The Americanization of Yoga?
Understanding Intellectual Property Rights in the Context of Global Capitalism

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In 2003, yoga became intellectual property.[·] This was the year that Bikram Choudhury, the multi-millionaire guru to celebrities such as Madonna and Racquel Welch, claimed copyright to a sequence of twenty-six postures performed in an environment meeting certain specifications for temperature, decor, and sound (Guthrie, Pook, Hodgson, Isaacs, Blevins, Nestruck). Choudhury's claim was recognized by the U.S. Copyright Office, and almost immediately thereafter his lawyers began sending cease-and-desist letters to yoga studios in the U.S. and Canada. On the basis of Choudhury's copyright, the letters warned yoga teachers that they were not authorized to teach any yoga in the so-called Bikram style or deriving from it, if they had not completed his $5000/person training course and paid a franchise fee for their studio. They also threatened licensed yoga teachers who altered the Bikram sequence or taught aspects of it in combination with other forms or in an environment different from his specified conditions with penalties of $150,000 per infringement. The financial stakes in the (as yet unsettled) Choudhury cases are thus considerable, as are the ethical and political questions it raises about culture and the limits to intellectual property rights.

Immediate responses to Choudhury's assertion of ownership fell into two categories. An association of yoga teachers, calling themselves Open Source Yoga

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Unity, has contested Choudhury's right to claim ownership of yoga postures, on the grounds that the postures and sequences are part of a tradition that extends back several thousand years. Clearly making reference to the open source movement in software, the yoga teachers' group argues that "yoga exists in the public domain" and that Choudhury's claim to ownership is contradicted by statements made by the Indian guru who taught him. In short, this first response focuses on the proprietary claims themselves.

The second set of responses moves a step further, reading aggressive proprietary claims as a distinctively American problem. "It's the Americans who are trying to patent everything as their intellectual property," a dancer told The Times of India in a piece recording a range of opinions on copyright issues (Walia). In the same piece, other respondents (including Ashok Jain, a lawyer on the Indian Supreme Court) assert that a national system of "cultural patents" should be developed to protect inherited culture from privatization and theft by foreigners. This understanding of the Bikram yoga case as a prime instance of Americanization is also expressed—although in somewhat different terms—by some Americans. The Denver Post, for example, described Choudhury's yoga system itself as "the apex of the persistent Westernization of an ancient Eastern practice that is shedding its primary spiritual component as it flexes and twists its way westward" (Blevins K01). Understanding yoga as inherently "Eastern," spiritual and anti-corporate, The Denver Post article identifies both Choudhury's standardized "McYoga" and his claims to own this product as parts of the process of Americanization. This critical framework has dominated public discussion of this case. None of the initial coverage described Choudhury's claims as consistent with his authority as a guru. In fact, even a consistently pro-market, pro-western publication such as The Economist

concluded that while, "intellectual-property law is crucial to economic success… extending it to yoga will…prove too much of a stretch" ("The Litigious Yogi"). Even The Economist has decided that intellectual property law can and should respect limits marked by cultural difference.

These reactions to Choudhury's claims suggest that Americanization is an important—and perhaps the primary—concept on which many critics of the global regime of intellectual property rights rely. As a concept, Americanization of course predates contemporary discussions of global intellectual property rights. Domestically, it was widely used in the early twentieth century to describe official and informal programs to acculturate immigrants to the US, but as a concept describing international relations, "Americanization" is primarily a post-1945 idea. Drawing on interwar descriptions of mass production and mass culture, during the Cold War context it described the US's aggressive sponsorship of capitalist democracy in postwar Europe and in the new nations emerging from colonial rule (Kuisel Chapter One and Wagnleitner). For critics, it quickly came to address as well the cultural baggage that accompanied Cold War initiatives. In this context, Americanization became associated with "coca-colonization," or the intrusion of commercial values and a social style (informal, individualist, anti-intellectual, monolingual, secular, prudishly sexual and so on) associated with the United States. It is in this latter sense that the concept has been reprised for discussions of globalization. As a description of cultural changes that can be evaluated either negatively or positively, the concept of Americanization now describes an opposition between tradition and modernity and the fall into degraded modernity that accompanies consumerism (Amin, Flusty). In many cases, it often shades off into anti-Americanism,

even though it is simultaneously used in a virulently pro-American sense by figures of power in the US. Either way, though, as a concept, "Americanization" tends to support nationalist or regionalist worldviews.

The underlying nationalism of Americanization discourse has persisted even in contemporary discussions that primarily concern the economic foundations of cultural change. For instance, in the very important discussion surrounding patents based on so-called traditional knowledge, we find traces of a critique of Americanization. While the major corporate players behind the new intellectual property regime routinely charge entire developing nations with piracy, Vandana Shiva and other admirable defenders of agriculturalists in developing nations have turned the charge of piracy back against Western (mainly US-based) corporations that claim patents in long-established collective products and practices (such as Basmati rice or health remedies derived from the neem tree). Describing corporate efforts to patent traditional knowledge as biopiracy, Shiva and other activists draw attention to the pillaging of the commons and the process of incorporation into capitalist logic that underlies changing consumption patterns. At the same time, though, while primarily focusing on undue corporate influence on national and international policy, the arguments of the biopiracy position touch on versions of the Americanization thesis. For instance, in interviews, Shiva typically describes the agents of biopiracy as Monsanto, Sandoz and other multinational corporations, but at times she also conflates these firms with the US government and with the aspirations and identity of "America" as a whole. In one case, Shiva asserts that "the U.S government is not designing America as a society where people are involved in making things. It has dismantled manufacture. It has gone off to China. Pick up anything in a supermarket -- it

is made in China. But America would still like to collect returns and that is through intellectual property" (Paget Clark). To the extent, then, that they describe corporate piracy in national and cultural terms—that is, as if it were supported by and benefiting all Americans—critics of biopiracy suggest protective nationalism as an antidote—such as a system of "cultural patents" granted by the state to the nation to protect its delimited inheritance.

While nationalist remedies may well be strategically necessary to disrupt the clearly shortsighted and inequitable transfer of rights to natural resources from South to North, at a conceptual level, this sort of layering together of state, nation and culture may impede long-term political analysis. In their strong form, Americanization arguments not only obscure crucial disparities among state, nation, and culture; downplay the powerful class divisions within the US; and accept the grounds of a highly questionable tradition/modernity opposition. They also fall short of a forward-looking account of the processes of capitalist globalization and revert to a description of a centrifugal cultural imperialism. Simply put, criticizing the proprietary claims of either Choudhury or corporate biopirates for replicating an American agenda means reducing the multi-directional flows of globalization to the single-minded process of Americanization. While this strategy has the benefit of clarity, it also risks reinventing some of the very phantasmatic oppositions (tradition/modernity, spiritual East/materialistic West) that organize many ideological accounts of capitalist development in the first place. And, more to the point, describing globalization as Americanization means missing the opportunity to locate and map emergent forms—forms that are noticeably new and not

necessarily contained by the pseudo-universal (and pseudo-national) projects advanced by a tiny political and economic elite within the US.

In order to test the limits of Americanization thinking, then, we will want to consider the implications of one of Michael Hardt and Antonio Negri's major theses in their influential and controversial manifesto, Empire. Arguing that "a new imperial form of sovereignty has emerged," Hardt and Negri assert that "*The United States does not…form the center of an imperialist project,*" although it clearly does "occupy a privileged role in Empire" (Hardt and Negri xiii-xiv). To understand privilege without centrality in this sense is a necessary step in understanding the US's influence in globalization. In this essay, I explore Hardt and Negri's thesis by describing the off-center American role in the global intellectual property regime in particular. Reconstructing an activist and scholarly discussion about the cultural specificity of intellectual property, I assess the arguments of proponents of and opponents to the Americanization thesis, before returning to the Choudhury case. In this case, something scandalous and, for many observers, previously unimaginable (and thus distinctively contemporary) seems to have taken place, so learning what kinds of questions we might usefully ask about it could help guide other descriptions of the present. In particular, working through the arguments surrounding and underlying the so-called Americanization of yoga may help interested parties develop points of orientation for a post-nationalist and critical study of capitalist globalization.

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By the start of the 21st century, the standardization and extension of intellectual property rights in the global arena were essentially *faits accomplis*. The movement towards standardization, however, began well before a meaningful American commitment to intellectual property was in place. The global system developed from the architecture established by the Berne Convention, the major international agreement governing intellectual property during the late nineteenth and early twentieth centuries. The Berne Convention was established in 1886, and it provided the basic framework of reciprocal rights that signatory nations granted one another. Under Berne, authors were protected against pirate editions of their works, and conditions for the production of derivative works were standardized internationally. During this phase, however, the intellectual property regime was not yet global. In fact, some have argued that its parameters reflected specifically French conceptions of universalism (Wirten 23). Also, large portions of the global economy—such as the Soviet bloc states—did not participate (Levshina and Pakhomova). Furthermore, throughout most of the twentieth century, the effectiveness of the Berne Convention was limited by the fact that the US, the world's largest economy, was not an official signatory. Because the US was on average an intellectual property importer until the 1980s and because anti-trust arguments governed much federal understandings of intellectual property until that point, the US resisted binding and internationally reciprocal interpretations of intellectual property rights. This was consistent with the history of relatively loose standards regarding international literary piracy throughout the formative stages of the development of American culture and economy, as Meredith McGill has demonstrated. Until economic trends reversed themselves and the US became an intellectual property exporter in the 1980s, it was not

interested in strong enforcement of intellectual property rights internationally. Thus, even if we were to decide that intellectual property rights are distinctively American or that their vigorous enforcement represents an extension of the project of Americanization, we would have to limit our discussion to the version of intellectual property rights that has appeared since the 1980s. Before that point, intellectual rights were clearly not a high priority for US foreign policy, and domestic defenses were less consistently energetic as well.

Even for the period since the 1980s, however, debate over how to understand the origins and purpose of global standards for intellectual property rights has been intense. This debate has asked whether intellectual property is a universal concept or one with particular—i.e., American—cultural and historical limits. Within this debate, both critics and proponents of strong intellectual property rights appeal to both universalist and particularist interpretations of these rights. This suggests that when we begin with the question of cultural specificity (American or otherwise), the debate quickly becomes confused. A concern with Americanization may have prematurely foreclosed vital explorations into the history and purpose of intellectual property regimes. If so, then the discussion should move from genetic questions about the origin of the concepts and be reorganized around the question of corporate influence over the production of culture. From this point of view, intellectual property rights are neither specifically American nor universal; they are instead nationally variable but institutionally enshrined protections for a particular form of the corporation. Thus, capitalist logic, rather than national identity, should be the focus of scholarly and political investigation into intellectual property

rights. Before we arrive at this conclusion, however, it is important to consider the positions expressed by defenders and critics of global intellectual property rights.

Many proponents of standardized and strongly protectionist intellectual property rights can be found in international institutions. The World Intellectual Property Organization (WIPO) in particular has, since the 1970s, been affiliated with the UN. WIPO is the organization responsible for administering international intellectual property treaties, training intellectual property administrators from participating nations, and sponsoring research into problems raised by the current intellectual property regime. Prior to the adoption of Trade-Related Intellectual Property agreements (TRIPs) in 1994, WIPO had minimal authority regarding the enforcement of intellectual property standards, and it set deadlines for legislative reform regarding intellectual property in developing nations. TRIPs, however, gave WIPO a more active role in harmonizing international standards. After TRIPs, WIPO had the authority of the World Trade Organization (WTO) behind it, because developing nations in particular had to agree to harmonize (a.k.a., standardize) intellectual property rights in order to be in good standing with the WTO. Essentially, TRIPs required that a) heightened standards of intellectual property protection be adopted as national legislation by all participants, b) a wider range of products be afforded protection, c) standards be enforced more robustly (May 70-71). The justifications offered for these expansions of the international intellectual property regime were primarily commercial in nature.

These commercial justifications are liberal or neo-liberal in orientation. Beginning from the assumption that the fruits of intellectual labor are rightly considered property, such arguments tend to assume a Lockean labor theory of property that treats

property rights as the reward offered for an investment of one's labor. One owns the results of one's labor for the same reasons one owns one's body: because each is the physical expression of the self (McSherry 39-42). An investment of intellectual labor is thus properly rewarded by the state's guarantee of a right to own and benefit from the ownership of the product of intellectual labor. In this vein of thinking, benefits are primarily financial, and these provide incentives to produce and innovate. This argument about individual incentive is then generalized to nations and industries, and protection of intellectual property rights becomes attached to a discourse of development. Moving from the model of the individual author to generic descriptions of invention in the context of a capitalist corporation, the defense of strong intellectual property rights argues that exploitation of a new technology is only worthwhile when the corporation's interest is protected within a particular market (May 54). On this argument, the right to benefit financially from an otherwise unmotivated investment of labor provides the ground for economic development.

This description of intellectual property rights as the motor of development appears repeatedly in WIPO documents (Irr 24-28). For WIPO, the logic of development is assumed to be identical or very similar for all nations, despite the fact that the most rapid periods of development for the American and Western European economies occurred prior to and largely in disregard of protectionist interpretations of intellectual property. The foundational assumption, instead, is that intellectual property rights are universally beneficial, because the capitalist economy is assumed to follow universally applicable principles and indeed to lead to universal peace and democracy. It is for this reason that, intellectual property rights are perhaps counter-intuitively enshrined in

human rights declarations and covenants (Irr 6-24). In human rights discourse, intellectual property rights counterbalance and limit a universal right to share the culture and knowledge that are the common heritage of humankind. The universalism of intellectual property rights granted to individuals derives from and complements universal and collective rights to culture.

These universalist arguments are then extended to become defenses of cultural particularism. In UNESCO's world heritage site program, for instance, the legitimate assertion of national ownership and the right to stewardship over sites of particular importance to world culture is a precondition for receiving funds designated for protection of those sites. This ownership includes both ownership of the physical site and a collective (and proprietary) claim to the cultural heritage installed there. The contributions of particular nations to a universal but also diverse cultural heritage are thus ensured by the assertion of a form of property assumed to be universal. In recent years, UNESCO's concept of universal property rights in culture has expanded to include intangible as well as tangible properties.

The universalist tendency of defenses of intellectual property rights does not only appeal to the high-minded internationalists in the UN agencies. It also characterizes arguments based on capitalist self-interest. As political scientist Susan Sell has demonstrated in Private Power, Public Law, a small group of extremely influential US corporations (namely, Bristol-Myers, CBS, DuPont, GE, GM, Hewlett-Packard, IBM, Johnson & Johnson, Merck, Monsanto, and Pfizer) organized the Intellectual Property Rights Committee (IPC) in 1986; responding to the structural imperatives of global capitalism, this group was almost solely responsible for moving the US trade policy

toward vigorous defense of intellectual property rights in the 1980s. Framing the debate in terms of projections of profit lost through piracy, this group made its members' particular corporate interests central to a national and then global agenda. Arguing that the social benefits of public access to new information and technology accrue indirectly though commodity consumption, this group successfully prioritized its particular interests as the necessary means to whatever universal ends might exist. As Sell argues, the "triumph of the IPC was the triumph of a small fraction of the private sector" (55). Although many critics of intellectual property rights use this kind of statement of corporate self-interest to expose the culturally and historically specific nature of the intellectual property regime, its proponents do not obscure the self-interested nature of their defense of intellectual property rights. They simply interpret self-interestedness differently—as a universal principle. For the Intellectual Property Committee, it is the assertion of a public—especially national—interest in limiting copyright or patent that is unacceptably particularistic (Sell Chapter 5). Corporate self-interest understands itself as a particularism that can and should be universal.

This understanding of a paradoxically universal self-interest of course precedes and outlasts data; it is ideological. As Slavoj Zizek argues in The Sublime Object of Ideology, ideology is that which one insistently believes precisely because of empirical evidence of its untruth. The specific ideology underlying the expansion of global intellectual property rights since the 1980s, then, is and should be recognized as being anti- and post-national. It takes national differences in intellectual property regimes as its target; economically coerced global harmonization is its goal. The ideology of intellectual property proponents invents its own evidence of profits that it imagines it has

lost and treats this evidence as empirical data, at the same time that it ignores evidence that a rigidly protectionist intellectual property regime is neither necessary for innovation nor provides immediate economic benefits to the developing world. After all, as Corynne McSherry has convincingly demonstrated, responsibility for research and development within the US at least has substantively shifted to the research university, an institution that operates at the margins of individualist intellectual property rights and relies greatly on a gift economy (McSherry 68-100). Capitalist self-interest is not a necessary pre-condition for innovation, nor does it necessarily reward research. And, as international patent statistics reveal, despite a heavy investment in scientific and technological research in South and East Asia, more than ten years into a harmonized international regime of intellectual property rights, approximately 99 percent of all patents are registered in the USA and Europe (May ix); developing nations and private organizations within them have clearly not benefited in any immediate sense from expanded definitions and enforcement of intellectual property rights. Building on this point, Christopher May argues that "the justificatory schemata mobilized in the political economic relations of the global information society are contradicted by the actuality of those relations" (164). Justifications of intellectual property are not made with reference to the actual conditions produced by this architecture, but rather with reference to an ideologically sanctioned (and patently self-contradictory) neo-liberal conception of the relationship between public and private goods and particular and universal interests.

My argument is that this neoliberal ideology is the proper target for critics of intellectual property. Unfortunately, some critics of the pseudo-universalism of intellectual property rights have tended to focus instead on the red herring of national

specificity. Not only does that critique replicate the thinking of corporate defenders of intellectual property. Also, hasty critiques of Americanization have sometimes substituted for analysis of the more fundamental logic of capitalist expansion.

Most critics of intellectual property do rightly attack the assumption that intellectual property rights are the motor of development and point out the enormously concentration of ownership of intellectual property on a global scale. In Steal This Idea, for instance, Michael Perelman uses UN statistics similar to those cited above to make the point that "rich, industrialized countries now hold 97 percent of all patents worldwide. Compounding the inequity, more than 80 percent of patents granted in developing countries belong to residents of industrial countries" (6). The problem with this presentation of statistics, however, is that nations do not hold patents, as his corollary reminds us. Individuals (or those legal fictions that behave as individuals, namely corporations) hold patents. These patent holders may reside in nations, but they are not identical to nations. Nation-states can and do uphold the interests of their corporate citizens; we need only remind ourselves of the Bush Administration's vigorous defense of the pharmaceuticals industry in negotiations with South Africa over the distribution of life-saving but wildly unaffordable AIDS drugs. But, as the same negotiations revealed, the state is also subject to pressure and logic that differ from those that govern corporate behavior. No matter how compromised it may be, the public responsibility of the democratic state requires different decision-making processes and can on occasion produce different results than those that follow from the profit motive alone. As Susan Sell's analysis reminds us, the political and the economic logics of the intellectual property regime—while far too often far too closely identified—are nonetheless not

entirely identical. This is the situation that must be addressed in critiques of intellectual property. It is the lack of fit between corporations and the state that must be explored.

After all, intellectual property rights are clearly produced by states and have only recently been embraced as essential to capitalist expansion. Copyright in particular emerged from royal prerogatives and was understood in the early modern period as a privilege, not a right, granted to guilds in exchange for their defending the monarch's interest by censoring seditious or heretical publications (Patterson 20-27, 114-142). After subordinating economic to political interests in the eighteenth century, copyright became associated with the rights of authors; although the concept of author's rights sounds like an appeal to the individual as understood in Enlightenment natural rights theory, historical scholarship has revealed that in this period the emergence of modern intellectual property law still had more to do with state-sanctioned limits on the book publishing industry than with the sudden desire to recognize and reward liberal individualism (Patterson 143-150). Efforts to centralize and regulate book publishers were involved in the formulation of intellectual property rights in the eighteenth century. Book publishers accepted these limits in part because of their fear of international competition, especially from French imports; controls over translation and imports combined the anti-heresy interests of the state with the protectionist desires of the publishers (Patterson 121; Feather Chapters 1-3). Intellectual property rights, in short, were primarily political, not economic, in origin; they were, in fact, established as nationalist protections against the emerging international market of the eighteenth century.

Of course, intellectual property rights serve different ends in the twenty-first century than they did in the eighteenth. They are now widely understood as pro-market and individualist in the corporate sense. There is an interesting story to tell about that transformation (see Sherman and Bently), but in this context it is more pertinent to sketch the contemporary residue of the formative period of intellectual property rights. After all, Anglo-American case law (where many aspects of intellectual property disputes are decided, despite the statutory origins of copyright and patent) tends to be cumulative and conservative as an intellectual system. For better or worse, the contradictions historically embedded within it continue to frame subsequent decisions, and social changes tend to outstrip the pace of legal change. For critics of the system, however, this eclectic structure can be an advantage, especially when, as at present, there is a sense that important and previously protected resources are being lost. In short, at present, it is crucial to recognize conflicts within the intellectual property regime of the West, because these conflicts can reveal important resources for critics of the global intellectual property system.

Conflicts over intellectual property within the West have been both international and domestic. There are many critiques of intellectual property within the dominant regime. For instance, Anglo-American intellectual property law does not correspond on all points to legal traditions deriving from the Napoleonic code. Most famously, the French tradition protects an author's inalienable moral rights, on the grounds that an author has a continuing interest in maintaining the integrity of work, even after rights to publish and adapt the work have been re-assigned. Since American law does not officially recognize an author's moral rights, numerous international contests have

emerged over this issue. (There have also been intra-European conflicts on this issue, but for the sake of concision they will not be treated here.)

At the same time, increasingly, within the Anglo-American tradition, controversies such as the Choudhury case (to which we shall return in the next section) have revealed differences between those who understand the purpose of the law as the promotion of economic self-interest or and those who emphasize social goods. The core concepts of American intellectual property law appear in the Constitution, Article I, section 8; this clause of the Constitution establishes Congress's responsibility "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Here, as throughout the extensive statutory codes and case law on the topic, the key ideas are 1) the author or inventor, 2) writings and discoveries, and 3) progress. Definitions of each of these concepts have expanded over time, and the exclusive rights covered by the clause, as well as the "limited times," have grown longer as well. In the 1780s and 90s, copyright lasted 14 years, but at the start of the 21st century, in the most common scenarios, it lasts the author's lifetime plus 70 years or, in the case of corporate authorship, at least 95 years after publication. If the life span of human beings had increased at the same rate, the average person would now live more than 204 years! Clearly, the overall drift of intellectual property law in the US has been towards increasingly broad and protectionist interpretations and has outstripped the pace of other social changes.

Nonetheless, each extension and expansion of the domain of intellectual property has been accompanied by challenges within the terms of American law. It is to this

critical tradition that critics of the global regime should attend. For instance, numerous cases have challenged the concept of the joint author. Many of the most valuable intellectual properties—such as Hollywood movies, or software—are jointly authored in a commercial context, so the stakes of this dispute are high (McSherry Chapter 2). Building on an analogy to individual authorship, in joint authorship cases the courts require that each author make a distinct and clearly original contribution to the work in order to be recognized as an author. Although this may sound reasonable enough at first glance, this definition causes problems because it is difficult to reconcile with the interpretation of co-authorship in some professions. For instance, academic scientists often attribute authorship to individuals who provided inspiration, institutional or financial support but were not involved directly in the writing or research process (McSherry 83). Because the professional but also financial implications of authoring scientific articles can be considerable, the disparity between professional and legal interpretations of authorship is consequential. Through a series of exemptions for academic practices, American intellectual property law has historically recognized and incorporated such challenges.

The law has also been somewhat—although very incompletely—responsive to challenges to authorship that draw attention to its cultural specificity. Cultural rights have been recognized (although again in a very limited and exceptional fashion) in American intellectual property law. Here, as in other postcolonial "settler" nations, some of the key cases have to do with the rights of indigenous people. In rulings limiting the commercial use of sacred images and even the alienability of particular images and artifacts from their authors, the courts have in effect recognized something like collective

or peoples' rights. By treating a people as an author with legitimate rights to protection, such decisions question the individualist premises of the author-concept. Because copyright in unpublished works in particular is correlated to the lifespan of an individual, this collectivist interpretation challenges a key aspect of the administration, at least, of copyright.

Internal challenges have also been made to the concept of writing enshrined in American intellectual property law. Historically, the expansion of copyright protections to music, photography, film, and other new media has rested on analogies between these media and writing. As a result, the tangible expression of the original and quantifiable evidence of "substantial similarity" (comparable to counting the number of words reproduced in a derivative work) became essential to infringement cases. With new media and art forms, however, it is often difficult to decide what counts as a tangible expression, a question also raised in cases involving ownership of images of bodies and media that are difficult to quantify, such as vocal style (Gaines 105-142). By making it clear that some of the most valuable media at issue in intellectual property case law are only weakly tangible and thus only loosely quantifiable, such cases challenge the analogy between writing and other forms of communication, a fundamental analogy for copyright.

Finally, the concept of progress (and the associated ideal of the public good) has come into question in a wide array of cases. Some of these are memorably summarized and evaluated in a recent book by constitutional law scholar, Lawrence Lessig. Building on his arguments in earlier publications about the chilling effect on technological innovation presented by strongly protectionist interpretations of copyright and patent, in Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and

Control Creativity Lessig concludes that the quality of American cultural production, as well as the organization and goals of the society as a whole, are endangered by the concentration of ownership of intellectual property:

> The product of … large and concentrated [media] networks is increasingly homogenous. Increasingly safe. Increasingly sterile. The product of news shows from networks like this is increasingly tailored to the message the network wants to convey…. Independent, critical, different views are quashed. This is not the environment for democracy (166).

We cannot rely on the courts to protect democratic cultural diversity, because the "law now regulates the full range of creativity—commercial or not, transformative or not," Lessig concludes (171-172). Instead, we need changes to the domestic intellectual property regime, and "these changes have to be *reductions* in the scope of copyright, in response to the extraordinary increase in control that technology and the market enable" (169). The public goods involved in access to new and existing expressions, as well as the goods produced by exercise of the property right itself, are for Lessig being swamped by the expenses of administering the intellectual property system. These are not public expenses; this is not an argument against a public registry of copyright. Rather, it is the enormous cost of private litigation that, regardless of the merits of cases, drowns out innovation and constrains progress. In the conversion from a free culture in to a "permission culture," Lessig argues, the beneficiaries are lawyers and a few mega-conglomerate corporations. Even an enthusiastically economistic interpretation of the law, such as Richard Posner's, are hard-pressed to identify the rapidly escalating costs of acquiring permission to consume and invent with progress. Prioritizing the enrichment of lawyers hardly conforms to most notions of productivity; nor does it appear to provide a solid foundation for long-term economic growth.

When joined by challenges to the concepts of authorship and writing, this kind of critique of narrowly economistic interpretations of progress adds up to a reconsideration of the legal profession and its role in American society. From this vantage point, we are ready to move on to a larger institutional critique of relations between the state and the corporation. As mentioned above, Susan Sell has thoroughly and persuasively documented the way that a small group of influential intellectual property owners were able to direct American trade policy in the 1980s and 90s by insisting on special protections as a condition of American participation global trade organizations. One of the questions this scenario raises concerns the response of public power to private interests. Should the state capitulate so readily to the self-interested arguments of financially influential corporations? Or, is the role of the state more properly to define and defend the public—understood as the national populace, at the very least? Who speaks for the public domain, for public schools and public libraries, for the public sphere, if not the state?

By raising these questions and reminding us of the responsibility of the state to balance private interest against public interests, domestic and international challenges to intellectual property protectionism have begun to develop into a political counter-discourse. Although arising from the embattled American context, this discourse can also be a tool for international disputes regarding corporate seizure of common resources, precisely because it reveals the fractures already present within the US intellectual property regime. Furthermore, by foregrounding the limitations of economistic interpretations of the law as the handmaiden to corporate interests, this counter-discourse provides some of the starting points for a critique of contemporary capitalism. This

critique begins not in appeals to abstract principles of the social good or fantasies about the premodern past, but rather within the law itself. As Hardt and Negri remind us in Empire, concept and defense of the commons is immanent to Anglo-American tradition; it emerges from within the tradition of radical democracy (300-303).

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So, what are the consequences of understanding intellectual property as corporate logic rather than culturally specific (i.e., American)? How might we analyze the Bikram Choudhury case in particular in light of this revised perspective? If even intellectual property disputes have a utopian and critical aspect, how can we tap that resource in analysis of a case that seems such a classic example of the proprietary enclosure of the commons? Since, at this writing, the Choudhury case or cases are still proceeding through the court system, obviously no decisive analysis is possible. Nonetheless, it is clear what sorts of questions one would want to ask of this case and the many others to which it is analogous.

As property law grows increasingly determinate in global neo-liberal ideology, even a non-specialist will want to be familiar with some of the basic elements of legal argumentation. This means that we will want to consider the a few key legal concepts and test their adequacy for this controversy as well as considering which precedents are likely to guide decisions on this case. For the Choudhury case, this leads us first of all to an investigation of the history of cases in which ownership of bodily practices is at issue. Because the distinction between intangible ideas and tangible expression is fundamental

for copyright, bodily practice can be a difficult subject for copyright law. Copyright in choreography, for instance, is difficult to establish, unless the dance has been scored in writing and thus made tangible outside of the bodily movements, and major cases over the legacy of Martha Graham, for instance, have complicated the forms of ownership and inheritance involved in choreography. Without a written version of the choreography, however, courts have had difficulty deciding whether particular movements represent uncopyrightable ideas or original and copyrightable expressions. Where the idea in question is an idea about expression and the idea is only made evident through expression, the foundational distinction between idea and expression tends to break down.

Copyright in exercise regimes has been similarly controversial; one of the most prominent cases in recent years on this topic has been the Pilates dispute. In fact, references to the Pilates dispute have appeared in some of the coverage of the Choudhury case. In an important 2000 decision, the courts decided that Pilates has become a generic mark and thus was not subject to the exclusive rights of a trademarked technique (Aquino 7). There was some lack of clarity about how fully exclusive rights could apply to physical training regimes. However, in this case the regime of movements was clearly invented by an individual, so the fundamental issue of the Choudhury case—whether he has the right to claim ownership of a portion of traditional knowledge—was not at issue in the Pilates decision.

Within American law, these cases involving the idea of bodily expression have been difficult in part because of the way that cultural norms about the body have effected some legal interpretations. This is particularly evident in cases involving pornography.

For instance, one of the landmark cases in intellectual property law concern pornographic representations of Dallas Cowboys Cheerleaders. In *Dallas Cowboys Cheerleaders v. Scoreboard Posters, Inc.*, the right of former cheerleaders to benefit from the valuable and trademarked image of the sexy cheerleader—an image that their own shapely bodies substantially supported—was subordinated to the team owners' property in the supposedly wholesome image of the cheerleaders. In the landmark case *Dallas Cowboys Cheerleaders, Inc.v. Scoreboard Posters* (1970) (where ex-cheerleaders posed topless but in uniform for a poster), the economic argument (deciding the case on the basis of profits allegedly lost) merges with a culturally specific understanding of a woman's bare breasts as necessarily vulgar and erotic and thus demeaning to the Dallas Cowboys Cheerleaders uniform. In such a case, as in the Choudhury case, there is space for addressing American intellectual property law's limits. The legal history provides evidence that reveals how unstable and questionably moralistic copyrights in bodily representations have been. In analyzing the Choudhury case, this means that it may prove fruitful to consider how it imagines bodies—as passive and standardized recipients of instruction—and ask to what extent that presumption is consistent with the more troublesome view of the body as a source of value that has also sometimes featured in American intellectual property law.

A second set of considerations for the Choudhury case revolves around the relationship between copyright and licensing. With new communications technologies, so-called one-click licensing has become common; this is the kind of license one "clicks through" when installing new software (Gomulkiewicz 687). The problem with these licenses is that they pre-emptively establish a set of contractual conditions that typically can not be negotiated by the user. As a user, one has only two options: accept all of the

conditions or do not use the licensed product. Because of the one-sided character of these licenses, the copyright owner can set conditions that go far beyond his or her legally authorized rights and make these terms of use. Contemporary licensing practices allow the owner to claim a complete monopoly over the use of the product; this has the effect of requiring users to alienate some of their rights (e.g., right of first sale) in order to gain access to copyrighted materials (Lessig 199-208). This is protectionism and distorts the balance between rights of owners and users that is supposed to organize copyright.

In the Choudhury case, the licensing of teachers and franchises could probably be considered separately from the question of the viability of his copyright. Potentially, even if the copyright in the postures were not upheld, Choudhury might still have the right to require yoga teachers wishing to use his name to be licensed and franchised. The range of conditions required for usage of Choudhury's copyrighted sequence are insisted upon in the licensing agreement rather than in the copyright itself. Here, we may be seeing one of the more socially advantageous results of American intellectual property law's resistance to recognizing the moral rights of the author. If Choudhury is the legally recognized "author" of this sequence, under a moral rights regime he might well have the right to set such specific and restrictive conditions on the usage of his sequence. If, however, the rights of the user are counterbalanced and protected (however weakly) by public goods or the rights of users to produce non-infringing derivative works, then the author's future control over the context in which a copyrighted work is used is less secure.

It might also be important for the Choudhury case to historicize some of the arguments about ethics and the public domain. Frequently, the American courts have

been hesitant to prioritize the public domain over the property rights of individuals. In cases concerning the commercial appropriation of folklore, for instance, the courts have often found in favor of the commercial appropriator—emphasizing the originality of tangible expressions of the folklore. Then, subsequent works based on the same folk stories have had to demonstrate their distance from the earlier commercial versions. This strategy has been very successful for Disney, for instance; as Bob Levin describes, in the landmark Air Pirates case, Disney successfully defended their rights to the ownership of animal characters common in children's stories on these grounds. Claims that one's work borrows from the public domain and that the ethics of the public domain should be respected are notoriously difficult to substantiate in the courts, in part because of the question of standing. Who has the right to stand for "the public"? If having suffered demonstrable harm (usually financial) is a pre-condition for bringing a non-frivolous case before the courts, which private individuals can authoritatively demonstrate that they have been harmed by the shrinkage of the public domain? If the state does not serve as the protector of the public domain, who can and should? Some of these questions were at issue in *Eldred v. Ashcroft*, the 2003 Supreme Court case challenging the Sonny Bono Copyright Extension Act. Although ultimately unsuccessful in limiting the extension of the duration of copyright, the case was imaginatively constructed on this issue. At the same time, Lawrence Lessig, the lead lawyer for the "public domain" side of the argument, has subsequently asserted that the case was unsuccessful in part because the arguments wrongly assumed that an ethical approach to the question of the public domain would be a major concern for the court (Chapter 13). Instead, he concluded, the case was decided by economic logic. The ethical or social good argument as insufficiently

powerful on its own terms, so a more direct confrontation with the economistic logic must be found and attached to a search for alternatives within the legal tradition.

Similar conclusions are suggested by another case involving yoga. In the late 1980s, members of Kripalu, a yoga commune in Western Massachusestts, sued their former guru in *Dushkin et al. v. Desai* for, among other things, breach of contract. While preaching celibacy and asceticism, the guru had also engaged in adulterous affairs with some of his disciples and misappropriated funds from the commune's publications and classes (Reynolds, Auerbach, Tesher). Although ownership of the yogic techniques themselves was not directly at issue in this case, certain cultural questions about the nature of authority and sexuality definitely were, and the court explicitly commented on what it saw as the naiveté of the commune's disciples, refusing to rule on their sense of an ethical violation of communal trust. Instead, the court was on more solid ground with judgments based on business practice and charges of fraud. Recognizing the collective nature of the copyrighted materials produced by the commune was also difficult for the courts, so claims based on the ethics of respecting collective property were also judged to be weak. Ultimately, the disciples were most successful making claims that most clearly analogized Kripalu's arrangements with those of a for-profit business. The contract model allowed for rulings of breach of contract and fraud. What this suggests for the Choudhury case is that perhaps the Open Source Yoga Unity coalition could be successful if it emphasizes business practice over the ethics of ownership. Because the public domain—especially traditional knowledge in the public domain—is primarily defined as a negative concept in American intellectual property law (i.e., as that not owned by a private individual), it is perhaps most pragmatically defended indirectly—by

way of attacks on the business practice of those who lay claim to it. As a long-term project it is clearly essential that American intellectual property law develop a positive conception of the public domain and, more broadly, the commons. But, strategically, as Lessig's experiences in *Eldred v. Ashcroft* should remind us, these developments will have to take place in a context that first recognizes and then directly counters the power of the reigning economistic logic.

This two-step approach to some of the legal questions at issue in the Choudhury case suggests that it is essential ultimately to consider cultural questions as well. For the purpose of a broader analysis of globalization and the role of American culture within it, it is essential that three tasks be undertaken: 1) we must dispose of the artificially static opposition between traditional and modern societies; 2) we must pay close attention to the two-directional nature of fantasies about national character; and 3) we must closely chart the effect of business practices on the distribution and organization of culture.

An opposition between traditional and modern societies underlies the Americanization hypothesis. Americanization is widely perceived as modernization by means of consumer capitalism; as such, it threatens "tradition" where tradition is understood in terms of precapitalist and often sacred values and practices (Kuisel 1-14). The problem with this account, however, is that—in the name of cultural protectionism—it identifies the non-American with the traditional and requires both to reside in the unchanging past. Despite the intuitive common sense and emotional power of the appeal to an ancient tradition in the Choudhury case, this static ideal is probably not, strictly speaking, applicable to yoga. As Joseph Alter has convincingly demonstrated in his impressive new ethnography Yoga in Modern India, during the twentieth century, yoga

has been part of an alternative modernization of Indian society, and popular (and controversial) forms of yoga have developed to act within and upon Indian society in the twentieth century. According to Alter, many yogic practices drawing from and adapting Western instrumental medicine, as well as versions of Central European naturopathy, are currently practiced in India, and several branches of yoga have been explicitly aligned with political, even fundamentalist, movements in the Indian nation. In this context, it is also important to recognize that as well as being consistently syncretc, as an intellectual system, yoga is explicitly universalist. Its practitioners and spokespeople do not necessarily or always understand themselves as participating in a culturally specific or national form opposed to the pseudo-universality of Americanized modernity. In fact, some of its major figures in the twentieth century have underscored yoga's philosophical universalism. Yoga, the internationally famous guru B. K. S. Iyengar writes in The Tree of Yoga, a collection of lectures he delivered repeatedly to students worldwide, "was given for the human race, not for the Hindus…. yoga is a universal culture" (16). This universalistic spirit is reflected and confirmed in the global spread of yoga studios and practice. Some have even asserted that the spread of yoga itself represents the cultural face of the unprecedented movement of people and media that we know as globalization (Tomlinson Introduction). In short, to describe yoga as a static and local tradition opposed to the universalizing forces of the modern means one may be missing a chance to describe an alternate modernization and/or an affirmative globalization.

More specifically, for the Choudhury case, it might be interesting to investigate whether the concept of the body or bodily practice as property that underlies Choudhury's claim to copyright relies on any pre-modern concepts that are ill-defined in intellectual

property law. For instance, what conception of the guru/disciple relationship is required by Choudhury's claims? If a guru differs from a teacher in the alternate tangibility of his (usually his) instruction, perhaps there are interesting ways in which a decision for Choudhury might open up questions troubling academics—questions, for instance, about who owns syllabi and why. If a category such as "guru's rights" (as a subset of a celebrity's "publicity rights"?) were recognized, then perhaps this addition to the exceptional nature of intellectual property would have unpredictable consequences. By protecting the embodied transmission of knowledge, such a decision could shore up the tenuous concept of the gift economy on which many academics around the world have relied. At the same time, perhaps there is some interesting potential in the unstable status of yoga as a quasi-sacred practice—neither identical to Hinduism nor explicitly secular. If either gurus or yoga instructors have rights that derive from their participation in a modernized tradition with a quasi-sacred status, that may prove important for raising questions about the church/state opposition so crucial in American law, including American property law (think, for instance, of exemptions to property tax granted to religious institutions). If yoga inhabits a quasi-sacred realm between instruction and worship, then the relationship between that realm and commercial interpretations of the franchise, for instance, may not be as secure as initially imagined.

Secondly, in thinking through the Choudhury case and the Americanization thesis more broadly, it is essential to recognize the mutually constitutive national fantasies involved as projections. We should ask how important Bikram Choudhury's Indian birth, training, and name were to his claim to copyright. It would be interesting to learn if his claims have been treated differently from any claims made in similar enterprises

organized around white American gurus, such as Baron Baptiste. Also, it seems crucial to ask why Choudhury's Indian origins are so rarely addressed by his followers or by international commentators on the case. Is he assumed to be a representative American because of his claim to intellectual property? Or, do other frequently described aspects of Choudhury's public persona make him a WASP American, regardless of his national origins? For instance, Choudhury is routinely quoted as having compared himself to Superman and Jesus and describing his "balls" as "100 megatons" each (Keegan). Are the self-evident machismo and arrogance of these remarks the attributes that make him American? If national identity derives from an individual's stated attitude and not from his biography, though, it is difficult to see how this would support the view that yoga is inherently Indian, since its gurus have said that it is universal and that yogic practice leads to transcendence of culture and history. Some degree of projection of a fantasy about American character here seems to distort the processes and personal histories involved.

At the same time, it is undeniably obvious that many of the at least 15 to 20 million American practitioners of yoga have projected a fantasy about Indian character in their investments in yoga. Vijay Prashad outlines some of these fantasies in The Karma of Brown Folk and describes their entanglement with the production of contemporary hybrid ideologies, such as the pro-capitalist quietism of self-help guru, Deepak Chopra (Prashad 47-68). By imagining an eternal, static India where yoga as a "fossil religion" (as Mircea Eliade repeatedly put it) survives unaltered, many Americans project a fantasy about travel and/or quasi-religious practice as an easy escape from the anxieties of a modern capitalist conditions (Chu, Linden, Ornish). In the process, representations of

yoga typically ignore the politically complex meaning that yoga has in modern India (such as, its association, for some, with Hindu fundamentalism), and they pay little attention to the middle-class migrants from India to the US—migrants benefiting from the 1964 Civil Rights Act that aimed to lay to rest precisely some of these racialized projections. It seems essential in the Choudhury case to account for the fact that white Americans have become heavily invested in idealizing a spiritual "Eastern" other outside of a system of private property or worldly values. While we can and should certainly explain some of this projection of an exotic other as an expression of dissatisfaction with the spiritual emptiness of consumer culture—that is, as a kind of critique of mind/body divisions and ultra-materialism—we also need to account for the specifically racial and national character of these projections. After all, there are certainly ascetic veins within the Anglo-Christian tradition; it is not necessary to turn to yogic exoticism for an alternative to modernity. But, since the nineteenth-century Transcendentalists at least, many American left-liberals have been invested in a projection of fantasies of "mysterious India"—perhaps because in such a national projection one can avoid direct recognition of the nostalgic aspects of such a social critique and invent oneself as a "race traitor," who both benefits from white American social privilege and imagines oneself as unaffiliated and external to that system of benefits. At least, this is what Slavoj Zizek has suggested in a related context: "Western Buddhism, this pop-cultural phenomenon preaching inner distance and indifference towards the frantic pace of the market competition, is arguably the most efficient way, for us, to fully participate in the capitalist dynamics, while retaining the appearance of mental sanity — in short, the paradigmatic ideology of late capitalism" (Zizek 2001). If Zizek's thesis is at all pertinent, then, in

examining the Choudhury case in particular, we will want to untangle the stakes involved in this two-directional system of projections.

Finally, for the purpose of cultural analysis of cases such as Choudhury's, it may well be necessary for humanists to focus more on the cultural effects of business practice. We should ask what political assumptions underlie our interpretations of business. Should we analogize yoga teachers to small business owners threatened by the McDonalds or the Walmart mass marketing of yoga? If so, does sympathy for their case suggest another form of nostalgia (overlaid on the nostalgia for the pre-modern outlined above)—nostalgia for the yeoman farmer or for pre-Fordist production? In other words, are political critiques of global business practice up-to-date or are they rely on an essentially Depression-era vocabulary and set of assumptions? To the extent that the Americanization thesis is an anti-standardization thesis, it does seem mainly to reflect pre-WWII-era critiques of mass production. In producing cultural critique on the basis of Choudhury-type cases, we will want to ask whether these terms are indeed adequate to the situation of the global economy. In particular, it seems essential to account for the New Age capitalist ideologies in the context of globalization. After all, in the 1920s and 30s, Henry Ford's version of mass production was explicitly pro-Americanization; he famously supported assimilation programs and a politics of nationalist isolation. At the start of the 21st century, however, standardization and capitalist consolidation regularly occur in the name of the transnational and the non-national; a one-world logic grounds everything from human rights discourse to cell phone ads. If we are to treat these appeals as more than simply window-dressing and thus if we are to take their ideological content and the relationship between that content and the transnational organization of business

seriously, then we must go beyond exposing their national underpinnings. We must do more than claim that globalization equals Americanization by another name.

For these reasons, in this essay, in an effort to explore resources beyond those provided by the Americanization thesis, I have aimed to demonstrate that contemporary intellectual property disputes have often been interpreted as instances of an American enclosure of the global commons. The alternative to this form of Americanization is assumed to be the strengthening of cultural nationalism and state-based legal protections—a system of "cultural patents." Critics have aspired to fight property with property and culture with culture. This critique and solution, however, conflate America with capitalism and the state with the corporation. By focusing on an exposé of the pseudo-universalism of intellectual property rights, the anti-Americanization position relies on a dated and phantasmatic concept of American society, as well as missing the far more crucial opportunity to open up the cracks already in evidence within the US intellectual property regime. By contrast, I hope to have demonstrated that the core concepts of intellectual property are already in question within American law and society, because even the United States is unevenly developed as a capitalist society. The American legal system—let alone the structure of the society as a whole—reflects its complicated and conflicted history with respect to capitalist development. Academic and religious exemptions to the property system, for instance, are crucial to the project of regenerating the counter-proprietary discourse of the commons, as is a long and uneasy history of litigation involving ownership of the body in part, whole, or image. Critics of the global intellectual property regime will want, in my estimation, to draw on these resources. With pharmaceuticals patents in particular, the stakes are too high not to make

use of all resources available. Ultimately, the smokescreen of anti-Americanization ideologies must be blown away, so that the much more determinate dynamics of capitalist expansion will appear at front and center stage.

If critical analysis is genuinely committed to producing an account of the material conditions of the present, then it is in this sense that we should understand America's decentralized privilege within Empire: America is one of the places in the world where the capitalist logic is most highly developed, and thus it is within the US that many (although obviously not all or even necessarily the most powerful) alternatives and critiques of capitalist logic appear. Precisely because of their off-center intimacy with capitalism, American institutions have developed a critical vocabulary that can be enormously useful. Cultural critiques of inequitable tendencies within globalization—especially the tendency towards monopolistic and proprietary control over common intellectual resources—will lose a potentially vital resource if they remain entrapped in the anti-Americanization vocabulary of an earlier era. A fully materialistic account of the dynamics of globalization will, instead, need to make use of American critical traditions both for their diagnostic and utopian potential.

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