# The denial of history: Reification, intellectual property rights and the lessons of the past

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**In this article, I examine the impact of the reification of intellectual property rights (IPRs) on the global political economy of information and knowledge. I begin by establishing the central functions that IPRs perform in the global political economy, and then review reification as an analytical tool for the examination of social phenomena. The interrogation of IPRs using the concept of reification raises the issue of the role of anxiety in the politics of knowledge. There are two dimensions of anxiety that need to be accorded some analytical weight in any general discussion of the political problem of IPRs: anxiety about personal welfare, and anxiety about control. Both of these can be readily identified in discussions and disputes about the scope, applicability and costs of IPRs in the global system. This is to say that the reification of intellectual property contributes to the continuing discourse of depoliticisation and technocratic policy-making in this area. Thus, I argue that the reification of intellectual property must be resisted if we are to establish a meaningful global politics of information and knowledge.**

We are often told that we have entered a new age and a new society: the 'information society'. Such claims have prompted a widened interest in and concern about intellectual property rights (IPRs). Indeed, intellectual property is the legal form through which many key resources of this 'new' society are commodified: through the recognition of IPRs, ideas, information and knowledge are made into property-like goods that can be exchanged in

markets. Although intellectual property has a long history, recent interest and commentary has mostly been prompted by the inclusion, in 1995, of intellectual property in the remit of the World Trade Organization (WTO) in the form of the first global legal settlement for intellectual property: the 'trade-related aspects of intellectual property rights' (TRIPs) agreement (May, 2000; Sell, 2003). The previous international regime for the governance of IPRs, overseen by the World Intellectual Property Organization (WIPO), was strengthened and expanded by the TRIPs agreement, not least in that it made disputes over IPRs subject to the WTO's dispute-settlement mechanism.

Considerable interest and concern has been expressed in policy-making, activist and academic circles regarding the role and effect of IPRs in the contemporary global system. However, this article takes a more general look at one central issue related to IPRs: reification. The purpose of this is to establish the status of IPRs as a political economic issue, not an arcane technical issue only for legal specialists. This article sets out the functions that IPRs perform and then briefly reviews reification as an analytical tool for the examination of social phenomena, before applying it to the institutionalisation of IPRs. This suggests that anxiety is a factor that needs to be accorded some analytical weight in any general discussion of the political problem of IPRs. Moreover, the reification of intellectual property contributes to the continuing discourse of depoliticisation and technocratic policy-making in this area. Therefore, reification must be resisted if a meaningful global *politics* of information and knowledge is to be established: it is only by understanding the reification behind the discourses that stress protection for IPRs that a principled political response to the effects of the commodification of information and knowledge can be constructed.

Although capital is, of course, segmented and fractional, encompassing varying 'models of capitalism', there remain some clear 'laws of capitalism' (Wood, 2003). Perhaps the most important aspect of these laws is the necessity of private property *rights* for capitalist social relations. As Samuel Oddi has noted, the widespread use of a natural rights discourse in the political debates over IPRs (most obviously at the WTO and the WIPO) tries to establish that 'these rights are so important that individual [WTO] member welfare should not stand in the way of their being protected as an entitlement

of the creators. This invokes a counter-instrumentalist policy that members, regardless of their state of industrialisation, should sacrifice their national interests in favour of the posited higher order of international trade' (Oddi, 1996: 440).

This naturalisation has profound effects on the manner in which we conceive of the 'problem' of intellectual property. Indeed, the realm in which property itself is exchanged has also been naturalised. Markets just *are*, and any notion that they need to be set up seems to be largely absent from popular discourse; rather, they merely need to be unleashed. Thus the issues explored in this article are part of the more general problem of the rule of law, the construction of markets in capitalist social relations, and the role of reification in *naturalising* these contemporary structures of capitalism.

Reification obscures certain avenues of reform and trajectories of socio-economic development by naturalising the contemporary legal settlement that frames specific political economic issues. In particular, reification obscures the historical specificity of intellectual property. Although the history of various forms of IPRs can be traced back at least five hundred years, the current manifestation of intellectual property as 'rights', rather than as the limited monopolies that patterned the earlier history of 'owning' ideas, is linked with the emergence of modern capitalism. The 'right' to exploit ideas and knowledge as commercial assets was founded as capitalism started to accelerate in the eighteenth century. Entrepreneurs (such as James Watt and later Thomas Edison) sought to establish and maintain market advantage by denying their competitors access to the inventions on which their businesses were built. The reification of IPRs into natural rights of individual innovators and creators denies this historical shift, and obscures the interests served by the protection and enforcement of patents, copyrights, trademarks and other forms of intellectual property.

## The general functions of intellectual property

When knowledge and/or information becomes subject to ownership, intellectual property rights conventionally express ownership's legal benefits: the ability to charge rent for use,

to receive compensation for loss, and to demand payment for transfer. Intellectual property rights are subdivided into a number of groups, two of which generate most discussion: industrial intellectual property (patents), and literary or artistic intellectual property (copyrights). The difference between patents and copyrights is conventionally presented as the difference between a patent's protection of the idea itself, and copyright's protection of its expression. However, in recent decades, this simple distinction has started to break down as the scope of IPRs has been widened to encompass new technologies and new forms of knowledge and/or information. Many political disputes about IPRs are concerned with the possibility, or morality, of rendering certain knowledge or information as property: for instance, the question of whether scientific data about the human genome should be owned or free to all. However, the key function of intellectual property (as with any form of commodification) is to bring resources (of whatever form) into the market by establishing ownership rights over them. This function is not 'natural', but rather a reified social process.

Laws of intellectual property attempt to balance supporting the rights of individuals over their creative endeavours with the public benefit of the diffusion of innovation in a manner relatively unlimited by cost. The establishment of property rights is claimed to foster and support innovation and progress by encouraging individuals' endeavour with the promise of rewards: i.e. property rights in the results of their efforts.

Furthermore, by organising the ownership, transfer and use of knowledge and information through markets, efficient use is promoted. Thus IPRs support the social need for innovation and advance. However, legislators through the many centuries of intellectual property's legal history have also recognised that knowledge and information are significant social goods, which need to be circulated as widely as possible. Indeed, in its early history, (prototypical) intellectual property was structured not as *property rights* but rather as limited *monopolies*, with duties of dissemination attached (May & Sell, 2005: ch. 3). And while this notion of monopoly has faded, it remains influential in the continuing recognition of the need to balance private rights with the public benefit/social good aspects of any grant of intellectual property.

This important balance between private reward and public interest is at the heart of all contemporary intellectual property legislation, and is most explicitly expressed through the imposition of time limits on IPRs. Unlike property rights in material things, IPRs are formally temporary: once their term has expired, they return to the public realm where no price can be exacted (May, 2000: 65). Thus, depending on the assessment of the public benefit of free dissemination (which is to say, non-marketised availability), time limits on the rights accorded to intellectual property owners vary. Rights over important knowledge for economic development (industrial property or patents) last for twenty years, while copyrights over (only) specific expressions of ideas last for much longer—the life of the author plus at least fifty years. Informational marks (trademarks, geographical indicators) can be protected in perpetuity (under certain conditions), as their social utility lies in the accuracy of the information they carry. Thus the commodification of knowledge and information is, for the most part, temporary, and circumscribed by limits on the scope of commodification (through the criteria for patenting, for instance).

Most importantly, IPRs formally construct scarcity of use where none necessarily exists. Knowledge and information, unlike material things, are not necessarily rivalrous, in that their use by more than one person or body at the same time seldom detracts from their utility. Most of the time, knowledge (before it is made property) does not exhibit the characteristics of material things. Take the example of a hammer (as material property): if I own a hammer and we would both like to use it, our utility is compromised by sharing use. I cannot use the hammer while you are using it; you cannot use it while I am, and thus our intended use is rival. For you to also use my hammer, either you have to accept a compromised utility (relying on my goodwill to allow you to use it when I am not), or you must buy another hammer. The hammer is scarce.

However, the idea of building something with hammer and nails is not scarce. If I instruct you in the art of simple construction, then once that knowledge has been imparted, your use of that information has no effect on my own ability to use the knowledge at the same time: there is no compromise to my utility. We may be fighting over whose turn it is to use the hammer, but we do not have to argue over whose turn it is to use the idea of hammering a nail

into a joint: our use of the idea of cabinet construction is non-rival. Ideas, knowledge and information are generally non-rivalrous.

To be sure, if you and I were both cabinet makers, then my instructing you in cabinet construction might lead you to compete for my customers, possibly reducing my income. But we might say that any secrecy regarding my skills was anti-competitive. There are other cases—'information asymmetries'—in which knowledge may produce advantages for the holder by enabling a better price to be extracted, or by allowing a market advantage to be gained. Here, information and knowledge *is* rivalrous, and wider availability of this knowledge would cause market advantage to be compromised. However, rivalrousness is not necessarily of any wider social benefit: competition is often beneficial to customers, while information asymmetries produce market choices that are not fully informed and which, therefore, can be harmful.

When information is 'naturally' rivalrous, the social good may be best served by ensuring that it is shared and not hoarded. For instance, many problems experienced by buyers in the second-hand car market could be ameliorated if car dealers were required to reveal everything they knew about the cars they were selling. This would be likely to reduce the price they could obtain for much of their stock; but it would enhance the general satisfaction (and even safety) of second-hand-car buyers. Conversely, if trademarks offer useful information regarding the origin, reputation and quality of goods and services, then allowing just anyone to use specific marks reduces their social utility. Here, the imposed scarcity *does* serve a wider social purpose while also benefiting the owner of the mark, who can treat it as a commercial asset (well-known trademarks are often accorded significant monetary value by companies and their share-holders).

To sum up: it is difficult to extract a price for the use of non-rival (knowledge) goods, so a legal form of scarcity (IPRs) is introduced in order to ensure that a price can be obtained for use. Material property is 'naturally' scarce, and therefore is already rivalrous in potential use, whereas knowledge in most cases is non-rivalrous prior to its becoming intellectual property. Therefore, as Arnold Plant stressed seventy years ago, unlike 'real' property rights, patents (and other IPRs) are not a *consequence* of scarcity.

They are the deliberate creation of statute law; and, whereas in general the institution of private property makes for the preservation of scarce goods, tending (as we might somewhat loosely say) to lead us 'to make the most of them', property rights in patents and copyright make possible the *creation* of scarcity of the products appropriated which could not otherwise be maintained. Whereas we might expect the public action concerning private property would normally be directed at the prevention of the raising of prices, in these cases the object of the legislation is to confer the power of raising prices by enabling the creation of scarcity. (Plant, 1934: 31)

The protection of rights for the express purpose of raising prices is, of course, the central issue that the politics of intellectual property has to deal with.

## Some remarks on reification

Although there are phenomenological analyses that could be deployed in order to consider the processes of reification, the advantage of building on the analysis of reification from the (still-) persuasive account of capitalism originally developed by Karl Marx is that it makes a clear link between the process and the capitalist political economy.

Thus any critical consideration of reification within capitalist social relations should start with Marx's brief but suggestive comments. In notebook VI of the *Grundrisse*, Marx argued that 'The crude materialism of the economists who regard as the *natural properties* of things what are social relations of production amongst people, and qualities which things obtain because they are subsumed under these relations … imputes social relations to things as *inherent characteristics*, and thus mystifies them' (Marx, 1973: 687, second emphasis added).

Earlier in the notebooks, Marx had noted that the 'economists' put considerable effort into this 'forgetting': the wilful depiction of socially-contrived relations as if they were natural occurrences (Marx, 1973: 85). Indeed, the aim of such depictions was to present production 'as encased in eternal natural laws independent of history, at which opportunity *bourgeois* relations are then quietly smuggled in as the inviolable natural laws on which society in the abstract is founded' (Marx, 1973: 87). Reification, then, is the

abstracting of a particular set of relations into an ahistorical, naturalised (and hence non-political) set of occurrences.

Marx moved on from regarding this process as merely 'forgetting' in his subsequent writing: in *Capital*, reification and fetishisation had become 'magic and necromancy' (Marx, 1887 [1974]: 80). He was clear that 'the existence of things *quâ* commodities and the value-relation between the products of labour which stamps them as commodities, have absolutely no connection with their physical properties and with the material relations arising therefrom' (Marx, 1887 [1974]: 77).

Thus, since the relations between producers (which is to say, workers) are only established by the trade in things, labour relations 'appear, not as direct social relations between individuals, but as what they really are, material relations between persons and social relations between things' (Marx, 1887 [1974]: 78). The 'reality' of exchange obscures the social relations of production: social actions are presented as the actions of things and hence are externalised—rendered as natural occurrences rather than as the interaction of social beings.

As Marx went on to point out in the third volume of *Capital*, such a depiction of the role of commodities as naturally occurring things 'corresponds to the interests of the ruling classes by proclaiming the physical necessity and eternal justification of their sources of revenue and elevating them to a dogma' (Marx, 1894 [1959]: 830). The commodification of things into forms of property removes them from the sphere of social interactions, and places them in the realm of marketised interactions where they can be bought and sold with little reference to their production (or the interests of their direct producers). Bertell Ollman argues that this is the most important example in Marx's work of 'reciprocal effect' (Ollman, 1976: 200), as the dialectical relationship between reified subject and object is maintained analytically by Marx, who resists a reduction to either 'vulgar determination' or 'vulgar free-will'. The process of reification can never be total; rather, it reflects an ongoing attempt to dominate—and to distort—relations between people into relations between things.

Although Marx's rather scattered remarks on reification were developed into the study of fetishism by many Marxists, more focused work on the idea of reification itself was only prompted by Georg Lukács's study, *History and Class*

*Consciousness* (see, for example, Petrovic, 1991). Furthermore, the wider exploration of the notion of reification stemmed not so much from the original publication of that work in 1923, but from its appearance in French in 1960, and subsequently in an English translation in 1971 (Berman, 1985 [1999]). At the centre of Lukács's book is a long chapter, split into three, on 'Reification and the consciousness of the proletariat' (Lukács, 1923 [1971]: 83-222). For the purposes of this article, it is only necessary to briefly explore some issues from the first part, 'The phenomenon of reification', since this contains the analytical discussion that will be used below.

The problem that Lukács identifies with other treatments of reification is that previous analysts (particularly Georg Simmel in *The Philosophy of Money*) have tried to present reification itself as a timeless or ahistorical problem, rather than linking it to the capitalist organisation of society (Lukács, 1923 [1971]: 95). In such analyses, he suggests, the process of reification itself has been reified; it has been removed from history and rendered as a psychological process that occurs through the natural interaction of humans in society.

Lukács wishes to resist such an analysis: the problem of reification is that it presents the contemporary world as 'the only possible world, the only conceptually accessible, comprehensible world, vouchsafed to us humans' (Lukács, 1923 [1971]: 110). But this world is not outside time; rather, it is the world built by capitalism, and must be understood as such.

Lukács suggests that there are two sides to reification under capitalism:

> *Objectively* a world of objects and relations between things springs into being (the world of commodities and their movements on the market). The laws governing these objects are indeed gradually discovered by man, but even so they confront him as invisible forces that generate their own power. … *Subjectively*—where the market has been fully developed—a man's activity becomes estranged from himself, it turns into a commodity which, subject to the non-human objectivity of the natural laws of society, must go its own way independently of man just like any consumer article. (Lukács, 1923 [1971]: 87)

Thus there is reification into naturalised market structures, causing their dependence on social interaction to be hidden,

to a large extent; and reification (linked to the more formal legal alienation of products of labour) that sees the product of labour reduced to the commodity form for exchange.

Lukács sees reification as a (potentially) universal mode of social organisation; but even in its incomplete form, 'Consumer articles no longer appear as the products of an organic process within a community. … They now appear, on the one hand, as abstract members of a species identical by definition with its other members and, on the other hand, as isolated objects the possession or non-possession of which depends on rational calculation … [although] *this isolation and fragmentation is only apparent*' (Lukács, 1923 [1971]: 91, emphasis added).

Therefore, for Lukács (as for Marx) it is this necessary illusion of natural laws and naturalised market relations that supports the commodification of social life, and allows the continuing expansion of capitalist property relations by presenting the process of commodification as a depoliticised, natural occurrence. Mirroring the self-reinforcing expansion of capitalist social relations, Lukács suggests that the process of reification, likewise, 'progressively sinks more deeply, more fatefully and more defiantly into the consciousness of man' (Lukács, 1923 [1971]: 93). Andrew Arato glosses this aspect of Lukács's analysis as indicating that 'everywhere is passivity and isolation in face of a world that is only seen in fragments: a world that appears fundamentally unchangeable' (Arato, 1972: 37). The recognition and use of reified practices and structures makes them seem increasingly natural and un-produced; reified practices and structures are consolidated and reinforced through their everyday use.

Lukács's totalising notion of a 'veil of reification' (Lukács, 1923 [1971]: 86) unfortunately lapses into determinism (Arato, 1972: 53 ff.). The complex process of society's reification is not an undifferentiated process that can be presented singularly; rather, it is a mosaic of segmented processes. Nevertheless, as Peter Berger and Thomas Luckmann point out, 'the basic "recipe" for the reification of institutions is to bestow on them an ontological status independent of human activity and signification [and] specific reifications are variations on this general theme' (Berger & Luckmann, 1971: 107). Thus, while the process of reification may be a recognisable and generalised social occurrence, its actuality may differ from specific instance to specific instance; *the analysis of reification must examine actual pro-*

*cesses within social interactions, not presume a universal and undifferentiated programme of reification.*

Lukács allows for the possibility that reification's imposition can be challenged through the 'minimal consciousness of alienation' that is manifest among workers; reification may be recognised *within* the realm of reification itself, although this possibility may continually be under-mined by the subject's class position (Arato, 1972: 59-61). Therefore the concept of reification is neither a social totality, which opens an analytical space in order to understand the revelation of the process itself; nor is it a process without an agent.

As regards reification's totality, Timothy Bewes recently pointed out, reflecting on Lukács's analysis: 'Immanent in the "total reification" thesis is its own immediate repudiation—so hard on its heels as to be almost simultaneous with it. Reification is a self-reflexive, or dialectical concept; one invariably finds that the concept itself has played a part in any objection to it—yet, at the same time, the concept is always on the brink of succumbing to the very process it denotes' (Bewes, 2002: 89).

Unless the social agents of reification are identified, the process itself is in danger of becoming naturalised, and this does little to further the critical analysis of capitalism. Matthew Kramer identifies the clear danger of circularity in this process: 'a reified commodity system will have to presuppose itself; it can finally become established only on the condition that it has already become established' (Kramer, 1991: 214). Reification reveals capitalism's self-fulfilling prophecy: a 'naturalised' structure that has had its politico-legal history removed. As regards agency, it is of central importance to the unmasking of reification to recognise that 'Even while apprehending the world in reified terms, man continues to produce it. That is, man is capable paradoxically of producing a reality that denies him' (Berger & Luckmann, 1971: 107). Thus the practices that conform to, and thus confirm, reified structures are themselves the practices that establish and maintain the very structures seen as 'other'.

Peter Gabel has made perhaps the strongest statement of this 'agency' position as regards the process of reification: 'we participate in an unconscious conspiracy with others whereby everyone knows of the fallacy, and yet denies the fallacy exists … reification is not simply a form of distortion, but also a form of unconscious coercion which, on the one hand, separates the *communicated* or *socially apparent* reality

from the reality of experience and, on the other hand, denies this separation is taking place' (Gabel, 1980: 26). We are complicit in the processes of reification.

However, this also opens up the space for a critique of the process and, importantly, (re)establishes the possibility of political action as regards any specific reified institution or set of institutions.

In Bewes's view, cultural critics' fear of reification has, unfortunately, often reified the process itself (Bewes, 2002: 173). Bewes argues (drawing some intellectual sustenance from Kierkegaard's ethics) that 'all anxiety is about reification, because all anxiety *suffers* from reification' (Bewes, 2002: 245). It is fear that lacks a firm object, that seeks (through reification) an object that *can be* feared. Furthermore, as Bewes stresses, 'the object of anxiety is always a nothing—a gap, a space, an absence' (Bewes, 2002: 247).

Hence the dialectical process of reification reflects anxiety in both directions: anxiety about the forms of relations into which we enter, stimulating our reification of them; while at the same time, and conversely, our anxiety regarding this reification (our unease at this 'unconscious conspiracy') requires us to hide such reification by reifying it into a natural process.

Specifically in terms of intellectual property, *anxiety related to the forms of relations* (fears regarding theft, piracy and profitability of productive relations grounded on knowledge or informational resources) has prompted a vigorous political campaign to establish (and perpetuate) IPRs, culminating in the TRIPs agreement. This anxiety reifies a subject for these fears to regard as threatened; intellectual property. The discourse of 'piracy' and 'theft' dominates the discussion of copyright in the global political economy (Halbert, 1999).

However, the difficulty of establishing the extent of counterfeiting and the scale of the losses from such activities itself prompts industry leaders' anxiety: what can they do about an 'enemy' that is so diffused, and whose impact is difficult if not impossible to quantify? How can losses to sales of CDs be quantified when it is impossible to count sales that never happened? Given the strength of the content industries as industrial lobbyists in the developed world (most obviously in the US), it is unsurprising that new copyright legislation (the Digital Millennium Copyright Act in the US, and the EU Copyright Directive) seeks to establish much

firmer legal mechanisms to underpin new technological solutions to the 'problem' of intellectual property theft. Anxiety about loss drives the (forced) consolidation of IPRs, building on a reification of naturalised rights and their protection.

Related to *anxiety regarding the process of reified commodification*, naturalised narratives of justification are widely utilised in order to underpin and legitimise this process of making knowledge and information into property: copyrights and patents reflect the natural rights of creators to benefit from their efforts and to control the products of their own ingenuity. Anxiety regarding the troublesome metaphorical linkage between material property rights and IPRs is subsumed by the reification of these (new) rights as *natural* rights.

Recognising the potential (and actual) criticisms of the commodification that lies at the centre of the content industries' business models, reification itself becomes the solution to the anxiety that it has prompted through the assumption of a naturalised commodification. Here, the constant recourse to questions about the future of the content industries—if there is no way of offering incentives to creative practitioners, how will creative endeavour continue?—presents IPRs as 'natural rights', conveniently forgetting a long, pre-industrial history of human intellectual and creative endeavour.

When the law (of IPRs) is reified, and therefore accorded a natural status, criticism must be unnatural, must be destabilising in a way that can be presented as dangerous by those who have carried forward the process of reification in their (or, more generally, capital's) interests (Kramer, 1991: 237). Furthermore, when conditions are deemed natural, they are regarded as unchanging and impervious to change: reification serves a clear, conservative purpose of maintaining the status quo.

Indeed, human control over the reified world is denied; it has been dehumanised (Berger & Luckmann, 1971: 106). However, the reification process for intellectual property, as for all segments of capitalist social relations, is both contestable and driven by a specific set of (capitalist) actors. By unmasking the reification at the centre of the politics of intellectual property, the political possibilities of alternative approaches to the contemporary global governance of knowledge and information can be revealed.

**Reification and IPRs**

When intellectual property is eulogised, it is usually on the basis of the protection of the creator, the owner of the knowledge that is made property. The creator's rights are protected so as to act as a general spur to innovation and to socially useful activity. Arguments about 'just deserts' and theft are allied to the need for social efficiency in the allocation of resources (May, 2000: 16-29). However, as Jeremy Waldron notes, all this talk of property 'sounds a lot less pleasant if … we turn the matter around and say we are imposing *duties*, restricting *freedom* and inflicting *burdens* on certain individuals for the sake of the greater social good' (Waldron, 1993: 862). This is to say that IPRs limit the actions of others regarding knowledge vis-à-vis the owners of intellectual property and that, as such, prospective users are forced to sacrifice their particular wants or needs on the altar of social necessity.

Non-owners' 'rights' are constrained because these rights are regarded as less important than the support of the social good of innovation by IPRs. In the realm of copyright, the limitation on activities (unauthorised copying or plagiarism) is hardly life-threatening—but what about areas in which intellectual property limits the use of less ephemeral knowledge? The very real consequences of the distribution and control of IPRs lead to a more critical conclusion regarding the social good served by their general protection in areas ranging from AIDS medicines and 'biopiracy' to issues around the availability of databases of scientific information or meteorological records, and the constrictions put on development by the non-working of technology patents in Africa.

Nevertheless, IPRs are often defended on the basis of their support for the maximisation of economic utility. By assuming that the market is the best method of allocation (in most, if not *all* circumstances), IPRs are justified on the basis that rendering knowledge and information as property serves this social good. This also encompasses the argument that in order to introduce the market into the products of the mind, an artificial scarcity (property-ness) must be constructed: without scarcity, pricing becomes difficult, if not actually impossible. However, the argument that the market is the most efficient method of allocation of resources requires a certain world-view to be adopted—one that is neither natural nor self-evident for the results of intellectual

activity. But once such an assumption *has* been made, a certain agenda of choices for dealing with knowledge or information is established. In order to take advantage of markets, knowledge must be constructed as property (rights).

It is only the view that *intellectual property itself* is plausible in the first place that allows the arguments for efficiency/utility to support specific IPR regimes. Thus, and crucially, the process of reification maintains a circular argument: efficiency depends on markets, which requires knowledge to be treated as property, which ensures that it is efficiently utilised (Nance, 1990). The agenda of choices from which plausible and acceptable arguments regarding the valuing (and use) of knowledge can be developed is strictly limited to those that draw explicitly on established property *and* market efficiency themes. The possibility that these two conceptual elements might be mutually interdependent is obscured by reification. Or, to utilise Kramer's terms: the institution of intellectual property can become 'established only on the condition that it has already become established' (Kramer, 1991: 214). Reification produces the depiction of an atemporal process of commodification, a realm in which individuals 'rights' are naturalised, and hence the problems of intellectual property are reduced to issues regarding the implementation of mechanisms to control and shape this natural process of making property from knowledge. This circularity reveals the continuing process of reification.

The justifications utilised in order to legitimise IPRs involve stories intended to establish claims regarding the reward for effort, and the protection of one's ideas from misappropriation, alongside arguments about market efficiency (May, 2000: 22-29; May, 2004). Crucially, the drive to establish IPRs was mainly led, in its early history, by governments wishing to secure the importation of strategic knowledge and technologies, and latterly (in the last three centuries) by the industries whose knowledge would be protected. The individuals who appear so prominently in the stories of reward for effort and the sanctity of creative endeavour have seldom been particularly active in the campaigns for the establishment of legislation.

From the Stationers' Guild in seventeenth-century Britain to the global pharmaceutical industry today, it has not been the innovators or authors who have been pressurising legislators to expand and consolidate the rights that can be claimed by the 'owners' of knowledge; rather, it has been

the industries whose business models depend on the exploitation and reproduction of knowledge, from selling CDs to selling medicines, and from high fashion to computer software. This is not to say that individuals have been absent from such political campaigns: Victor Hugo was prominent in the campaign to establish an international copyright regime in the second half of the nineteenth century, and recently the music industry has deployed a number of well-known musicians to argue for the protection of copyrights in music (although, as Courtney Love and Chuck D have demonstrated, this argument is not accepted by all musicians). However, in the long history of IPRs, it has mainly been companies and their representatives that have demanded the commodification of knowledge and information.

This reflects their location in the capitalist mode of production, and the requirements of the systemic 'logic' of their position (Wood, 2003). One of the key functions of IPRs is to construct a scarcity when none necessarily (nor naturally) exists, in order to support price-making and the subjection of knowledge to capitalist economic relations. However, without clear legalised (and legitimated) protections, the mobilisation and utilisation of knowledge and information becomes problematic, and leads to anxiety as regards the continuity of profitable practices.

Where the deployment of such resources is developed as a business model (for instance, in the printing/publishing industry or in engineering), the theft and unauthorised duplication of content is always a problem. If information and knowledge are not necessarily rival, then the duplication of an idea (a technological solution) or a particular expression (a piece of writing) is considerably less difficult to do than its initial development. Indeed, the expense of initial effort is a central aspect of the justification for IPRs. However, once an intellectual property has been commodified, one of the key threats to profitability is the unauthorised (and, therefore, unpaid) duplication of content or use of idea. But this threat is no longer amorphous and difficult to substantiate; rather, the threat has been reified into a *threat against property*.

For IPRs, the role of anxiety is therefore clear in the initial reification into property rights itself, and in the forgetting of such socialised construction. Capitalists' anxiety about theft or piracy leads them to seek the establishment of protection, and hence the discourses of 'theft' and 'piracy'

are extensively utilised. The moment in which the 'objects' threatened are *made* into property is forgotten or obscured; rather, the fact of intellectual property is the normality that is threatened. The music industry decries the stealing of tracks by digital downloaders, although the making of these musical performances *qua* property is not natural, nor an unavoidable part of their social production.

However, the reified copyrighted object is treated as a normal property whose owners rightfully expect to profit from it. Likewise, in the realm of pharmaceutical patents, the patented knowledge is presented as a discrete object that is threatened by compulsory licensing, or by generic (and unlicensed) production. The making of the specific medical knowledge into a property is regarded as natural and justified, while any compromises obtained through (for instance) compulsory licensing (May, 2002) are treated as abnormal and thus limited to special circumstances, and are often the subject of long, hard negotiations.

To be absolutely clear: reification is not the technical construction of the legal mechanisms of IPRs, but rather the socialised construction (reification) of these legal structures as *natural*, and threatened by the unacceptable actions of others. The protection of intellectual property is reified into a structure that reflects claims about natural (and timeless) rights. Regarding the recent history of the governance of IPRs, the most significant element of a natural-rights-based justification of IPRs is its universality (Oddi, 1996: 429-430): if IPRs are natural rights, then they should also be universally recognised and protected. Indeed, recent anxieties about 'piracy' of music and films, the utilisation of 'generic' pharmaceuticals in developing countries, and the seemingly uncontrollable duplication of content across the internet, have been at the centre of the political thrust to establish the globalisation of intellectual property regimes through the WTO. This involves a political project to firmly establish unauthorised use as *theft*. The anxiety about the 'thieving other'—the foreigner who does not respect the rights that are only *natural*—underlies the shift to the global governance of IPRs.

The very clear anxiety among knowledge 'owners' regarding the continued construction of the scarcity required for their profitable activities has prompted the reification of the structures required to maintain such scarcity. TRIPs is depicted as reflecting a set of *natural* rights, not the special interests of the industries (the segments of capital) that have

been prominent in the establishment of a globalised governance structure (Jawara & Kwa, 2003: 36-39; Sell, 2003: ch. 5). Within the current economic organisation of global society, commercial operators have certain justified interests in maintaining the means for their profitable activities. Additionally, new information and communications technologies, especially the internet, may have greatly expanded (although by no means universalised) the possibilities outside the modes of commodification favoured or required by corporations. However, the reification of a class-privileging mechanism as a naturalised institution (IPRs) obscures the social costs, and downplays the real-world effects of continuing to protect the interests of one set of social actors. Furthermore, the contested history of IPRs is forgotten.

The process of reification, although generalised, is also driven by the abilities of certain segments of *capital*—those that depend on IPRs most centrally (the content industries, and the software and pharmaceutical sectors)—to capture the mechanisms of regulation. Indeed, the reification of their interests as 'natural' rights also leads to the downgrading and obscuring of others' interests and the 'rights' they might seek to claim. Other rights—the right to life, the right to access socially useful (or vital) information, the right to enjoy economic and technological advances—are secondary (and 'political') rights compared to the 'natural' rights of the IPR-owner. Hence, despite considerable social costs as regards access to life-saving medicines, new technologies or educational information, these costs are presented as unfortunate by-products that may be ameliorated but should not detract from the need to protect IPRs. However, the subliminal recognition that these costs might not be accidental, but rather are a central part of the 'problem' of IPRs, prompts a second mode of anxiety (also globalised), which has led to the reification of the very process of reification itself: a collective act of forgetting.

## Forgetting reification

Until recently, this 'forgetting' had largely gone unchallenged, leaving political debates around TRIPs moribund: disputes were often limited to technical issues such as periods allowed for implementation, or the interpretation of specific articles of the TRIPs agreement. Reification depoliticised these issues.

However, recently the history of IPRs has been remembered, prompting resistance to the reification of IPRs by recalling their processes of institutionalisation. Until the last few years, legal historical work has been treated as *historical* and of little contemporary political importance; the history of IPRs was presented as a teleological tale of progress towards the final global settlement of TRIPs.

However, as the social costs of instituting a globalised regime of IPRs have become more obvious (and harsher), the origins of this regime have been questioned. Since the process of reification can never be complete, a critical opening has always been available, if seldom utilised; but now the further expansion of owners' rights has prompted a re-examination of *global* social costs.

This re-examination requires an appreciation of the historical processes that have led to the contemporary institution. This historicisation of the debate immediately challenges the forms of reification, and hence the supporters of IPRs have fervently denied the relevance of history. Corporations and their allies have mobilised considerable political resources in order to establish that whatever happened in the past, the protection of IPRs clearly serves global developmental goals. Conversely, those less convinced of the social value of widening the scope of protection for IPRs, from NGOs to developing countries' negotiators, have started to focus on the historical record. This has led to well-founded claims that the rich countries instrumental in the establishment of TRIPs are suggesting that developing countries 'do as we say, not as we did'.

It has become a common observation that the US publishing industry thrived in the nineteenth century by publishing the 'unauthorised' work of European authors, only recognising the rights of non-US authors in 1891. But, perhaps less often noted, US industrialisation proceeded apace with technologies that were patented abroad but freely available (essentially through 'piracy') to entrepreneurs in America, especially in the petro-chemical sector (May & Sell, 2005: ch. 5). Trade interests in IPR-protection have now almost drowned out any development-related concerns around the costs of protecting IPRs. Development concerns have often disappeared behind an atemporal (reified) account of IPRs that suggests that global productivity and efficiency must be maximised through the commodification of knowledge for trade.

For many developing countries, these issues are secondary to the more pressing need to access information and knowledge that will support their further economic development. In a very real sense, the two sides are talking past one another (Bawa, 1997: 96). The reified character of the institution of intellectual property precludes a clear understanding of the critics' position by those whom the system benefits.

The experience of the newly industrialised countries (NICs) of east Asia clearly reveals the tension between trade and development issues. The reliance on weak (or non-existent) IPR protection in the early stages of development benefited the NICs quite extensively. Surveying a number of studies, Nagesh Kumar concludes that 'the east Asian countries, viz. Japan, Korea and Taiwan have absorbed substantial amount[s] of technological learning under weak IPR protection regime[s] during the early phases [of economic development].

These patent regimes facilitated the absorption of innovation and knowledge generated abroad by their indigenous firms. They have also encouraged minor adaptations and incremental innovations on the foreign inventions by domestic enterprises' (Kumar, 2003: 216). National laws (only recognising national invention or creation) supported the appropriation of foreign knowledge and information, as it did when the US, and before that Britain, were 'developing countries'.

However, as local industries themselves started to innovate, a stronger regime of protection was established, *but only then*. Once their own anxiety about 'theft' and control emerged, company managers began to *recognise* the 'natural rights' of information and knowledge 'owners'.

As Dru Brenner-Beck's extensive study of countries that had utilised the non-recognition of IPRs as a development strategy established, 'former pirate activities strongly contributed to the development of the infrastructure and technical capacity necessary to ensure that the touted advantages of intellectual property protection actually materialise' (Brenner-Beck, 1992: 115). The protection of IPRs only makes policy sense once a certain level of technological momentum has been achieved through ('pirated') imitation, and certain levels of (economic) anxiety start to manifest themselves.

Given the current debates regarding pharmaceutical patents, it is as well also to note that France, Germany, Japan

and Switzerland, among others, only extended patent protection into this sector in the 1960s and 1970s, by which time their industries had matured. Ironically, having reached the heights of economic development, the governments of the most developed countries now argue that the protection that *they* ignored in their years of speedy expansion will actually aid and support the economic development of other countries.

These rights are not 'natural', however, but are rather the result of politico-legal developments related to key sectors of (now-) developed countries' economies. The reification of the process of legal institutionalisation serves to substantiate a negotiating position that is ahistorical. But the social bargain of IPRs is not ahistorical; rather, it reflects the extent of nationally generated innovation and techno-economic development. The bargain on which IPRs are built is historically contingent, not a reflection of natural rights.

## Concluding remarks

Although the discourse of natural rights remains powerful, recognition of the social costs of the globalised construction of (knowledge) scarcity has risen up the global political agenda. However, the justification of IPRs on the basis of naturalised rights has considerable political tenacity—these rights, at certain levels of protection and for a certain limited scope of commodification, may be broadly acceptable even among groups criticising the overall regime of governance. Thus, reification is an unseen but powerful structure of modern capitalism that shapes the understanding of the world; this understanding is then mobilised to apprehend its social relations and also to criticise them.

Global governance has become a social good that criticism must not be allowed to fundamentally undermine. Hence, reification presents global governance (encapsulated here in the TRIPs agreement) as progressive and natural, and (re)makes criticism into attempts to ameliorate its marginal effects, or to modify its 'normality' (the 'normality' of the commodification of knowledge and information, in this case). Criticism that questions the historical development of political naturalisation—criticism that unmasks reification—is sidelined or ignored.

The recognition of reification as a process that obscures relations of exploitation should perhaps lead us to reject the

whole notion of intellectual property as merely the manifestation of class advantage and power. By discussing the ownership of knowledge and ideas (even in critical terms), the *possibility* of IPRs is maintained unless that ownership is forthrightly rejected. On one hand, reformism may be a capitulation to the forces of capital and a rejection of the critical project of Marxism.

However, if few of us now believe that the final crisis of capitalism is either imminent or even likely in our lifetimes, we must think about ways in which plausible reforms to the systems and structures of capitalist power can at least ameliorate the most serious problems that they cause in the contemporary world.

The key strategy must be to return the discussion of IPRs to the (global) political realm, where a more wide-ranging and historically contextualised debate about policy can be conducted. The processes of reification are not transitory, nor easily disposed of (if disposal is even possible). Thus, when reification is forgotten it remains a continuing barrier to the political requirement to embed the governance of IPRs in its historical and globalised social context.

The positing of political alternatives needs to be based on the revealing of the reified structures of governance for what they are: a system for benefiting certain segments of capital, constituted through *political* bargaining. Establishing the role of reification is a major element in that political project, as is recognising that reification itself is not a process outside the structures of capitalism, but rather is a central element of the reproduction of the system in which the political economy of IPRs is manifest.

The critique of reification encourages the historicisation of IPRs and the recognition that this is a political economic history, not a teleological tale of improvement and progress. Revealing reification is a significant element in constructing a new global politics of intellectual property.

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