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AMY KAPCZYNSKI

The Access to Knowledge Mobilization and the New Politics of Intellectual Property

Once the domain of experts, intellectual property (IP) law today has become the object of popular mobilization. Activists across the globe are campaigning against strong IP laws and working together to develop new conceptual rubrics to counter the legitimacy of exclusive rights in information. This access to knowledge (A2K) mobilization is having some success, and should cause us to revisit our understanding of the tectonics of IP law. As my recent article explains,[1] neither the recent expansion of IP law nor the new countermobilization can be adequately explained without an account of the role of interpretation in political action—and in particular, without an account of how acts of political framing both affect and are affected by law. Once we develop such accounts, we can see the special gravitational pull that law can exert on groups engaged in political contests. This pull has potentially important implications for how we understand the nature and effects of legality, especially internationally.

IP law has grown significantly stronger over the past three decades, not only domestically but also internationally. The predominant account in IP scholarship of this expansion draws on public choice theory, which treats law as the product of market forces that are directed by the choices of rational, self-interested actors. On this theory, the "market" for IP law systematically favors rights holders over copiers and the public more generally, because rights holders can obtain rents, and have comparatively immediate and concentrated interests. The strongest articulations of the argument suggested that the

1. Amy Kapczynski, *The Access to Knowledge Mobilization and the New Politics of Intellectual Property*, 117 YALE L.J. 804 (2008).

barriers to public mobilization against stronger IP law were effectively insurmountable.[2]

Nonetheless, diverse groups have emerged recently to contest the trend of expanding IP law. Who would have thought, a decade or two ago, that college students would speak of the need to change copyright law with "something like the reverence that earlier generations displayed in talking about social or racial equality"?[3] Or that advocates of "farmers' rights" could mobilize hundreds of thousands of people to protest seed patents and an IP treaty?[4] Or that AIDS activists would engage in civil disobedience to challenge patents on medicines?[5] Or that programmers would descend upon the European Parliament to protest software patents?[6] These groups have also begun to have a significant effect on IP law. For example, they have created open licensing schemes that now govern millions of works around the world,[7] secured the first ever amendment to a core WTO agreement,[8] and helped halt the progress of several new IP treaties.[9] They have also collaborated to produce joint declarations and a draft Access to Knowledge Treaty.[10] The political valence of the field has markedly changed; IP owners find themselves frequently on the defensive, and increasingly at odds with one another.[11]

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2. *See, e.g*, Yochai Benkler, *Through the Looking Glass: Alice and the Constitutional Foundations of the Public Domain*, LAW & CONTEMP. PROBS., Winter/Spring 2003, at 173, 196.

3. Rachel Aviv, *File-Sharing Students Fight Copyright Constraints*, N.Y. TIMES, Oct. 10, 2007, at B7.

4. *See* Martin Khor, *Indian Farmers Fight Seed Patents*, GREEN LEFT WKLY., Nov. 10, 1993, http://www.greenleft.org.au/1993/122/5060.

5. *See* Stephanie Nolen, *A Victory for South Africa's Martyr-in-Chief*, GLOBE & MAIL (Toronto), Sept. 13, 2003, at F1.

6. *See* Marc Jacoby, *How Hartmut Pilch, Avid Computer Geek, Bested Microsoft*, WALL ST. J., Sept. 12, 2006, at A1.

7. *See* Creative Commons, License Your Work, http://creativecommons.org/about/license/ (last visited Apr. 16, 2008); Free Software Foundation, GNU General Public License, http://www.gnu.org/licenses/gpl.html (last visited Apr. 16, 2008).

8. Press Release, World Trade Org., Members OK Amendment To Make Health Flexibility Permanent (Dec. 6, 2005), http://www.wto.org/English/news_e/pres05_e/pr426_e.htm.

9. Mark F. Schultz & David B. Walker, *How Intellectual Property Became Controversial: NGOs and the New International IP Agenda*, ENGAGE, Oct. 2005, at 82.

10. *See* Geneva Declaration on the Future of the World Intellectual Property Organization, http://www.cptech.org/ip/wipo/futureofwipodeclaration.pdf (last visited Apr. 16, 2008); Adelphi Charter on Creativity, Innovation, and Intellectual Property (Oct. 13, 2005), http://www.sitoc.biz/adelphicharter/pdfs/adelphi_charter2.pdf; Treaty on Access to Knowledge (May 9, 2005) (draft), http://www.cptech.org/a2k/a2k_treaty_may9.pdf.

11. *See, e.g.*, Stephen Heuser, *High Tech, Biotech Clashing on Patent Bill*, BOSTON GLOBE, July 19, 2007, at A1.

In short, constituencies and popular claims that once seemed impossible now are emerging, as advocates generate new theories of their shared interests (in, say, the "information commons" and "access to knowledge") and new challenges to the legitimacy of exclusive rights in information.[12] This development highlights the limitations of stylized theories of collective action that assume that social actors have fixed (and only material) interests, and that fail to address the role of interpretation in political action.

To better understand the new politics of IP, we can draw upon the sociological literature of "frame mobilization."[13] This literature begins with the recognition that groups mobilizing for change must engage in acts of meaning making in order to generate a sense of shared problems and possible solutions and to legitimate the changes that they seek. They do so by mobilizing "frames," or "schemata of interpretation," that allow people to "locate, perceive, identify, and label" experiences and events.[14] Framing is a creative and contingent process that draws on existing social meanings, and that opens up as well as shuts down certain opportunities and alliances. Framing is also necessarily "dialogic," evolving within and between groups and in relation to contextual factors that vary across space and time.[15]

The frame analytic perspective can help us understand not only the A2K mobilization, but also the industry mobilization that preceded it. Consider, in this regard, a question posed by William Landes and Richard Posner about the public choice theory that they employ. If IP laws invariably create rent-seeking pressures, why did these pressures manifest themselves so acutely beginning in the late 1970s? Citing influences such as the "[f]ree-market ideology" that came to prominence then, Landes and Posner come to a perhaps surprising conclusion: "political forces and ideological currents . . . *abetted by* interest-

12. *See, e.g.*, Yochai Benkler, *Overcoming Agoraphobia: Building the Commons of the Digitally Networked Environment*, 11 HARV. J.L. & TECH. 287, 298-319 (1998); James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, LAW & CONTEMP. PROBS., Winter/Spring 2003, at 33; Geneva Declaration on the Future of the World Intellectual Property Organization, *supra* note 10.

13. *See, e.g.*, Robert D. Benford & David A. Snow, *Framing Processes and Social Movements: An Overview and Assessment*, 26 ANN. REV. SOC. 611 (2000).

14. ERVING GOFFMAN, FRAME ANALYSIS: AN ESSAY ON THE ORGANIZATION OF EXPERIENCE 21 (1974).

15. Marc W. Steinberg, *Toward a More Dialogic Analysis of Social Movement Culture*, *in* SOCIAL MOVEMENTS: IDENTITY, CULTURE, AND THE STATE 208, 208 (David S. Meyer, Nancy Whittier & Belinda Robnett eds., 2002).

group pressures that favor originators of intellectual property over copiers, may explain the increases" in copyright protection that we have seen.[16]

We can make sense of this with frame mobilization theory. Here, "ideological currents" are framing resources that both shape and are shaped by groups seeking to gain advantages in law. The much-discussed recent proliferation of the term "intellectual property"[17] might be understood as the product of framing dynamics as well. The term may have become popular and at the same time facilitated the claims of rights holders because it helped industry groups to characterize and promote their interests as related ("*intellectual* property"), and to take advantage of available legal frames to legitimate their aims ("intellectual *property*").

A2K advocates are also actively creating new concepts in order to build coalitions and gain support. As one prominent A2K actor succinctly put it, "Like the environment, the public domain must be 'invented' before it is saved."[18] The point is not that material and political resources don't matter to mobilization, but that meaning itself is a kind of resource—one that structures how people value and use other resources and that conditions how people understand their common interests and how they motivate and legitimate action. (There are, of course, limits to the scope and power of acts of reinterpretation. The nature of these limits is an important subject, but not one that the article seeks to address.)

But why *this* coalition and why *these* claims? Both at times pose dilemmas for those involved. Access to generic medicines may seem to have little to do with the freedom to remix Hollywood movies, and some argue that conflating these issues has significant costs.[19] The importance of the concept of the "public domain" to the discourse of A2K creates tension with affiliates who seek protection for traditional knowledge.[20] Moreover, as the article shows, although many of the strands of this mobilization emerged in relationship to claims about fundamental human rights or distributive justice, key A2K

16. WILLIAM M. LANDES & RICHARD A. POSNER, THE POLITICAL ECONOMY OF INTELLECTUAL PROPERTY LAW 22, 25 (2004) (emphasis added).

17. *See, e.g.*, Mark A. Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 TEX. L. REV. 873, 895 (1997) (book review).

18. Boyle, *supra* note 12, at 33, 52.

19. *See, e.g.*, Aviv, *supra* note 3, at B7; Richard M. Stallman, GNU Project, Did You Say "Intellectual Property"? It's a Seductive Mirage (Oct. 19, 2007), http://www.gnu.org/philosophy/not-ipr.xhtml.

20. *See* Editorial, *Freedom From IPR: Towards a Convergence of Movements*, SEEDLING, Oct. 2004, at 3.

documents are notable for how much they rely on frames of information economics, innovation, and competitive markets.[21]

How, then, should we understand the interpretive choices being made by A2K actors? We might begin by recalling that groups frequently "create oppositional discourses by borrowing from the discourses of those they oppose."[22] Evidenced here, though, is not merely a contest over common terms, but a contest over common terms *mediated by law*. As described in more detail in the article, the links that A2K actors have drawn to one another mirror the categorization of IP law itself. The discourses of incentives and information economics that these actors are adopting and reworking are of course those most commonly used to justify IP law. And the strategic choices that A2K groups are making are also influenced by the affordances of law.

The frame mobilization literature has only recently begun to address the role of law in framing processes. But as some scholars have recognized, law can exert a particularly powerful influence on the meaning-making efforts of movement actors. That is because it represents a "dual resource," offering groups both instrumental power and conceptual resources to legitimate their aims.[23] Legal frames are attractive to collective actors because (or where) they are "semantically permeable."[24] But because legal frames are also tethered to doctrine, history, and institutions, they are also semantically constrained.

The point of all of this is to show that law can exert what we might call a "gravitational pull" on movement actors. This pull corresponds not to law's force as command, but to law's attraction as a medium where competing groups come to make claims and disagree. This force is of interest for many reasons, as the article describes.[25] For example, it can lead opposed groups into zones of overlapping consensus in which law can appear legitimate despite sharp contestation. This may happen, for example, when groups seek to redeem a constitutional provision before a court,[26] or when they create open licensing regimes whose only persistent principle is that of copyright law itself,

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21. Kapczynski, *supra* note 1, at 867-69.

22. Marc W. Steinberg, *supra* note 15, at 208.

23. Nicholas Pedriana, *From Protective to Equal Treatment: Legal Framing Processes and Transformation of the Women's Movement in the 1960s*, 111 AM. J. SOC. 1718, 1727 (2006).

24. Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297, 322 (2001).

25. Kapczynski, *supra* note 1, at 876.

26. *See* Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de Facto ERA*, 94 CAL. L. REV. 1323, 1381-1414 (2006).

that creators should dictate the terms under which others may use their works.[27]

To posit that law has a gravitational force is to suggest that it can join competing groups not only in agreement, but also in *disagreement*, or struggle over the meaning of common terms.[28] One critical question in contemporary debates about globalization regards the degree to which publics can be built beyond national boundaries. One implication of the co-evolution of the A2K and rights-holder mobilizations is that international law and legal institutions, even those associated with prototypically "private" law, may have a key role to play in building such publics.[29]

To posit this is to open up a new field of questions, for example, about the nature of the commonalities and disagreements that can be built across borders through engagement with transnational law. To this we might add more general questions of when, whether, and how much law will matter to the framing processes of particular groups. The article seeks to pose rather than answer these questions—and to persuade those concerned with international law and the new politics of IP that they are very much worth asking.

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27. *See* Niva Elkin-Koren, *What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons*, 74 FORDHAM L. REV. 375, 400-01 (2005).

28. JACQUES RANCIÈRE, DISAGREEMENT, at xi (Julie Rose trans., 1999).

29. *See, e.g.*, HANNAH ARENDT, THE HUMAN CONDITION 57-58 (2d ed. 1958) (contending that the public is "not guaranteed primarily by the 'common nature' of all men who constitute it, but rather by the fact that, differences of position and the resulting variety of perspectives notwithstanding, everybody is always concerned with the same object").