photocopying copyrighted articles for academic courses, or the reproduction of large chunks of text in a book or article review. In an intriguing essay on the somewhat perverse shifts in definitions of fair use over the last decade or so, legal scholar Rebecca Tushnet shows clearly how, at precisely the same time that 'copyright has been a one-way ratchet, covering more works and granting more rights for a longer time' (2004, p. 539), so too have U.S. courts enacted a gradual restriction of what shall count as an allowable copy under fair use. The mechanisms and genealogies at work here are complex, but the effect is clear if not, at first blush, odd. Increasingly, U.S. courts have privileged transformative use – that which adds something new – over mere replication in their definitions of allowable copying under fair use. Tushnet explains much of this shift through her detailed attention to the convergence of First Amendment (free speech) arguments and fair use doctrine: courts seem ever more inclined to recognize as protectable copies only those iterations which put a distance between that which is being copied and the copy itself, just as free speech protects critical speech, that which puts a distance between the original and that which is being talked about. 'Fair use increasingly requires transformation, that is, the addition of new material or a new, critical perspective' (Tushnet 2004, p. 550).

One implication of this move towards transformative use is that just plain, nontransformative copying – the kind of copying that fair use originally protected – is increasingly and literally defined as piracy. It may seem counterintuitive that a practice such as making photocopies of works for academic use is now falling on the side of piracy or bad copying, while adding something new or changing the context of reproduced material (as in taking an image, changing its size, and putting it on your website) may be considered an authorized form of fair reproduction. But this is precisely the direction that U.S. jurisprudence has taken. In this context, the *proper* copy is thus, *not* a copy, if by that we mean a simple affirmation or reiteration.[6]

Again, the designation of copying as piracy is precisely the type of thing that public domain and creative commons advocates militate *against*. Yet, again, the distinction between the transformative copy (good) and the mere copy (bad) also structures articulations of what should be done in the name of the creative commons and the public domain.

The Public's Pirate

The two most recent books by creative commons founder Lawrence Lessig, *Free Culture* (2004) and *Remix* (2008), are pointedly animated by pirates, piracy, and the disparate anxieties engendered thereby. Lessig is particularly concerned about the 'war on piracy' waged by the industries (publishing, media) with a strong investment in strong copyright protection; he is concerned about the ways in which this war unjustly criminalizes 'your kids' as pirates for downloading music; he is concerned about the ways in which this criminalization stifles the creativity waiting to burst forth from our remix culture and its citizen-bricoleurs (see 2008, pp. xv–xxii and 23–33). But, as Lawrence Liang (2010) notes, Lessig and others working in this arena are simultaneously quite willing to

FIGURE 1
Nike, copy. Street graffiti, Buenos Aires, Argentina. May 2006. Photo: C. Hayden.

differentiate these heroic, unjustly criminalized remixers from those guilty of just plain, irredeemable, piracy. There is a tired (but never tired-out) geopolitics to Lessig's distribution of good copiers and bad copiers: in contrast to 'our kids', '[a]ll across the world, but especially in Asia and Eastern Europe, there are businesses that do nothing but take other people's copyrighted content, copy it, and sell it – all without the permission of the copyright owner . . . This is piracy plain and simple . . . This piracy is wrong' (Lessig 2004, p. 63; also cited in Liang 2010, p. 5). The reference here is to the proliferation and sale of such things as unlicensed copies of DVDs, or what the U.S. government calls, in trade enforcement lingo, the 'commercial, non-transformative' copy.

A normative liberal stance demands that we come down on the right side of this line between those who make new things by their creative acts of copying (Lessig's exalted remixers), and those who merely copy the creative works of others – and, more egregiously still (so it is said), make money in the process. But it is only at great cost, analytically and politically, that we accept as neutral, given, or self-evident that line between proper copying and piracy. In historian of science Michelle Murphy's terms, we can see in this asymmetrical formulation a 'distributed ontology of reproduction', that is, a moral discourse and political economic formation organized around the delineation of proper and improper reproductive acts.[7] Liang parses Lessig's formulation in precisely these terms: 'pirates who merely reproduce without producing . . . cannot play a role in the public domain, since they cannot claim the representative status given to the transforming creator within the productive public domain' (Liang 2010, p. 7).

Perhaps it is not surprising that Lessig, himself an avid defender of intellectual property (used in the right way), should come down clearly against something called 'piracy'; structurally, of course, this move comes with the territory. But, read alongside the developments in fair use, we come to the somewhat arresting observation that the criteria used to delineate something that is properly public are becoming quite a bit like the criteria that have long been used to allocate private property rights. Re-definitions of fair use within copyright law, alongside the incitement to Remix and Innovate in public or in common, suggest that the legitimating warrant for copying properly (within the authorized public domain) is converging powerfully with the logics of improvement that have underwritten property claims since, at least, the first enclosures. As Tushnet argues pointedly, 'We have replaced the figure of the creative genius deserving both acclaim and property rights [the author recognized by copyright] with the figure of another creative genius [the transformative copier] who deserves her share of the acclaim and the rights because of the new material she's added. This does nothing to defend copying itself' (2004, p. 561).

If you must transform something in order (legally) to copy it, then what indeed is left of the mere copy and what is left for the mere copier? In continuation with the work of property claims themselves, the sedimentation of creativity as the threshold for participation in these public domains and creative commons, turns the mere copy into trespass or piracy.

The ways in which improvement can colonize or saturate the public domain reflects and thus helps legitimize normative regulatory orders. It also has implications for critical inquiry and for activist aspirations; that is, for how the question of access, publicness, and copying are posed in the first place. There is a great deal embedded in an uncritical, renewed commitment to inventiveness at the expense of the illicit copy, which commit us to far too many assumptions before we've even begun. Rather than simply rule

'unauthorized' reproductions out of order, one might, instead, set forth to understand empirically the actual practices at work where liberal-legal epistemologies can only see trespass. Improper copying takes many forms, and the normative incitement to regulate – either through intellectual property regimes or through public domain and protected commons mechanisms – can at times obscure our willingness or ability to understand the practices that unfold in its name. Brian Larkin's work (2007) on pirated video cassette films in Nigeria and Adrian Johns' work (2002) on early twentieth century English sheet music piracy, for example, trace the complex social networks, dense material infrastructures, rich aesthetic sensibilities, and economic circuits that make 'piracy' into a robust collective practice with sometimes counterintuitive relationships to authorized or sanctioned reproductions. Attending to these practices makes for good ethnography and good history; it also helps us open up the closed moral-political loop in which innovation is (presumed to be) a good in itself, and copying when you are not allowed can only mean 'communism', theft, or piracy. Attending to practices of unauthorized copying can, as well, open up another set of questions about how we conceive of the reach of the public domain itself. Copying, like, intellectual property, has epistemological effects. It is to these effects that I now turn, with an eye on developments in contemporary pharmaceutical politics.

Una industria copista: Pharmaceuticals and the Domaining Effects of the Public

To be worried about the line between the *copy* and theft and not, pace Proudhon (1993) and a clever Argentine graffiti artist, the line between *property* and theft, is already to assume, neutralize, and naturalize quite a lot. In particular, it is to leave unmarked the

FIGURE 2
Property =theft. Street graffiti, Buenos Aires, Argentina, May 2006. Photo: C. Hayden.

legitimacy and the epistemology of the rule of (intellectual) property law (see da Costa Marques 2005).

In the previous section I was concerned with how the commons can expand, rhetorically and normatively, against the 'mere' or the uninventive copy. Here, I turn briefly to another domain of practice and contest – the production and regulation of copied pharmaceuticals – to pose a related suite of questions about the rhetorical expansions of the public domain. My interest in this section has to do with the public domain's normative place in the continued harmonization of intellectual property regimes in the so-called global South. But my starting point is a commonplace formulation in the so-called global North. In the U.S. and Europe, we speak readily about the public domain as that which is left (or left-over), outside of the patent or copyright. In contexts saturated with the rule of intellectual property law, this notion of the residual public domain is utterly banal. If a book is no longer under copyright, it resides in the public domain; if a pharmaceutical is no longer under patent, it must be a generic, circulating in the public domain. These statements ratify a vision of the world in which the public domain is what we find outside of intellectual property, and it is the *only* thing we find outside of intellectual property.

In what sense does this formulation – if not patented (or copyrighted), then public – also contribute to the work of securing an expanding, liberal public domain against its constitutive outsides? Pharmaceutical copying provides a particularly vivid point of departure for addressing these questions. As with the extension of copyright over ever more kinds of work and ever-longer periods of time, the scope of pharmaceutical patents has summarily expanded over the last twenty years. The harmonization of pharmaceutical patents in particular through multilateral trade conventions has meant that nations such as Mexico, Brazil, Thailand, India, and others now concede twenty years of monopoly protection on pharmaceuticals before the molecule becomes part of the public domain – and thus becomes (legally) available for manufacture and commercialization by other laboratories. In IP parlance, such generic competition (properly) begins only when a patent ends.[8] But not all pharmaceutical marketplaces operate according to such neat, sequential logics (first patented drug, then generic).

In Argentina, as in the rest of the Americas recently, middle- and lower-class consumers' inability to purchase their medications (such as insulin for diabetics) was one of the most potent and urgently-felt effects of the economic crisis that hit with such force in 2001 and 2002. In the wake of that particular crisis, the government took steps to facilitate the prescription and sale of inexpensive copied drugs. Specifically, federal health policy began to encourage the prescription of drugs by generic name (the name of the molecule, such as loratadine) rather than brand name (Claritin). Similar moves had already taken place elsewhere in Latin America: in Mexico, for example, the turn to generics began in 1997, framed as a way to combat the dominance of foreign-made, expensive, patented drugs in the domestic marketplace (see Hayden 2007). But in Argentina, the politics and even the epistemology of the copy has been configured rather differently. Though then-President Carlos Menem formally committed Argentina to the conditions required by TRIPS in 1996 by putting a pharmaceutical patent law on the books, these patents have explicitly not been enforced, in large part due to the pressures exerted on Congress by the domestic 'copycat' drug industry (which refers to itself matter-of-factly as *la industria copista*). The Argentine drug industry largely makes and markets copies of drugs patented elsewhere, and many of those copies are unlicensed. Argentine *copias* have been known

to beat their 'original', patented counterparts into the domestic market and hence to become the leading, dominant brands. Argentine researchers and public officials are explicit that copying as copying (not copying as innovation) has been essential to their constructions of the public good.

The strength of the *industria copista* has generated predictable geopolitical responses: in the late 1990s, the Clinton administration in the U.S. launched a pronounced trade war against Argentina for its embrace of pharmaceutical 'piracy'. The normalcy of the unlicensed copy also generates unexpected taxonomic and epistemological effects. Importantly, in the absence of a fully enforced pharmaceutical patent regime, the copied drug is not (as it is in the U.S. and in Mexico) semiotically and chronologically 'second' to an 'original'. Rather, as I have laid out in greater detail elsewhere, all drugs (including what we might call the 'original') are considered copies, in the sense of being one of many; in turn all drugs are also brands, in the sense that they all have trademarked names (Hayden 2010). This point is important because it has some bearing on how we might understand what it means to introduce 'cheaper, generic drugs' into the Argentine pharmaceutical marketplace. The prevalence of domestically-made *copias* has not necessarily ensured a proliferation of affordable drugs. To the contrary, the dominant Argentine brands are relatively expensive (Lakoff 2004) and the goal of post-crisis measures (2001–2002) requiring the prescription of drugs by their generic name has been to create a market for *less expensive copies* (of copies). *Copias* are thus among the expensive, leading brands; generics are, for many consumers and pharmacists whom I have interviewed, simply lesser-known copies, made by smaller laboratories without much of a marketing budget or a brand presence.

We might need to look twice, then, to understand what a generic drug is or can be in this context. The seemingly straightforward, residual, U.S. and European definition of a generic noted earlier – if not brand-name original, then generic copy – does not hold water for long in Argentina (nor, arguably, in India where an analogous situation held, at least until January 2005). Though pharmacies sell drugs as generics, and patients consume drugs as generics, Argentine pharmacoeconomists, physicians, and policymakers insist that in the absence of an enforced pharmaceutical patent regime, the generic drug cannot and does not exist as a distinctive kind of thing. In legal terms, it is a non sequitor: without a patent regime, there is no such thing as a generic. Elsewhere, I have described this relationship with the shorthand phrase (and with apologies to Marilyn Strathern), no patent, no generic (Hayden 2010). But the arguments developed in this essay give another turn to this formulation. In the absence of enforced pharmaceutical patents, these *copias* are not pirated, either.[9] No patent, no generic, no piracy. What does this triple negative tell us about the nature of the public domain?

For a start, it tells us that without private intellectual property, there is arguably no public domain: without a patent, there is simply no generic. Merely recognizing this point requires some recalibrations in our analytic languages. We should, perhaps, specify that this presumably residual and expansive category (the public domain) is actually something quite specific and bounded. At the very least, insisting on calling the public domain the *legal* or the liberal public domain would start to bring into view the regulatory architectures and infrastructures that are its condition of possibility, and the kinds of (illiberal?) circulations that are ruled out of its bounds (see also Christen 2005).[10] Doing so thus tells us that the public domain has its constitutive outsides, and echoing the discussion in the previous section, these outsides are comprised not only by the patented

'original' but also by the pirated copy. The argument becomes even more trenchant if we take seriously the prospect of a proximate change in Argentine regulatory structures. Many commentators there fully expect a pharmaceutical patent law to gain traction in the next decade. An enforced pharmaceutical patent law would create a markedly different notion of the generic than the one currently in operation. With patents in force, the generic would become a legally intelligible, distinct kind of thing; it would become the sanctioned, proper copy, and an emblem of the regularized public domain. Meanwhile the 'pirated' *copia* would become (at least in legal terms) its illicit counterpart. In Argentina, fully in line with global trends in the harmonization of the proper pharmaceutical copy, the non sequitor of the generic seems poised to settle in not *against* the patent, but in a neatly bundled package with it. In this way, we might argue that the generic may well work to secure an expanding public domain not just 'against' the patented drug, but against the illicit copy as well.

Expansions and Constrictions, Revisited

There are essentially two ways in which the public domain works, expansively, in the examples I have addressed rather schematically in this essay. First, there is the deliberate, protected community – the public domain of open source software, the protected commons that expand through copyleft and other mechanisms for keeping ideas and inventions in circulation. This is the inventive, creative 'commons' whose expansion must be rhetorically and technically secured, not just against private monopolization but also, it would seem, against the non-innovative copy (and the non-innovative copier). Second, there is the idea of the public domain as that which is neither cordoned off as restrictive private property nor as a protected commons; this is the public domain as everything else, as represented in the idea that if a drug is no longer under patent, it must reside in the public domain.

My provocation has been to suggest that, epistemologically and politically, these rather benign-sounding constructions can be colonizing, even enclosing, precisely insofar as they are expansive and expanding. The incitement to copy *creatively* and the juridical idea of the generic pharmaceutical draw our attention to the different ways in which public domains have their constitutive outsides – not just their exclusive patent-holders and copyright-hoarders, but their trespassers and pirates. I have thus been interested in the simultaneous play of expansion and restriction that we find in common between the 'enclosures' enacted through expanding intellectual property regimes, and the remedies to such expansions enacted in the name of the public and the commons. Calls for the expansion of the public and the commons give me pause, precisely because such expansions rhetorically and conceptually extend the normative work of the very property regimes they seek to contest.

Where pharmaceuticals are concerned, this point comes into view in the half-useful idea that if a drug is not under patent protection, it therefore must reside in the public domain. But as we know so well (yet repeatedly forget), the public domain extends only as far as property regimes do. It makes a world of critical and political difference to note that the residual formulation of the public domain – if not patented, then public – is *normative*, not descriptive. It ratifies a taxonomic order in which something like the Argentine *copia* should not count as a proper copy at all, but as such it cannot account for a situation in which the Argentine *copia* is indeed the privileged drug in circulation. With generic drugs

as a point of reference, we might note that 'making things public' does not only mean setting them into circulation outside the strict restrictions of monopolistic deployments of intellectual property; making things public also means bringing them into legal regimes as intellectual property's sanctioned, constitutive outside.

At the same time, some of the things happening in the name of copyright reform, fair use, and creative commons raise the strange prospect of a growing convergence between the criteria used to grant intellectual property rights, and those used to determine what shall count as a copy that is properly public or common. If intellectual property rights require that we be creative and transformative, and if legally sanctioned forms of copying increasingly require that we be creative and transformative, what kinds of personhood, practices, and modes of engagement in the world are ruled back out of bounds precisely in the name of more inclusive, democratic, modes of circulation and appropriation? And in the name of what, exactly, will the 'mere copy' be defended? The questions raised earlier along these lines bring to mind critical anthropological engagements with liberal notions of property and personhood. These engagements have acquainted us with the figure of the inventive modern subject: the Lockean person, possessed of property in himself and hence poised to transform that which is common into private property through the exertion of his own labor (see Strathern 1999; Coombe 1998). We often use this figure to think critically about the specific kind of personhood required and assumed in liberal notions of property, with all of its constitutive exclusions. Now, with the incitement to remix and innovate in public, we are confronted with the somewhat puzzling figure of the inventive modern copier. I do not mean this phrase to be a celebratory one, as Lessig does (it is hard not to think of inventiveness as celebratory, but that is part of the challenge I want to offer here). Rather, I think we would do well to extend the critical vocabularies we have already honed regarding the propriety of property to an analysis of the propriety demanded and produced, in these arenas, in the name of the good copy. Ironically (or perhaps inevitably), I have suggested, the proper copy shares a great deal with the propriety of property; the proper copy increasingly must be inventive or transformative just as 'invention' itself must be inventive. Embedded herein is a high liberal view of the political economies of copying, one that is not only descriptively inadequate to a great number of the quotidian practices of production and circulation of things and relations in the world, but one that also echoes, and in some circumstances helps foster, the increasing criminalization of the mere copy.

In the end, my aim is resolutely not to argue that because the public domain is intimately entwined with 'the private', it is contaminated and to be distrusted. Far too much intelligent theoretical work has been done for us to hold onto such a dead-end commitment to the purity of domains. But with the figure of the (im)proper copy firmly in view, I would maintain that there is important analytic work to be done in thinking critically about the implications of the public-ization of everything.

ACKNOWLEDGEMENTS

Many thanks to Alberto Corsín-Jimenez, Tony Bennett, and two anonymous reviewers for their extremely perceptive and engaged comments; to Tim Choy, Amy Kapczynski, Michelle Murphy, Kavita Philip, and my colleagues in the working group Oxidate for their invaluable input; and to Ksenia Korobkova and Chris Hebdon for research assistance and intellectual provocation.

NOTES

1. http://www.pipra.org/index.htm.
2. http://syntheticbiology.org/; see also http://openwetware.org/wiki/Rabinow_lab.
3. http://www/bios/net/daisy/bios/g2/2442/404.html.
4. As I write, debates over the Google Books legal settlement hone in on precisely this point. An initiative that was touted as a way to make books and 'knowledge' public has begun to look, to many publishers, libraries, and legal scholars, just like a privatizing move, as Google may end up with exclusive rights to distribute a wide range of texts. The expansiveness of Google's effort to make books public has started to look like a monopolization.
5. http://www.bios.net/daisy/bios/home.html.
6. Spurred on by Tushnet's excellent discussion, I find myself in the odd position here of finding reasons to think, against the post-structuralist, critical, and feminist theory to which I am drawn on this topic, that sometimes a copy can, indeed, just be a copy.
7. See http://redtechnopolitics.wordpress.com/.
8. Global public health activists and developing nation policy makers obtained a concession from the WTO with the 2001 Doha Declaration, which allows for 'compulsory licenses' on still-patented drugs to be issued in the case of public health emergencies.
9. Consider the situation in Brazil prior to 1996,when its pharmaceutical patent law was enacted: 'the unpatentable status of drugs ... allowed licit copying of [antiretrovirals] ARVs' (Cassier & Correa, 2007, p. 84). Here, then, we might also say, no patent, no piracy.
10. Kim Christen aptly notes, in the context of Aboriginal Australians' ambivalent engagements with public domain and commons platforms, that 'the public domain has always been an exclusionary proposition, a space to define who does not count' (2005, p. 334).

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Cori Hayden, Associate Professor, Department of Anthropology, 232 Kroeber Hall, UC Berkeley, Berkeley, CA 94720-3710, USA; Email: cphayden@berkeley.edu