Introduction

Property, Place and Piracy

Martin Fredriksson, Linköping University and James Arvanitakis, Western Sydney University[i]

Daniel Boyd
We Call them Pirates Out Here, 2006
oil on canvas
226 x 276 x 3.5cm
© *Courtesy of the artist and Roslyn Oxley9 Gallery, Sydney*

Emanuel Phillips Fox
Landing of Captain Cook at Botany Bay, 1770, 1902
Oil on Canvas
192,2 x 265,4 cm

Daniel Boyd's 2006 painting *We call them pirates out here*, re-depicts Emanuel Phillips Fox' description of Captain James Cooks' 1770 landing in Botany Bay, Australia. Fox's 1901 work is an emblematic image of the 'discovery' of New South Wales: showing how brave men 'conquer' new land for the British crown and empire. In a colonial imaginary this represents the expansion of the empire, the spread of civilization, Enlightenment and the rule of law to new untamed territories.

For the colonizers Australia was *Terra Nullius*: a land unaccounted for by any other colonial power and thus, there for the taking. The legal doctrine of *Terra Nullius* was a cornerstone in European colonization indicating that a state could lay claims to any piece of land that was not the proclaimed territory of another sovereign state (Drahos, 2014). With the state being

defined according to European standards this meant that the land that Captain Cook 'found' and marked with the Union Jack was the legitimate property of Great Britain – all according to colonial law. The fact that that land was already inhabited was legally insignificant as the inhabitants were not part of a Western civilisation.

In his paraphrase on Fox' painting, Boyd shifts the gaze and looks at the discovery of Australia from the perspective of the first nation people: those who were already there for millennia when Cook 'discovered' their country but who have been erased from Boyd's rendering of the scene just as they are about to be erased from the landscape that Fox depicts. His conclusion is straightforward: 'out here' – in the colonies – the colonisers are the pirates, stealing land and resources. The iconography is clear enough: by giving Captain Cook an eye patch and a parrot and imposing a skull and bones on the Union Jack, Boyd lifts the veil and exposes the coloniser as the pirate.

Boyd's painting challenges us to question what it means when planting a flag on a piece of land. In some cases it merely tells the world that 'I was here'. But as the landing at Botany Bay shows it can also be an act of appropriation: telling the world 'I was here and now this belongs to me'. This draws out the very origin of the construction of property: laying claims to a resource and arguing that, 'now this belongs to me'. Whether this claim will be respected as a 'property right', is dependent on the extent in which it can be enforced – be it through firepower or the force of law.

These two factors – law and martial power – are intimately connected, not only because the rule of law in the end is enforced through the state's monopoly on violence, but also because the law tends to be written by those who have the greatest firepower at their disposal – symbolically or literarily. The colonisers thus impose their laws, and their definitions of property on the colonized. For those who live in the colonizing culture that definition of property appears to be self-evident and incontestable. If we shift perspective, however, we see that it is always constructed by someone with a specific purpose. This is how we understand *Property* – the first factor in our equation.

Together with slavery, colonialism is one of the best examples of how property is contextually constructed as it involves a claim that is absurd today but appeared perfectly natural to those who made it at the time. In the case of colonialism the resource at stake is a piece of land, which leads us to the second factor of our equation: *Place*. Colonialism is spatial in a double sense. First of all, it involves the appropriation of land. Secondly, the legitimacy of that appropriation depends on a geopolitical logic where legitimacy is distributed differently depending on the spatial origin of the actors: a European origin alone carries the entitlement to appropriate resources used by people from other parts of the world. This captures our understanding of the relationship between property and place. In this book, place is both an object of appropriation and constitutive of a structure of power that legitimises appropriation.

By naming James Cook a pirate Boyd questions that legitimacy and transforms him from a hero of Western civilization to a thief. And it is here the subtext in Boyd's painting becomes important. Instead of merely implying the connection between piracy and colonialism it calls out the colonisers as it explicitly makes the statement: 'We call them pirates out here'. By doing that it places the voice of the colonized subjects in the centre – in direct contrast to Fox's depiction of silent players on the brink of extinction.

Piracy – the third factor in our equation – can be many things: it can be the act of exercising colonial or hegemonic power, or it can be an act of subversion, resisting those powers. We see it as is an act of opportunism that exploits the lack of definite and clearly defined property rights or relations. It can be grassroots movements of file-sharing movies, squatting unoccupied buildings or tapping into water or electricity infrastructure. It can also be hegemonic force, such as colonial empires or biopirating pharmaceutical companies, who exploit other peoples' inability or disinterest in articulating property claims that are deemed valid within a global legal system.

As Alexandra Ganser discusses in her contribution to this anthology, the authorities of a colonial Europe resented piracy because it represented an unsanctioned and uncontrollable form of mobility, not only spatially but also socially since the pirates rejected the social order of the navy and established their own social hierarchy. Both colonialism and piracy thus

actualizes the question of what constitutes legitimate and illegitimate mobility and how that is related to place and property. A question that is increasingly acute today as the colonial and settler colonial states are trying to tame what they see as illegitimate mobility by building walls and deporting unwanted visitors. The resent directed towards Mexican migrants in USA, or Syrian refugees and inter-European Roma migrants in Europe, more than anything reflects the fear of uncontrollable mobility.

About this book

The book takes a trans-disciplinary and multi-theoretical approach to place and property, using piracy as an analytical concept to discuss the legitimacy of power associated with various acts of appropriation. The chapters span from theoretical discussions on commons and property to empirical cases concerning access to and appropriation of land, natural, biological and cultural resources.

Colonialism is a good starting point for a discussion about how those concepts are socially constructed, but the book is not confined to colonial or postcolonial perspectives. The different sections of this book look at the relation between property and place and the various claims, rights and entitlements – legal, social, cultural and economic – that are associated with different places and geographically located resources. Piracy comes in as an analytical concept: understood as acts and practices that emerge in zones where the construction and control of property is ambiguous and the distinction between public and private blurred. Media piracy is a much-debated example, where file-sharers and copyright holders argue whether culture and information is a common resource that should be shared freely or a property that needs to be protected. This is not a dilemma unique to immaterial resources: this book highlights how concepts such as property, ownership and the rights of use are just as diffuse and arbitrary when it comes to spatial resources – be it land, water, air of urban space. Since the property claims and relations we discuss are inherently reliant on a (post)colonial world order, any attempts to challenge them also call for a decolonization of knowledge. That is why we open this book with a short text – a declaration if you will – over the four principles of decolonizing knowledge, written by Ingrid Matthews.

This is followed by an introductory text by James Arvanitakis & Martin Fredriksson, 'Commons, Piracy and Property: Crisis, Conflict and Resistance', which establishes a theoretical backdrop to this book. This chapter connects our understanding of piracy to a wider discussion about commons from a different range of perspectives, and it relates this to the crisis of property that piracy reflects and responds to. It takes the politicisation of copyright and file sharing as a starting point to discuss the concept of the commons and the construction of property. It argues that piracy, as an act and an ideology, interrogates common understandings of property as something self-evident, natural and incontestable. Such constructions founded liberal market ideology. The chapter has two broad aims: to outline the different phases of enclosure, from the physical commons, to the institutional and finally the cultural commons; and secondly, to discuss the way that piracy highlights the inherent instability of private property rights.

The next chapter, 'Property, Sovereignty, Piracy and the Commons: Early Modern Enclosure and the Foundation of the State', by Sean Johnson Andrews, connects to James Boyle's (2003) definition of the late 20th century expansion of the scope and scale of intellectual property protections as 'the second enclosure movement'. While Boyle looks at the first enclosure movement as an analogy to how expanding copyright regimes limit the circulation of information, Andrews makes a more direct connection. Using the writings of the Levellers and John Locke – alongside the work of the 'Invisible College' advocating the efficiency of enclosure, a movement with which Locke was associated – this chapter outlines how the first and second enclosure movements are coeval and continuing. As we struggle against the second enclosures, we can take this opportunity to resume the resistance over the first: to reconsider the role of state sovereignty, private property, and the commons. Andrews' chapter thus points to the connection between the propertization of information and land.

Philosopher David Hume famously argued that property was not a natural 'thing' but an imaginary relationship based in the workings of the human mind and social life. Property was inherently undecidable by reason and led to inequality, but was essential for liberty and action. The same kind of paradox was recognised by the anarchist Proudhon: property is theft, but property is also freedom. The views of such theorists suggest that property depends on both poetry and piracy, metaphor and violence. With violence comes the State, even the

pirate State. Anarchists have argued that commonality is as fundamental to property as is privacy, perhaps more so, as property depends on collaborative work and collective context of that work. Even libertarian pro-capitalist anarchists argue that intellectual property is an infringement, a form of piracy, although they may refuse to see that this is the same case for all property. These arguments imply that property relations will differ depending upon social and imagined relationships; hence an anthropology which looks at property in many cultures is vital to understanding the dynamics of property. The chapter 'Unreal Property: Anarchism, Anthropology and Alchemy' by Jonathan Marshall and Francesca da Rimini uses examples from many places and times, to make its point that property can be both natural and unnatural, liberating and oppressive, and that awareness of these paradoxes might help formulate less disruptive laws of property.

The following chapter, 'Piratical Constructions of Humanity: Innocence, Property, and the Human-Nature Divide' addresses the essence of property. Here Sonja Schillings discusses the importance of John Locke's property theory for the discursive construction of piracy. The chapter focuses on the implications of a legal definition since the 18th century that casts maritime pirates as Lockean invaders to the state of nature. Locke famously defined property in the sense of a permanent enlargement of the body into the world. Pirates, according to the consequential definition of William Blackstone, do not just steal objects and harm humans during their attacks, but they violate precisely this link between the human being and the world as would-be property. In colonial discourse, this potentiality of 'property' is especially pronounced, as colonial authorities distinguished between European settlers as potential owners of property, and natives as potential dependents (whose 'innocence' still required protection). Shilling's chapter disentangles these relations, and offers the colonial discussion of piracy as a way towards a more nuanced understanding of 'classic' definitions of property.

Pirates have been described as utterly mobile subjects in various discourses, from political theory to historiography, from philosophy to literary writing. Both in texts that aim at Othering the pirate and in those written by (former) pirates themselves, this mobility—with its geographic and social aspects closely entwined in the entrepreneurial colonial context of the early modern Atlantic—also had effects on how piracy was conceived in economic terms. Alexandra Ganser's chapter 'Mobility in Early Modern Anglo-American Accounts of Piracy'

demonstrates how literary pirate narratives have contributed to both a theoretical and a popular understanding of piracy as adventurous, outlaw inconstancy on the one hand and as illegitimate and violent monstrosity on the other, and examine the colonial underpinnings of this bipolar conception. It will review how the pirate has been set in relation to place, both geographical and social, in a number of Anglophone literary texts written at critical moments in the colonial context of the early modern era. It discusses how such representations ask for a postcolonial critique regarding the relation of mobile and immobile subjects in an unequally globalized world.

The United Nations Convention on the Law of the Sea (UNCLOS) provides the framework for combating maritime piracy and robbery at sea under international law. Within this framework, UNCLOS defines piracy as 'any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship…'. Most recently, this definition has been widely accepted and adopted by regional states in East Africa to assist in the prosecution and imprisonment of Somali pirates. Although the legal processes and practices put in place to combat Somali piracy have elicited a vast body of interdisciplinary research, none have challenged the underlying conceptualization of Somali piracy as a criminal act. Brittany Gilmer's chapter 'Compensation in the Absence of Punishment: Rethinking Somali Piracy as a Form of Maritime *Xeer'* seeks to (re)theorize those criminal acts through the lens of Somali *Xeer*: a local customary law defined in terms of property rights. The chapter argues that certain forms of Somali piracy may be better understood as attempts to secure compensation in the absence of punishment for property theft and destruction. As such, it opens up possibilities for reconceiving certain forms of Somali piracy as legal practices rather than criminal acts.

The relation between property rights and civil rights is at focus in Ingrid Matthews' chapter 'Commodification of Country: An Australian Case Study in Community Resistance to Mining'. Matthews examines how the state has created rights and interests in land, and mobilised state resources to safeguard those interests. The chapter takes its starting point in the protests against coal seam gas (CSG) extraction in *Biliga*, the Pilliga forest on Gamilaraay Gomeroi country in north-west New South Wales (NSW). The study examines legislation passed in 2016 by the conservative Coalition NSW government, laws which criminalised

previously legal actions of protest. The legislative amendments designed to stifle opposition to mining are profoundly anti-democratic. Yet the liberal democratic prototype imposed on Australia by the British colonial power was initially designed as government by propertied white men for propertied white men. In this sense, the laws are entirely consistent with the foundations of liberalism, while simultaneously being highly regressive in a world where slavery has been criminalised and suffrage extended to women.

The following chapter, 'Piracy on the Celestial Frontier? The "New Space" Quest for the Privatization of the Outer Space Commons, investigates the quest for the privatisation of the outer space commons through mining. Lured by potentially lucrative yields of rare minerals, several start-up firms have signalled their intent to extract natural resources from asteroids and other celestial bodies. In 2015, President Obama signed into law the *US Commercial Space Launch Competitiveness Act*, which contains provisions that would grant private property rights for mineral resources obtained in outer space to US citizens and enterprises. Central to this entrepreneurial charge into outer space are 'NewSpacers', a libertarian network of individuals, organisations and businesses who believe a new era of capitalist competition for space resources is destined to replace the government-centred 'old space' programs of decades past. However, tension exists between this recent legislation and international treaty law which has established outer space as the 'common heritage of mankind' – in particular, the non-appropriation principle of the *Outer Space Treaty* of 1967. In this chapter, Matthew Johnson discusses the likely consequences of the United States' legislative guarantee of private ownership in a commons where claims of national sovereignty are expressly forbidden under international law. Might a corporate enclosure of the space commons constitute a form of sanctioned theft, the forceful re-imposition of *res nullius* in a space established as *res communis* – 'for all mankind'? This chapter explores the way in which familiar concepts of 'land', private property, sovereignty, and 'the commons' are being tested and redefined as corporate actors anticipate and enact the privatisation of outer space.

We move back to Earth-based territorial disputes in the following chapter with a focus on contemporary events in the South China Sea. Here, China is laying claims to the vast span of waters and areas. The wrestle over the South China Sea is taking place at a time of major

shift in the regional balance of power, emerging great-power rivalry between China and the United States, and growing salience of maritime resources in national economic wellbeing and prosperity. Since 2007-08, all parties to the disputes have sought to reinforce their respective and competing sovereignty claims through legal, maritime enforcement, and fortification measures meant to strengthen each claimant's position. The signature feature of China's most recent approach has been the massive land reclamation projects, which turn these submerged reefs into large new islands with runways, port facilities, military buildings, and other relevant constructions that would allow China to extend and exercise control right in the middle of the South China Sea, and over the critical sea lanes of communication in one of the world's waterways for commerce. In the chapter '"The Ancestry Land": Land Reclamation and China's Pursuit of Dominance in the South China Sea' Jingdong Yuan discusses the rationale and implications of Chinese land reclamation activities, in the contexts of its relationships with other claimant states and Sino-U.S. completion for primacy in the region.

Mita Banerjee's chapter 'Nuclear Testing and the "Terra Nullius Doctrine": From Life Sciences to Life Writing' gives another perspective on the interaction between military expansionism and territorial appropriations. Banerjee looks at the politics of nuclear testing and the ensuing victimization of indigenous communities on the Marshall Islands and in Australia. These cases of nuclear testing were closely linked to the *terra nullius* doctrine discussed above. In Australian law, this doctrine held that since Aboriginal communities did not cultivate the land, they did not have a right to ownership; hence the territories inhabited by these communities were in fact said to be 'uninhabited' and suitable for nuclear testing. Linking recent studies on medical discrimination to the 'myth of the vanishing Native', Banerjee suggests that nuclear testing was inseparable from cultural and social policies which held that indigenous peoples possessed what might be termed a 'humanity of a different order'. It is this differentiation within the scope of the human that made nuclear testing possible. Linking documentary films such as *Nuclear Savage* to life writing narratives by survivors of nuclear testing in Australia and the Marshall Islands, this paper uses the concept of life writing as a form of resistance. It is in this vein, that indigenous peoples became 'objects' of scientific testing: their bodies became the raw material for the experiments conducted by the life sciences. Finally, the concepts of property and ownership take on a

particular dimension here: the legal allegation that indigenous communities did not own the territory they were living in led to their being dispossessed of both their physical integrity and their humanity.

The dispossession of indigenous people is also the focus of Martin Fredriksson's chapter 'Biopiracy or Bioprospecting: Negotiating the Limits of Propertization'. This chapter discusses the patenting and propertization of biological resources and traditional knowledge. This comes in many guises: some talk of 'biopiracy' while others prefer the term 'bioprospecting' or 'biodiscovery'. The choice of words between 'biopiracy' and 'bioprospecting' reflects different ways to conduct and regulate patenting of biological resources: while the former is an act of exploitation the latter attempts to establish procedures that ensure an equal sharing of the benefits created. But these different discourses also reflect fundamentally different approaches to the phenomenon: if much of the opposition against biopiracy objects to the idea of propertizing of biological resources and traditional knowledge as such, then the bioprospecting discourse accepts this moment of propertization as long as it is undertaken in a fair and equitable manner. By looking at the discourses over biopiracy and bioprospecting this chapter discusses how different approaches to biopatents also reflect different understandings and limits of property.

After exploring the appropriation of land, space and knowledge, the following chapters move on to discuss the appropriation and regulation of urban space from different angles. Franklin Obeng-Odoom's chapter 'Gated Housing Enclaves in Ghana: Property, People, and Place' re-conceptualizes the meaning of gated enclaves in Ghana, their drivers, and form. It uses a visual anthropology approach to interpret primary data collected in Ghana at different stages between 1990 and 2013. The chapter argues that, while the Western concept of gating has been widely applied to a particular housing form in Africa, this conception is partial at best and misleading at worst because it overlooks varieties of gated housing communities – mostly private, but also public – differentiated by form, structural drivers, histories, and property rights. The chapter highlights how 'gating' is a dynamic not a stationary phenomenon, demonstrating different typologies and forms evolve over time and place. These processes and experiences raise major questions about the creation of privileges for a few whose luxury is subsidised by the public from whom the *common* wealth is appropriated.

Daniel Robinson and Duncan McDuie-Ra visit the markets and malls of Bangkok, with vendors peddling 'genuine fake' handbags, 'same, same but different' branded t-shirts and the 'latest' DVDs (sometimes before they even reach the cinemas). Using the conceptual tools of urban/legal geography and the methodological tenets of 'walking ethnography', Robinson and McDuie-Ra explore selected goods and specific spaces where intellectual property rights are being enforced, ignored, and challenged: be it in markets and malls or mobile pavement vendors. Throughout their fieldwork they encounter fake/fibreglass cops policing fake goods, the decline of 'places of counterfeit DVDs', multi-layered regulation of street vendors, spaces of wholesale/export vending, as well as some exceptions and contradictions. The chapter discusses how the enforcement of intellectual property rights is bound up in other forms of spatial control in the city.

In Australia, the enclosed malls have become both the cathedrals of contemporary consumerism and the locus of superannuation fund investment activity, grounded on aspirations of ever increasing rental growth and capital appreciation in a high value but narrowly confined sector. The powerful and pernicious hold that mall shopping has on the collective psyche is articulated as the 'Gruen Transfer' – or 'Gruen Effect' – a theory of retail behaviour that relies on consumers being unconsciously and continually drawn into the mall to shop. Yet, unlike the streetscape that was hitherto the hub of the urban commons, the shopping centre is by its very nature exclusive. In the chapter 'The Real Gruen Transfer - Enclosing the Right to the City', James Arvanitakis and Spike Boydell engage the lenses of space, power, and design to analyse and review the Gruen Legacy – the contemporary enclosure of the urban commons. This enclosure is the real Gruen Transfer, whereby the institutional property landscape transforms and challenges the 'right to the city'.

In the epilogue, we reflect on how the contributions communicate with each other and what they say about the subject of this book. Here we use the questions and perspectives raised in the introductory chapters as a basis to discuss the empirical cases. This cross-fertilization of theory and empiricism creates dialogues between the individual chapters to better understand the current dilemmas and future challenges relating to property, place and piracy.

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