

# THE UNIVERSALITY OF INTELLECTUAL PROPERTY RIGHTS: ORIGINS AND DEVELOPMENT

by

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## 1. Definitional Observations

‘Intellectual Property’ is a generic term that probably came into regular use during the twentieth century.<sup>1</sup> This generic label is used to refer to a group of legal regimes, each of which, to different degrees, confers rights of ownership in a particular subject matter. Copyright, patents, designs, trade marks and protection against unfair competition form the traditional core of intellectual property. The subject matter of these rights is disparate. Inventions, literary works, artistic works, designs and trade marks formed the subject matter of early intellectual property law. One striking feature of intellectual property is that, despite its early historical links to the idea of monopoly and privilege, the scope of its subject matter continues to expand. The twentieth century has seen new or existing subject matter added to present intellectual property systems (for example, the protection of computer software as part of copyright, the patentability of micro-organisms as part of patent law), and new systems created to protect existing or new subject matter (for example, plant variety protection and circuit layouts). The strongly expansionary nature of intellectual property systems shows no sign of changing. Internationally, for example, special legal protection for databases remains part of the work program of the World Intellectual Property Organization (WIPO).

Trying to define the essence of intellectual property is difficult. Most definitions, in fact, simply list examples of intellectual property rights or the subject matter of those rights (often in inclusive form) rather than attempting to identify the essential attributes of intellectual property.<sup>2</sup> One should also note that individual intellectual property statutes provide definitions of the subject matter of their application. So, for example, copyright statutes will typically define terms such as ‘literary work’, as well as stating that copyright in a work consists of particular exclusive rights. Patent statutes define the term ‘patent’ in terms of invention and then specify the criteria of patentability. The definitional dimensions of intellectual property are further complicated by the fact that intellectual property regimes are the products of different philosophical and legal

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<sup>1</sup> It was customary to refer to industrial and intellectual property rights. The term ‘industrial’ was used to cover technology-based subject areas like patents, designs and trade marks. ‘Intellectual property’ was used to refer to copyright. The modern convention is to use ‘intellectual property’ to refer to both industrial and intellectual property.

<sup>2</sup> An example of this approach is to be found in Article 2 (viii) of the Convention Establishing the World Intellectual Property Organization, signed at Stockholm on July 14, 1967.

traditions. The term ‘copyright’, for example, refers to those common law systems that characterize the exclusive rights of authors in essentially economic terms (the rights to reproduce the work, to publish it and to adapt it are examples). Within civil law systems, the rights of authors are seen, at base, as being about the protection of the authorial personality (the right to be acknowledged as the author of the work and the right to control alterations to the work are the core rights). These systems are not referred to as copyright but rather as authors’ rights.<sup>3</sup>

A definition of intellectual property that moves beyond lists or examples and attempts to deal with the essential attributes of intellectual property has to focus on two elements: the property element and the object to which the property element relates. Intellectual property rights are often described as intangible rights. The idea behind this classification is that the object of the right is intangible. All property rights place the rightholder in a juridical relation with others. The key difference between rights of real property and intellectual property rights is that in the latter case the object of the right is non-physical. One can think of it as an abstract object rather than a physical object. It is possible that one can ‘own’ the abstract object without owning a particular physical manifestation of the abstract object. A letter sent to a friend, for example, results in the property in the letter passing to the friend, but not the copyright.

For the purposes of this paper, we will say that intellectual property rights are rights of exploitation in information. Information is becoming “the prime resource” in modern economic life.<sup>4</sup> Even in apparently non-information industries like agriculture, the control and ownership of genetic information has become a major factor, shaping the structure of that industry. It is precisely because information has become the primary resource that the exploitation of information through the exercise of intellectual property rights affects interests that are the subject of human rights claims. Property rights by their nature allow the rightholder to exclude others from the use of this prime resource and so they are likely to produce instances of rights conflict. To illustrate the point somewhat tersely: property in expression (copyright) conflicts with freedom of expression.<sup>5</sup>

The next section of the paper will, in a brief span, describe the evolution of intellectual property law. The historical focus is on the emergence of intellectual property as part of the positive legal order of states. All societies have had to devise norms for regulating the ownership and use of different kinds of information. Historically, this has been especially true of religious information. One can thus identify customary equivalents of intellectual property.<sup>6</sup> But the western intellectual property tradition is rooted in the idea that intellectual property rights are positive rights created by the state for the benefit of the commonwealth. Within Thomist political theory the

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<sup>3</sup> See Z. Radojokovic, “The historical development of “Moral Right””, (1966) *Copyright*, p. 203.

<sup>4</sup> T. Mandeville, *Understanding Novelty: Information, Technological Change, And The Patent System*, (Ablex Publishing Corporation, Norwood, New Jersey, 1996) p. 3.

<sup>5</sup> For an account of how the conflict might be resolved see Melville B. Nimmer, “Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?”, 17 (1970) *UCLA L. Rev.*, p. 1180.

<sup>6</sup> See R.H. Lowie, *Primitive Society* (New York, 1920) pp. 235-243.

validity of positive law was itself to be judged by the axioms of natural law.<sup>7</sup> The norms of positive law had to converge with the divine design which natural law communicated to men. The rules of positive law then met the test of validity, not by being a mirror reflection of some metaphysical counterpart, but rather by whether or not they contributed to the overall divine plan. Conceptually speaking, this allowed someone working within the natural law tradition to recognize the right of a state to modify property rights through the enactment of positive law.

The protection of intellectual property at an international level can roughly be divided into three periods. The first period, the territorial period, is essentially characterized by an absence of international protection. The second, the international period, begins in Europe towards the end of the 19th century with some countries agreeing to the formation of the Paris Convention for the Protection of Industrial Property, 1883 (the Paris Convention) and a similar group agreeing to the Berne Convention for the Protection of Literary and Artistic Works, 1886 (the Berne Convention). The third period, the global period, has its origins in the linkage that the United States of America (the U.S.A) made between trade and intellectual property in the 1980s, a linkage which emerged at a multilateral level in the form of the Agreement on Trade-Related Aspects of Intellectual Property Rights, 1994 (the TRIPS Agreement).<sup>8</sup> The dates of the various conventions do not represent a sharp epochal divide. They do mark a significant change in the evolutionary direction of intellectual property protection.

## 2. The History of Intellectual Property

### (i) The Territorial Period

The different subject areas of intellectual property originate in different places and at different times. Very probably all these laws can be traced back to the system of royal privilege-giving which seems to have operated in most of medieval Europe. The Venetians are credited with the first properly developed patent law in 1474. In England the Statute of Monopolies of 1623 swept away all monopolies except those made by the “true and first inventor” of a “method of manufacture.” Revolutionary France recognized the rights of inventors in 1791 and, outside of Europe, the U.S.A. enacted a patent law in 1790. These patent laws were nothing like today’s complex systems. They were mercifully short, simply recognizing the rights of the inventor. After these beginnings, patent law spread throughout Europe in the first half of the nineteenth century.<sup>9</sup> Statutory forms of trade mark law only make their appearance late in the second half of the

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<sup>7</sup> Q. Skinner, *The Foundations of Modern Political Thought*, Vol 2, (Cambridge University Press, Cambridge, 1978) pp. 148-149.

<sup>8</sup> The TRIPS Agreement is binding on all members of the World Trade Organization. See Article II. 2 of the Agreement Establishing The World Trade Organization (the WTO Agreement). Both the TRIPS Agreement and the WTO Agreement are part of the Final Act Embodying The Results Of The Uruguay Round Of Multilateral Trade Negotiations, Marrakech, April 15, 1994.

<sup>9</sup> F. Machlup and E. Penrose, “The Patent Controversy in the Nineteenth Century”, 10 (1950) *Journal of Economic History*, pp. 1, 3.

nineteenth century, even though trade marks had been in use for much longer.<sup>10</sup> The English courts developed protection for trade marks through the action of passing off.<sup>11</sup> For a variety of reasons, this proved unsatisfactory and statutory systems of trade mark registration began to make their appearance in Europe: England 1862 and 1875, France 1857, Germany 1874 and the U.S.A. 1870 and 1876.<sup>12</sup> Copyright follows a similar kind of pattern, modern copyright law beginning in England with the Statute of Anne of 1709.

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<sup>10</sup> F. Schechter, "The Rational Basis Of Trademark Protection", 40 (1927) *Harvard Law Review*, pp. 813-833.

<sup>11</sup> S. Ricketson, *The Law of Intellectual Property* (Law Book, Sydney, 1984) p. 599.

<sup>12</sup> S Ladas, *Patents, Trademarks, and Related Rights: National and International Protection*, Vol. 1, (Harvard University Press, Cambridge, 1975) p. 8.

The second part of the nineteenth century saw the proliferation in Europe of national intellectual property regimes. It was a period of somewhat chaotic growth with much borrowing and cross-pollination of intellectual property law between states. The principles of patent law to be found in the English Statute of Monopolies were gradually recognized in other states. The English devised the first law on designs in 1787, but they were influenced by the French design law of 1806 when they reformulated their law in 1839. Outside of Europe, intellectual property grew along colonial pathways. So, for example, the self-governing colonies of Australia enacted copyright and patent statutes that were essentially faithful copies of English models.

The territorial period is dominated by the principle of territoriality, the principle that intellectual property rights do not extend beyond the territory of the sovereign which has granted the rights in the first place. The principle is the product of the intimate connections to be found between sovereignty, property rights and territory. It was a principle which courts recognized in the interests of international comity.<sup>13</sup> A world in which states regularly claimed jurisdiction over the property rights established by other nations would be a world in which the principle of negative comity would have largely vanished. The principle of territoriality meant that an intellectual property law passed by country A did not apply in country B. Intellectual property owners faced a classic free-riding problem, or putting it in another way, some countries were the beneficiaries of positive externalities. Dealing with free-riding and positive externalities led states into the next phase of intellectual property protection: the international period.

## (ii) The International Period

During the nineteenth century states began to take a greater and greater interest in the possibility of international co-operation on intellectual property. At first this interest manifested itself in the form of bilateral agreements.<sup>14</sup> In copyright, a French decree of 1852 granting copyright protection to foreign works and foreign authors without the requirement of reciprocity did much to keep bilateral treaty-making in copyright alive.<sup>15</sup> Those states that were worried about the free-riding problem began to negotiate bilateral treaties with other states. Those states that saw themselves as recipients of a positive externality remained isolationist. The United Kingdom (the U.K.) and the U.S.A. provide an example of each response. The U.K. found in the eighteenth century that many of its authors were having their works reproduced abroad without permission and without receiving royalties. Much of the "piracy" was taking place in America, where authors like Dickens were very popular with the American public and therefore American publishers.

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<sup>13</sup> *British South Africa Co. v Companhia de Moçambique* [1893] A.C. 602, 622-24.

<sup>14</sup> For the history of these agreements in respect of copyright see S. Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986* (Center for Commercial Law Studies, Queen Mary College, Kluwer, 1987) pp. 25-38.

<sup>15</sup> H. G. Henn, "The Quest For International Copyright Protection", 39 (1953) *Cornell Law Quarterly*, pp. 43, 45.

The Americans were not the only culprits as the following passage from *Hansard* (1837) makes clear:<sup>16</sup>

“Every work written by a popular author is almost co-instantaneously reprinted in large numbers both in France, Germany and in America and this is done now with much rapidity, and at little expense . . . All the works of Sir Walter Scott, Lord Byron, Messrs. Robert Southey, Thomas Moore . . . and indeed most popular authors are so reprinted and resold by galignani and bardens at Paris.”

The UK response to this problem was to pass in 1838 and 1844 Acts that protected works first published outside of the UK. These Acts grounded a strategy of reciprocity. Foreign works would only gain protection in the UK if the relevant state agreed to protect UK works. The 1844 Act saw a considerable number of bilateral agreements concluded between the UK and other European states.<sup>17</sup> International copyright policy in the U.S.A. took a different turn to that of the UK. The U.S.A. Copyright Act of 1790 only granted copyright protection to citizens and residents of the U.S.A. This form of national protectionism prevailed in US copyright policy for a surprisingly long period: “For over a hundred years, this nation not only denied copyright protection to published works by foreigners, applying the ‘nationality-of-the-author’ principle, but appeared to encourage the piracy of such works.”<sup>18</sup> In fact, it was not until after the Second World War that the U.S.A. began to exercise real leadership in international copyright.<sup>19</sup> It did so with a boldness that few could have foreseen.

Like copyright, the different parts of industrial property also became the subject of bilateral treaty making, mainly between European states. By 1883 there were 69 international agreements in place, most of them dealing with trade marks.<sup>20</sup> They operated on the basis of the national treatment principle, this principle itself being the outcome of reciprocal adjustment between states. States had come to accept that if they did not discriminate between nationals and foreigners when it came to the regulation of intellectual property rights, neither would other states. In this way states could secure protection for the works of their authors in foreign jurisdictions.

Bilateralism in intellectual property in the nineteenth century was important in that it contributed to the recognition that an international framework for the regulation of intellectual property had to be devised, and it suggested a content in terms of principles for that framework. But this bilateralism was more by way of prelude. The protection it gave authors was never satisfactory.<sup>21</sup> The main movement towards serious international co-operation on intellectual property arrived in the form of two multilateral pillars: the Paris Convention of 1883 and the Berne Convention of 1886. The Paris Convention

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<sup>16</sup> Cited in B. Sherman, “Remembering and Forgetting: The Birth of Modern Copyright Law”, 10 (1995) *Intellectual Property Journal*, pp. 1, 7.

<sup>17</sup> *Ibid.* pp. 1, 10.

<sup>18</sup> Henn, *op. cit.* pp. 43, 52.

<sup>19</sup> B. Ringer, “The Role Of The United States In International Copyright - Past, Present, And Future”, 56 (1968) *Georgetown Law Journal*, pp. 1050-1079.

<sup>20</sup> Ladas, *op. cit.* pp. 43, 54-55.

<sup>21</sup> Ricketson, *op. cit.* p. 39.

formed a Union for the protection of industrial property and the Berne Convention formed a Union for the protection of literary and artistic works.

The Paris Convention had its beginnings in some US disgruntlement with a world fair for inventions which was being planned for Vienna in 1873. These world fairs, like the trade fairs of medieval Europe, were important meeting places. The U.S.A., echoing the fears of other countries, suggested that many inventions at the fair would end up benefiting the Austrian public without foreign inventors seeing any returns. The idea of a unified international patent system had been an idea circulating for some time, Prince Albert having raised the possibility of a harmonized patent system at the London World Exposition in 1851.<sup>22</sup> It was a German engineer, Karl Pieper, who managed to persuade the Austrians to hold in 1873 a Congress for Patent Reform. After another Congress in 1880, the Paris Convention of 1883 was opened for signature. Within 25 years most major trading nations had joined the Convention.

The Berne Convention was also a product of meeting places in Europe.<sup>23</sup> The bilateral copyright treaties that states had signed were more often than not just a paper reality. They also produced great complexity. An author wanting to know the extent of his protection in other countries would have had to consult a series of treaties and domestic laws. Influential authors like Victor Hugo, whose reputations and works crossed boundaries, formed the International Literary Association in Paris in 1878.<sup>24</sup> This Association began to hold regular meetings in Europe. At its 1883 meeting in Berne it produced a draft text of an international copyright agreement. The Swiss government was persuaded to organize an international conference using this draft text as a starting point for a multilateral convention on copyright. Berne became the site of intergovernmental conferences in 1884, 1885 and 1886, the year in which the Berne Convention was completed and opened for signature and ratification to the world at large. Like the Paris Convention, the Berne Convention had as its axis the principle of national treatment and a set of minimum rights which states had to recognize.

The Paris and Berne Conventions ushered in the multilateral era of international co-operation in intellectual property. The twentieth century saw the proliferation of international intellectual property regimes. Examples of areas that became the subject of international agreements include trade marks (Madrid Agreement (Marks), 1891 and Madrid Agreement (Indication of Source), 1891), designs (Hague Agreement, 1925), performance (Rome Convention, 1961), plant varieties (International Convention for the Protection of New Varieties of Plants, Acts of 1961 and 1991), patents (Patent Co-operation Treaty, 1970), semiconductor chips (Treaty on Intellectual Property in Respect of Integrated Circuits, 1989). The Paris and Berne Conventions also underwent numerous revisions.

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<sup>22</sup> F-K Beier, "One hundred years of international co-operation - the role of the Paris Convention in the past, present and future", 15 (1984) *International Review of Industrial Property and Copyright Law*, pp. 1, 2.

<sup>23</sup> In the case of copyright the first crucial international meeting was the Congress on Literary and Artistic Property held in Brussels in 1858. See Ricketson, *op. cit.* pp. 41-46.

<sup>24</sup> M. Kampelman, "The United States and International Copyright", 41 (1947) *American Journal of International Law*, pp. 406, 410-411.

Treaty-making in intellectual property was accompanied by the rise of international organizational forms. The Paris and Berne Conventions saw the creation of international bureaus (secretariats) which were merged in 1893 to form the United International Bureaux for the Protection of Intellectual Property (known by the French acronym of BIRPI).<sup>25</sup> BIRPI was superseded by a new organization, WIPO, which was established by treaty in 1967. WIPO became a specialized agency of the United Nations in 1974.

The international world of intellectual property over which BIRPI and then WIPO presided was a world in which sovereign states had agreed to certain foundational principles, the most important being the principle of national treatment. But by no means was it a world in which there was a harmonization of technical rules. States retained enormous sovereign discretion over intellectual property standard setting. The U.S.A. continued with its 'first to invent' patent system while other countries operated with a 'first to file' system. Civil code countries recognized the doctrine of moral rights for authors while common law countries did not. Developing countries (and for a long time many developed countries) did not recognize the patenting of chemical compounds. Standards of trade mark registration varied dramatically, even between countries from the same legal family. The law of unfair competition was a projection of local instinct even though the Paris Convention required all member states to protect against it.

Despite the fact that WIPO in 1992 administered 24 multilateral treaties, it presided over an intellectual property world of enormous rule diversity. By 1992 the organization also sensed, perhaps more strongly than anyone, the sea change that was about to take place in the regulation of intellectual property. The General Agreement on Tariffs and Trade (the GATT), across the road from WIPO in Geneva, was about to see to that. WIPO stood by as trade lawyers forced the world of intellectual property into the global era.

### (iii) The Global Period

During the international period the harmonization of intellectual property was a painstakingly slow affair. After the Second World War more and more developing countries joined the Paris and Berne Conventions. These conventions ceased to be Western clubs and under the principle of one-vote-one-state, Western states could be outvoted by a coalition of developing countries. Developing countries were not simply content to play the role of a veto coalition. They wanted an international system that catered to their stage of economic development and so, in the eyes of the West at least, they began to throw their weight around. In copyright, led by India, developing countries succeeded in obtaining the adoption of the Stockholm Protocol of 1967. The aim of the Protocol was to give developing countries greater access to copyright materials. Its adoption provoked something of a crisis in international copyright.<sup>26</sup> The Paris

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<sup>25</sup> A. Bogsch, *Brief History of the First 25 Years of the World Intellectual Property Organization* (World Intellectual Property Organization, Geneva, 1992) pp. 7-8.

<sup>26</sup> H. Sacks, "Crisis in International Copyright: The Protocol Regarding Developing Countries" (1969) *Journal of Business Law*, p. 26.



Convention also became the subject of Diplomatic Conferences of Revision in 1980, 1981, 1982 and 1984 with developing countries pushing for more liberal provisions on compulsory licensing.

During the 1960s, India had experienced some of the highest drug prices in the world. Its response was to design its patent law to help to bring about lower drug prices. Under Indian law, patents were granted for processes relating to the production of pharmaceuticals, but not for chemical compounds themselves. When it came to reforming the Paris Convention, countries like India pushed for provisions that would give developing countries more and more access to technology that had been locked up by means of patents. For India this was rational social policy for the educational and health care needs of its citizens. For the U.S.A., it was a case of free-riding. The U.S.A. in particular found itself more and more isolated at meetings relating to the Paris Convention.<sup>27</sup>

The international period was a world in which a lot of free-riding was tolerated. The only enforcement mechanism under the various intellectual property treaties were appeals to the International Court of Justice and most states took reservations on such clauses. No state was in a position to cast the first stone when it came to free-riding. The U.S.A. was not a member of the Berne Convention, but U.S. publishers took advantage of its higher standards of protection ‘through the back door’ method of arranging simultaneous publication in a Berne country like Canada.<sup>28</sup>

Not everybody in the U.S.A. was happy with this *laissez faire* attitude towards the enforcement of intellectual property rights. For the U.S. film and pharmaceutical industries in particular, intellectual property (copyright for the former, patents for the latter) represented the backbone of their industries. For pharmaceutical companies like Pfizer, intellectual property was an investment issue. They wanted to be able to locate production anywhere in the world safe in the knowledge that their intellectual property would be protected. Within the lobbying networks that had been organized by these global business entities, an idea began to be bounced around between a small group of consultants, lobbyists and lawyers who traveled these networks - that of linking intellectual property to trade.<sup>29</sup> There were two obvious advantages of such a move. First, if a set of intellectual property standards could be made part of a multilateral trade agreement it would give those standards a more or less global coverage. Second, use could be made of the enforcement mechanisms that states had developed for settling trade disputes.

During the 1980s, the U.S.A. reshaped its trade law to give it a series of bilateral enforcement strategies against countries it considered had inadequate levels of intellectual property enforcement or which were weak on the enforcement of such

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<sup>27</sup> S. K. Sell, “Intellectual Property as a Trade Issue: From the Paris Convention to GATT”, XIII (1989) *Legal Studies Forum*, pp. 407-422.

<sup>28</sup> Henn, *op. cit.* p. 65.

<sup>29</sup> For the history of this see P. Drahos, “Global property rights in information: the story of TRIPS at the GATT”, 13 (1995) *Prometheus*, pp. 6-19.

rights.<sup>30</sup> In 1984, the U.S.A. amended its Trade Act of 1974 to include intellectual property in the 'section 301' trade process. The 1984 amendment had a sequel in the form of the Omnibus Trade and Competitiveness Act of 1988. This latter Act strengthened the 301 process by adding more processes called 'Regular 301', 'Special 301' and 'Super 301.'<sup>31</sup> Essentially these provisions required the Office of the United States Trade Representative to identify problem countries, assess the level of abuse of US intellectual property interests and to enter into negotiations with those countries to remedy the problems. Ultimately, if this proved futile, the U.S.A. could impose trade sanctions. Countries caught up in the 301 process came to learn a simple truth. If they failed to act on intellectual property they would, sooner or later, face retaliatory action from the U.S.A.

At the Ministerial Meeting at Punta del Este in September of 1986, the meeting which launched the Uruguay Round of trade talks, intellectual property was included as a negotiating issue. The U.S.A. had the support of Europe, Canada and Japan for the inclusion of intellectual property in the Round but it was basically a U.S. initiative. It was the U.S.A., more specifically the U.S. business community, which had made all the running on the matter of intellectual property.

On 15 April 1994, the Uruguay Round concluded in Marrakech with the signing of the Final Act Embodying The Results Of The Uruguay Round Of Multilateral Trade Negotiations. More than 100 countries signed the Final Act. It contained a number of agreements including the Agreement Establishing the World Trade Organization and the TRIPS Agreement. The TRIPS Agreement was made binding on all members of the World Trade Organization (WTO). There was no way for a state that wished to become or remain a member of the multilateral trading regime to side-step the TRIPS Agreement.

#### (iv) Post-TRIPS

The TRIPS Agreement marks the beginnings of the global property epoch. The TRIPS Agreement is built on the edifice of the principles of territoriality and national treatment. But it also represents the beginnings of property globalization. Via the trade linkage, the TRIPS Agreement reaches all those states that are members of the multilateral trading system or which, like China, wish to become members. The regional commercial unions that have developed in the last few years have as one of their key objectives the implementation of the TRIPS Agreement.<sup>32</sup> More generally, intellectual property has come to feature strongly in regional arrangements of the 1990s, particularly trade arrangements.<sup>33</sup> The North American Free Trade Agreement (NAFTA) contains

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<sup>30</sup> See M. Blakeney, *Trade Related Aspects of Intellectual Property Rights* (Sweet & Maxwell, London, 1996) Ch.1.

<sup>31</sup> M. Getlan, "TRIPS and Future of Section 301: A Comparative Study in Trade Dispute Resolution", 34 (1995) *Columbia Journal of Transnational Law*, pp. 173, 179.

<sup>32</sup> M. Blakeney, "The Role of Intellectual Property Law in Regional Commercial Unions in Europe and Asia", 16 (1998) *Prometheus*, pp. 341, 349.

<sup>33</sup> An early example of regionalism in intellectual property are the Montevideo Conventions of 1889 which dealt with patents and trademarks, involving Argentina, Bolivia, Brazil, Chile, Paraguay, Peru, and

extensive provisions on intellectual property. Those provisions in fact served as something of a model for what might be achieved in respect of intellectual property at the multilateral level during the Uruguay Round of negotiations. In a recent survey of the role of intellectual property in regional commercial unions, Blakeney has identified different forms of co-operation and convergence on intellectual property law taking place amongst the states of the Central European Free Trade Agreement, the Association of South East Asian Nations, the Mekong River Basin Countries and the Asia Pacific Economic Co-operation Forum.<sup>34</sup>

In the past states have been able to steer their way through the international intellectual property framework by taking reservations on clauses in treaties or by not ratifying certain protocols or conventions. All of the TRIPS Agreement is binding on all members of the WTO. The TRIPS Agreement incorporates various other intellectual property conventions by reference. States, therefore, have to implement a common and enlarged set of intellectual property standards, standards that become common to more states by virtue of their participation in regional and multilateral trade regimes. More and more standards are becoming mandatory rather than permissive for states. States, for example, have less discretion to determine what can be patentable and what cannot.

The post-TRIPS era has been a period in which countries have had to engage in the task of national implementation of their obligations under the TRIPS Agreement. Least-developed countries have the advantage of a ten year transitional period under the agreement, but they have been under pressure from developed countries to move sooner rather than later on its implementation. The TRIPS Agreement operates under an institutional arrangement designed to promote compliance. The WTO Agreement establishes a Council for TRIPS, which is required to monitor members' compliance with their obligations under the agreement. The practice which seems to be developing is that states like the U.S.A. and Europe are asking other states to explain their intellectual property laws and whether they comply with the TRIPS Agreement. The monitoring by the Council for TRIPS, the active interest of the U.S.A. and Europe in the enforcement of intellectual property obligations, and the fact that disputes under the TRIPS Agreement can be made the subject of proceedings under the dispute resolution mechanism of the Final Act, mean that obligations of the TRIPS Agreement will over time become a living legal reality for states rather than suffering the fate of so many conventions, that of remaining paper rules.

The post-TRIPS period has also seen multilateral treaty-making in intellectual property continue. On December 20, 1996, under the auspices of WIPO, the WIPO Performances and Phonograms Treaty and the WIPO Copyright Treaty were concluded. The U.S.A. was one of the main agitators for a new international instrument to deal with the entry of copyright into the digital age. As part of its National Information Infrastructure Initiative in 1993, the U.S.A. had established a working group on

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Uruguay. The Treaty of Rome (1957), the treaty that constituted the European Common Market, provided for conditional protection of national intellectual property rights in Article 36.

<sup>34</sup> Blakeney, "The Role of Intellectual Property Law in Regional Commercial Unions in Europe and Asia", *op. cit.* pp. 341-349.

intellectual property rights. This working group recommended in a report in 1995 that the distribution right of copyright owners be clarified to include transmission, and that the law prohibit the circumvention of copyright protection systems.<sup>35</sup> The U.S.A. sought to globalize this copyright owner's agenda by pushing for the inclusion of some new form of communication right in an international instrument. The negotiating history of these two treaties is significant in that copyright owners met with organized resistance from copyright users. The U.S.A. consumer movement, for instance, was particularly active in successful opposition to the proposed database treaty. Copyright owners had both wins and losses at these negotiations. The Copyright Treaty grants copyright owners a right of communication to the public, but recognizes the right of states to determine the extent of the copyright owner's right of distribution.

All this suggests that future multilateral treaty-making in intellectual property will be a complex game fought out between user and owner groups, groups whose membership transcends national boundaries. Library groups, educational institutions, internet service providers and developers of software applications are likely to unite to oppose large software companies and publishers on matters of copyright reform. Indigenous peoples non-governmental organizations (NGO's), and environmental NGO's are likely to unite to fight the extension of the patent system to higher order life forms. Intellectual property policy has become a highly politicized arena in which state and non-state actors will continue to contest not just the rules of intellectual property, but also the roles of markets and government. Triumphs of the scale of the TRIPS Agreement may in the future be much harder to secure.

The TRIPS Agreement is but one part of a much deeper phenomenon in which intellectual property is playing a crucial role - the regulatory globalization of the norms of contract and property. Property law constitutes the objects of property; contract enables the exchange of those objects. Through contract the objects of property become tradeable capital. Together these norms constitute markets. This is a phenomenon we shall come back to in the last section of the paper.

An illustration of this phenomenon is the link between intellectual property and investment. The international regulation of investment for most of its history has occurred bilaterally. States over the years have created a web of bilateral investment treaties. Intellectual property, like any other asset, can be made the subject of a treaty. One aspiration in the Uruguay Trade Round, held mainly by international business, was that the Round would deliver a comprehensive multilateral agreement on investment that would free business from the restrictions on investment that were to be found in bilateral treaties. The ink eventually dried on a far more modest investment agreement - the Agreement On Trade-Related Investment Measures (the TRIMS Agreement). This agreement applies only to trade in goods. Since the TRIMS Agreement, negotiations at the Organization for Economic Cooperation and Development (the OECD) have seen the emergence of a draft text for a Multilateral Agreement on Investment (the MAI). The

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<sup>35</sup> The Report of The Working Group on Intellectual Property Rights, *Intellectual Property and the National Information Infrastructure* (Information Infrastructure Taskforce, United States of America, September 1995).

MAI negotiating text has gone through a number of changes, but all versions have defined investment to include every kind of asset including intellectual property rights.<sup>36</sup>

Intellectual property norms are also becoming a part of the emerging *lex cyberatoria* - the trade norms of cyberspace. The International Chamber of Commerce (the ICC) in a recent discussion paper stated that “[i]n cyberspace, all assets are intangible and can be classified as intellectual property.”<sup>37</sup> More generally, governments and business non-governmental organizations (NGO’s) have agreed that the intellectual property issues raised by electronic commerce have to be clearly settled. So far norm-setting on the intellectual property issues has proceeded largely by way of model laws that have been generated by international organizations of states (for example, the UNCITRAL Model Law on Electronic Commerce), national law reform bodies (for example, the work of National Conference of Commissioners on Uniform State Laws on Article 2B (dealing with the licensing of intellectual property rights)) or business NGO’s (for example, the ICC).

### 3. Human Rights, the Right of Property and Intellectual Property

The previous section showed that intellectual property rights are part of a complex regime of bilateral, regional and multilateral treaties that has been evolving since the nineteenth century. This section looks briefly at the extent to which intellectual property rights have been recognized in the human rights regime. The following two sections then explore the relationship between intellectual property rights and human rights.

The international document, which can perhaps be said to constitutionalize the human rights regime, is the Universal Declaration of Human Rights, 1948 (the UDHR). The UDHR does not expressly refer to intellectual property rights, but Article 27.2 states that “Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.” At the same time Article 27.1 states that everyone has “the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.” Article 27 thus carries with it a tension familiar to intellectual property law - the tension between rules that protect the creators of information and those that ensure the use and diffusion of information. The recognition of the interests of authors in the UDHR is complemented by the proclamation in Article 17.1 of a general right of property. This Article states that “[e]veryone has the right to own property” and 17.2

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<sup>36</sup> The text of the MAI is available at <http://www.oecd.org/daf/cm/mai/maitem.pdf>. The MAI negotiation like the Uruguay Trade Round is proving to be a protracted affair. The application of the MAI to intellectual property raises some as yet unresolved conceptual problems. Amongst other things, the regulation of intellectual property rights by governments (for example, compulsory licensing) might constitute expropriation for the purposes of the investment regime. Moreover, since, on one view, intellectual property rights are monopoly rights they might be argued to stand in the way of investment flows just as much as they facilitate them. Clearly some clever drafting will be required to overcome these kinds of potential problems.

<sup>37</sup> International Chamber of Commerce, “E-commerce roles, rules and responsibilities: A roadmap”, June 4, 1998, p. 11.

states that “[n]o one shall be arbitrarily deprived of his property.” The implication of Article 17.2 is that states do have a right to regulate the property rights of individuals, but that they must do so according to the rule of law.

The rights of the UDHR are further developed in the International Covenant on Civil and Political Rights (the ICCPR), 1966 and the International Covenant on Economic, Social and Cultural Rights (the ICESCR), 1966. In the atmosphere of the cold war, led by the former Soviet Union, newly emergent sovereign African and Asian states shaped the drafting of the two covenants with a view to emphasizing the rights of self-determination, national sovereignty over resources and freedom from racial discrimination.<sup>38</sup> The general right of property with its impeccable liberal pedigree stretching back to the Declaration of the French Revolution and the Bill of Rights of the U.S.A. did not make it into the two Covenants. Article 15.1 (c) of the ICESCR recognizes the right of an author to “benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production” produced by the author. By implication the article assumes that authors are entitled to the protection of their interests. The right recognized in Article 15. 1(c) is itself one element of a general right, the other two elements being essentially rights of access to cultural life and to the benefits of scientific progress. Together the two Covenants place a discernible emphasis on the interests that humans have in the diffusion of knowledge.<sup>39</sup>

The two Covenants along with the Declaration form the edifice upon which the international law of human rights rests, the International Bill of Rights as they are generally called.<sup>40</sup> Some international human right instruments do recognize a general right of property or something close to it. The African Charter on Human and Peoples’ Rights, 1981<sup>41</sup> in Article 14, guarantees the right to property, although it then goes on to recognize that that right may be encroached upon in the “interest of public need or in the general interest of the community”. The American Convention on Human Rights, 1969, in Article 21.1, recognizes a right of property, a right which no one is to be deprived of “except upon payment of just compensation” (see Article 21.2). A right to property was not included in the European Convention of Human Rights and Fundamental Freedoms, 1950 because of controversy over its drafting, but a right to peaceful enjoyment of one’s possessions was included in Article 1 of Protocol 1.<sup>42</sup> That Article then goes on to recognize the right of a “State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest.”

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<sup>38</sup> J. W. Nickel, *Making Sense of Human Rights* (University of California Press, Berkeley, 1987) pp. 66-67.

<sup>39</sup> See, for example Article 11 of the ICESCR (promoting the dissemination of knowledge in the context of freedom from hunger), Article 15.2 (stating that the right in article 15.1 requires states to take steps to diffuse science and culture), Article 15.3 (requiring respect for freedom of scientific research) and Article 19.2 of the ICCPR (linking freedom of expression to the flow of information).

<sup>40</sup> H.J. Steiner and P. Alston, *International Human Rights In Context* (Clarendon Press, Oxford, 1996) p. 121.

<sup>41</sup> 21 ILM (1982) 59-68.

<sup>42</sup> For a discussion, see F. G. Jacobs and R. C. A. White, *The European Convention On Human Rights*, 2nd. ed. (Clarendon Press, Oxford, 1996) pp. 246-247.

The status of the right of property in international law raises some complex issues. It does seem uncontroversial to suggest that the right of property forms part of the norms of international law. States through practices and treaties routinely recognize the property rights of their citizens as well as those of other states and their nationals. Without that recognition travel, diplomacy, investment and international commerce would be impossible. The difficult issues relate to the nature and scope of the right. Is it a negative right (the right not to have possessions interfered with) or does it include positive elements (the right to acquire property)? The right of property can, using a variety of legal taxonomies, be disaggregated into a number of different types (real, personal, equitable, tangible, intangible, documentary, non-documentary and so on). Does the recognition of a right of property in international law apply with equal force to all the different types of property that can be identified? Do all, some or any of these different kinds of property rights qualify as fundamental human rights?

In an interesting discussion of these issues, Schermers concludes that most property rights cannot be included in the category of fundamental human right.<sup>43</sup> His argument assumes that human rights and property rights can be broken up into categories. Fundamental human rights, he suggests, are “human rights of such importance that their international protection includes the right, perhaps even the obligation, of international enforcement.”<sup>44</sup> Most property rights, he suggests, do not fit into this category. Certainly it is hard to see how intellectual property rights do. He suggests that the only possible exceptions to this are those needs-based personal property rights, without which the exercise of other rights like the right to life would be meaningless. Moreover, the absence of the general right of property from the ICCPR weakens the claim that it is part of customary international law.<sup>45</sup> Attempting to put property rights into the category of fundamental human rights also encounters a conceptual problem. Both private international and public international law recognize the right of sovereign states to regulate property rights, to adjust them to economic and social circumstances.<sup>46</sup> Yet this is precisely not the way in which we think about fundamental human rights norms that prohibit genocide, torture and slavery, norms that at least some scholars argue are part of customary international law.<sup>47</sup> States cannot adjust these norms to suit their convenience. In the case of property, however, not only is it convenient for states to adjust property norms, but it seems vital to the development of their economies that they have the power to do so. It is for this kind of reason that the European Commission of Human Rights concluded that the grant under Dutch law of a compulsory licence in a patented drug was not an interference in the patent holder’s rights under Article 1 of Protocol 1 of the

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<sup>43</sup> H. G. Schermers, “The international protection of the right of property”, in F. Matscher and H. Petzold (eds.), *Protecting Human Rights: The European Dimension* (Carl Heymanns Verlag KG, Köln, 1988) pp. 565-580.

<sup>44</sup> *Ibid.* pp. 565, 579.

<sup>45</sup> R. B. Lillich, “Global Protection of Human Rights” in Theodor Meron (Ed.), *Human Rights In International Law: Legal And Policy Issues* (Clarendon Press, Oxford, 1984, 1992 reprint) pp. 115-170, 157.

<sup>46</sup> During the drafting of article 17 of the Universal Declaration it was agreed that ownership of property was subject to national laws, but that there was no need to state this in the Declaration. See Lillich, *ibid.* pp. 115-170, 157, fn. 29.

<sup>47</sup> For an argument to this effect see A. D' Amato, *International Law: Process and Prospect* (Transnational Publishers, Dobbs Ferry, New York, 1987) Ch.6.

European Convention of Human Rights. The “compulsory licence was lawful and pursued a legitimate aim of encouraging technological and economic development.”<sup>48</sup>

Thinking about the right of property in the context of human rights reveals nicely the ‘paradox of property.’ At one level it is inconceivable that the development of human personality and the protection of individual interests within a group can take place in the absence of property rules that guarantee the stability of individual possession. Yet within the context of the social group no other rules require the continuous adjustments that the rules of property do.<sup>49</sup> Modern governments continuously change the rules relating to the use of land, personal chattels, tax, welfare and so on. In modern societies property rights are in a constant state of adjustment. They are the means by which governments solve externality problems. It is for this reason we find that, when a general right of property is recognized in a human rights instrument, it is made subject to some sweeping public interest qualification.

Within information societies, societies where more and more individuals make their living through the production, processing and transfer of information, the paradox of property intensifies. One reason is that information in various complex ways becomes implicated in the exercise of fundamental human rights. So, to take an example, freedom of expression in a preliterate, pre-industrial world is a classical negative right. In the global digital village, however, the right of freedom of expression becomes a means by which to protect other more complex activities than simply the right not to be interfered with when one stands on a soapbox in the park. Citizen groups begin to demand access to the media so that their interests *qua* citizens are recognized. Freedom of communication is appealed to in this process, not as a classical negative right, but rather as a right of access, a positive right. Expression itself takes on many more forms. The complex jurisprudence that has arisen in the U.S.A. around freedom of speech is testimony to the way in which changing technological contexts force us to reconceptualize rights.<sup>50</sup>

Another reason that the paradox of property continues to deepen in our world is that the human rights regime continues to expand, so much so that some scholars have called for quality control on the origination of such rights.<sup>51</sup> The result of this expansion is that many more interests become the subject of rights claims, claims that involve use of information. Human rights scholars talk of three generations of human rights: classical rights (first generation), welfare rights (second generation) and peoples’ rights or solidarity rights (third generation). These third generation rights are the subject of

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<sup>48</sup> Application 12633/87 *Smith Kline and French Laboratories Ltd v The Netherlands*, 4 October 1990, (1990) 66 European Commission of Human Rights, *Decisions and Reports*, 70, 80.

<sup>49</sup> The right of governments to regulate the ownership of property through positive law was recognized by natural rights theorists like Locke. See P. Drahos, *A Philosophy of Intellectual Property* (Dartmouth, Aldershot, 1996) pp. 48-53.

<sup>50</sup> See T. Campbell and W. Sadurski, (Eds.) *Freedom of Communication* (Aldershot, 1994); F Schauer, *Free Speech: a philosophical enquiry* (Cambridge University Press, Cambridge, 1982). On copyright, internet and freedom of speech see S. Fraser, “The Conflict Between the First Amendment and Copyright Law and its Impact on the Internet”, 16 (1998) *Cardozo Arts & Entertainment Law Journal*, pp. 1-52.

<sup>51</sup> P. Alston, “Conjuring up new human rights: a proposal for quality control”, (1984) 78 *AJIL*, p. 607.



continuing debate at the levels of conceptual coherence, identification, and status in international law.<sup>52</sup>

For our purposes it is important to note that the identification and recognition of such rights in international law offer more potential points of conflict or tension with intellectual property rights. It is tension and conflict that is involved rather than breach. Human rights instruments tend to be drafted at the level of principle and in open textured ways. The precise content of these rights is difficult to formulate. Moreover, many of these instruments exist in that twilight zone of normativity known to international lawyers as soft law. These instruments are often recommendatory for member states or represent the views of NGO's. The Declaration of Principles of Indigenous Rights, 1984, for example, is a declaration of the Fourth Assembly of the World Council of Indigenous Peoples. The Convention on Biological Diversity, 1992<sup>53</sup> does recognize the concept of indigenous intellectual property, but it does so in language that requires a specification of content through protocols and other instruments.<sup>54</sup> By sharp contrast, most of the norms of international intellectual property law derive from treaty law.<sup>55</sup>

One candidate for a peoples' right is the right to development. The content of this right is, naturally enough, the subject of debate.<sup>56</sup> The Declaration on the Right to Development, 1986<sup>57</sup> is vague about the positive obligations of assistance that the right places on those against whom the right is being asserted.<sup>58</sup> Bedjaoui, in his discussion of the right, maintains that it involves the right of a people to choose its own model of development ( by implication a negative right) as well as the right to receive a share of resources that under the principle of the common heritage of mankind belong to all states (by implication a positive right).<sup>59</sup> Clearly, there is considerable tension between intellectual property rights and the right to development. Patent systems, for example,

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<sup>52</sup> For a discussion of the issues, see J. Crawford (Ed.), *The Rights of Peoples* (Clarendon Press, Oxford, 1988).

<sup>53</sup> 31 ILM (1992) 818.

<sup>54</sup> On the issue of 'softness' of norms in the environmental context see J. Ayling, "Serving Many Voices: Progressing Calls For An International Environmental Organization", 9 (1997) *Journal of Environmental Law*, pp. 243, 255-258.

<sup>55</sup> There are examples of where the concept of indigenous intellectual property gains some recognition in treaty law. The most obvious example is the Convention on Biological Diversity. Article 8(j) of that Convention requires states to respect, preserve, maintain and promote indigenous knowledge and lifestyles relevant for the conservation and sustainable use of biodiversity. Article 16.2 of that same Convention provides that any technology which is the subject of intellectual property rights and which is transferred pursuant to the objectives of the Convention must be transferred "on terms which recognize and are consistent with the adequate and effective protection of intellectual property rights". Article 18.1 of the Convention on Combat Desertification, 1994 also makes it clear that the process of technology transfer must take account of the need to protect intellectual property rights.

<sup>56</sup> For a history of the right in the North-South context, see P. Alston, "Revitalizing United Nations Work on Human Rights and Development", (1991) 18 *Melbourne University Law Review*, p. 216.

<sup>57</sup> United Nations General Assembly Resolution 41/28.

<sup>58</sup> Article 4.1 provides that States have the duty to take steps, individually and collectively, to formulate international development policies with a view to facilitating the full realization of the right to development.

<sup>59</sup> See M. Bedjaoui, "The Right to Development" in M. Bedjaoui (Ed.), *International Law: Achievements and Prospects* (UNESCO, Martinus Nijhoff Publishers, Paris and The Netherlands) pp. 1177-1193.

restrict access to life-saving drugs, by raising the price of those drugs. Raising drug prices globally will, all else being equal, generally adversely affect the health of the populations of poorer states.<sup>60</sup> The preventable death of large numbers of a state's population lowers its stock of human capital thereby interfering in its development prospects. The argument has a particular bite in the context of information, since information once in existence can be made available at zero or little cost. The recognition of a right to development might be the basis on which to argue that states should co-operate in lowering levels of intellectual property protection in some areas, or at least not advance those levels. However, it is important to note that there is no necessary conflict between the right of development and intellectual property. If it turns out to be empirically true that intellectual property rights contribute to economic development, there is no conflict.<sup>61</sup>

The precise content of cultural rights are amongst the most difficult to formulate of all peoples' rights. Nevertheless in those instruments that deal with cultural rights in the context of peoples' rights one can discern two broad principles, the thrust of which run counter to the policies of western intellectual property regimes. The first is a proprietary principle in which the right of a people to claim its entire culture is recognized. An example is Article 14 of the Universal Declaration of the Rights of

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<sup>60</sup> Within India, for example, the National Working Group on Patent Laws has pointed out that the implementation of the TRIPS Agreement will cause drug prices to rise dramatically. The drug Zantac retails in India for 18.53 rupees, in the UK at the equivalent of 484.42, and in the USA at the equivalent of 1050.70. Under the TRIPS Agreement, India is obliged to introduce product patents for medicines. Pakistan has introduced product patents. Zantac now retails in Pakistan at the equivalent of 260.40 rupees i.e. 11.27 times its price in India. See B.K. Keayla, *New Patent Regime: Implications for Domestic Industry, Research & Development and Consumers* (National Working Group on Patent Laws, New Delhi, January 1996) p. 20.

<sup>61</sup> This, of course, is the million dollar question. Most of the empirical evidence that exists on this question has been gathered in patents field. Much of the evidence here suggests that developing countries in particular are better off without the patent system or at least lower levels of protection. For early important work, see F. Machlup, "An Economic Review of the Patent System" (Study No. 15 of the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, U. S. Senate, 85th Congress, Washington D.C., 1958); E.T. Penrose, "International Patenting and the Less-Developed Countries", 83 (1973) *Economic Journal*, p. 766; R. Väyrynen, "International Patenting as a Means of Technological Dominance", 20 (1978) *International Social Science Journal*, p. 315. For a synthesis of much of the literature see A.S. Oddi, "The International Patent System and Third World Development: Reality or Myth?", (1987) *Duke Law Journal*, p. 831; J. Nogués, "Patents and Pharmaceutical Drugs: Understanding the Pressures on Developing Countries", 24 (1990) *Journal of World Trade*, p. 81. For a discussion of patents in the context of trade and technology policy, see B. Lyons, "International Trade and Technology Policy" in P. Dasgupta and P. Stoneman (Eds.) *Economic Policy and Technological Performance* (Cambridge University Press, Cambridge, 1987) pp. 169-205; A. Subramanian, "The International Economics of Intellectual Property Right Protection: A Welfare-Theoretic Trade Policy Analysis", 19 (1991) *World Development* pp. 945-956. For an example of literature that deals with the impact of the patent system on a medium sized country see *The Economic Implications Of Patents In Australia* (Australian Patent Office, Canberra, 1981); Industrial Property Advisory Committee, *Patents, Innovation And Competition In Australia* (Australia, 1984). For a recent critical discussion of intellectual property and conventional economics see D. Lamberton, "Innovation and Intellectual Property" in M. Dodgson and R. Rothwell (Eds.), *The Handbook of Industrial Innovation* (Elgar, Aldershot, 1994) pp. 301-309.

Peoples, 1976<sup>62</sup> which simply states that “every people has the right to its artistic, historical and cultural wealth.” Similarly, the Declaration of San José, which elaborates and condemns the concept of ‘ethnocide’, claims that Indian peoples have natural and inalienable rights of access, use, dissemination and transmission in the cultural heritage of their territories.<sup>63</sup> A proprietary claim to an entire cultural heritage is not a right that is presently recognized by western intellectual property systems. The second principle evident in peoples’ cultural rights is, somewhat paradoxically, a principle of cultural diffusion, based on the idea that cultures are part of a global intellectual commons to which all humans have some rights of access. The UNESCO Declaration of the Principles of International Cultural Co-operation, 1966, for example, in Article VII.1 states that “[b]road dissemination of ideas and knowledge, based on the freest exchange and discussion, is essential to creative activity, the pursuit of truth and development of the personality.” At the abstract level, a principle of cultural diffusion is not necessarily inconsistent with western intellectual property regimes, since most of those regimes allow their subject matter to fall back into the commons under certain conditions. But as was noted at the beginning of this paper, intellectual property systems are expanding in scope and strength of protection. At the concrete level it is hard to see how a principle of cultural diffusion is to work, if the practical effect of increasingly stronger intellectual property regimes is to raise the cost of educational, cultural and scientific information. Putting a price on or increasing the price of information necessarily inhibits its diffusion.

More generally, peoples’ rights are increasingly being used in campaigns by indigenous groups all over the world to reclaim or protect their traditional lands and resources. These include traditional resource management techniques, biological resources, and specific knowledge about the practical uses of those biological resources.<sup>64</sup> Protecting these informational resources within the context of the existing intellectual property regime raises some well-known problems. The present international intellectual property regime, as we have seen, is a western positive law regime that has been shaped by liberal political traditions. National intellectual property systems around the world link the origination of rights to individual persons and maximize the capacity of individual owners to trade in these rights. The sharp divisions, for example, that western lawyers draw between real and personal property rights do not resonate in indigenous cultures where the connections between land, knowledge and art form part of an organic whole. The practical outcome for indigenous groups is that many of their traditional informational resources fail to obtain protection.<sup>65</sup> Often this means that they can be freely appropriated.

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<sup>62</sup> Its status is described by Crawford as an ‘[u]nofficial declaration of scholars and publicists; basis for activities of Permanent Peoples’ Tribunal, a private foundation.’ See J. Crawford (Ed.), *The Rights of Peoples* (Clarendon Press, Oxford, 1988) p. 187.

<sup>63</sup> See Articles 7 and 8 of UNESCO Latin-American Conference, Declaration of San José, 11 December 1981, UNESCO Doc FS 82/WF.32 (1982), extracted in Crawford *op.cit.* pp. 202-203.

<sup>64</sup> For a comprehensive discussion of the recent history see J. Sutherland, “Representation of indigenous peoples’ knowledge and practice in modern international law and politics”, 2(1) (1995) *Australian Journal of Human Rights*, pp. 39-57; J. Sutherland, “TRIPS, Cultural Politics and Law Reform”, 16 (1998), *Prometheus*, pp. 291-303.

<sup>65</sup> See M. Blakeney, “Protection of traditional medical knowledge of indigenous peoples”, (1997) 6 *EIPR*, p. 446; J. Tunney, “E.U., I.P., Indigenous People and the Digital Age: Intersecting Circles”, (1998) 20 *EIPR*, pp. 335-346.

The response of indigenous peoples, as well as western NGO groups,<sup>66</sup> has been to begin a political struggle to change the existing intellectual property regime. During the course of this struggle, intellectual property has become linked to much bigger issues including the sovereignty and self-determination of indigenous peoples, the protection of culture, food security, biodiversity, sustainable development, health policy and biotechnology.<sup>67</sup> In these contests, for activists, peoples' rights have become the language of emancipation, western intellectual property regimes the medium of oppression. Indigenous groups have generated numerous declarations condemning prevailing intellectual property systems as, in the words of the COICA statement, 'colonialist', 'racist' and 'usurpatory'.<sup>68</sup>

One important point about these declarations is that they do not, however, abandon the concept of intellectual property altogether. Instead they assert and call for the recognition of indigenous intellectual property rights.<sup>69</sup> Indigenous peoples, it seems are seeking to make intellectual property serve a function beyond that of appropriation of value. They want property to function in a way that allows them to control the use of cultural information which in some deep sense is part of them, to which they are attached, cultural information they do not necessarily want to become the subject of global processes of commodification and appropriation. For them, intellectual property should first and foremost function to preserve their way of life.

#### 4. Intellectual Property Rights: Universally Recognized or Universal Rights?

It is an empirical fact, as the historical survey in section 2 has shown, that intellectual property rights are universally recognized. Does it follow from their universal recognition that they are universal norms (in other words, human rights)? If we define universal norms as those that are universally recognized, the answer is obviously yes. This definitional solution would probably be unsatisfactory to someone within the human rights tradition, especially for those theorists who defend human rights within a framework of moral realism.<sup>70</sup> For moral realists, the existence of universal rights is not contingent upon the test of recognition. If universal moral rights exist, they do so outside the framework of positive law. Even for non-moral realists, a simple recognitional test seems an unsatisfactory way of deciding whether or not something has the status of a

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<sup>66</sup> The Rural Advancement Foundation International (RAFI) is a western NGO that has been particularly active and successful in the cause of farmers' rights and the recognition of sustainable use of biodiversity.

<sup>67</sup> The links between biodiversity, sustainable development and indigenous knowledge are recognized in the Convention on Biological Diversity. See Articles 8(j), 10(c) and 18(4). See also Principle 22 of the Declaration of the UN Conference on Environment and Development (1992) and Chapter 26 of Agenda 21.

<sup>68</sup> The COICA Statement, 1994, Statement by the Coordinating Body of Indigenous Organizations of the Amazon Basin, on intellectual property rights and biodiversity.

<sup>69</sup> Two Australian examples of this are the *Julayinbul Statement on Indigenous Intellectual Property Rights* and the *Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples*. See H. Fourmille, "Protecting Indigenous Property Rights in Biodiversity", (March 1996) *Current Affairs Bulletin*, pp. 36-41.

<sup>70</sup> Moral realists defend the proposition that moral values are objective. For moral realists moral truth exists.

human right. The norms of etiquette that govern the interaction of travelers at international airports around the world are examples of widely recognized norms. Does it follow that the right to queue, for instance, has the same universal status as the rights of life and liberty? There seems to be ‘something more’ involved in the idea of a universal human rights norm whether or not one is a moral realist.<sup>71</sup>

One means by which to derive this ‘something more’ for intellectual property norms would be to argue that intellectual property rights are a species of natural right. One argument for justifying the existence of intellectual property rights is to claim that they are natural rights. Presenting intellectual property as a human right using the conceptual apparatus of natural right theory faces a number of difficulties. The first is that, even if one can justify the right of private property as a natural right, one is left with the question of whether intellectual property rights are natural property rights. A possible reply here is that intellectual property rights must be property rights because legislatures around the world declare them to be personal property rights. This begs the question. The existence of a natural right by definition cannot depend on a legislative declaration.

There are other problems. Intellectual property rights exist for a limited period of time, or their continued existence is subject to requirements of registration. The strongest candidates for natural rights must surely be the right to life and liberty. We do not think of those rights as having a limited tenure in the life of the rightholder. We also think of human rights as rights that belong to all humans (see Article 2 of the UDHR). Can we plausibly say that all states should enact a petty patent system, and those that do not breach a human right? Nor does the conceptual apparatus of natural rights theory lead neatly from the exercise of labor to a natural right of property.<sup>72</sup> Within natural rights theorizing about property it was accepted that property rights had about them a conventional character and could be circumscribed by the state.

A second conceptual path to the conclusion that intellectual property rights are fundamental human rights would be to suggest that rights that protect the connection between a creator of an information product and the information product belong in the category of human rights because they protect the personality of the creator. A personality based approach to justification already serves to underpin the civil law systems of author’s right. One issue is whether a personality based theory could plausibly underpin all intellectual property rights.<sup>73</sup> It might turn out that very few intellectual property rights make it into the category of human rights. Even if we accept that there is a personality right that belongs in the category of human rights, it does not

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<sup>71</sup> Nickel, for instance, in describing the conception of human rights to be found in the Universal Declaration, states that “human rights are held to *exist independently* of recognition or implementation in the customs or legal systems of particular countries” (his emphasis). See J. W. Nickel, *Making Sense of Human Rights* (University of California Press, Berkeley, 1987) p. 3. See also M.J. Perry, “Are Human Rights Universal? The Relativist Challenge and Related Matters”, 19 (1997) *Human Rights Quarterly*, pp. 461-509.

<sup>72</sup> See Drahos, *A Philosophy of Intellectual Property*, *op. cit.* Ch.3.

<sup>73</sup> For a discussion see J. Hughes, “The Personality Interest of Artists and Inventors in Intellectual Property”, 16 (1998) *Cardozo Arts & Entertainment Law Journal*, p. 81.

follow that all intellectual property rights protect the personality interest of originators of intellectual property.

A third line of argument might be to simply defend the recognitional test of human rights and say that, because intellectual property rights are widespread in international law, they are human rights. This leads us back to the problem we began with. Is it the case that the universal recognition of a norm turns it into a human rights norm? It is important also to note that this line of argument would have to deal with the kind of problems (described earlier) that Shermers mounts for the view that the right of property is a fundamental human right.

The upshot of this short discussion is that the view that all intellectual property rights are human rights by virtue of their universal recognition is problematic.<sup>74</sup> This should cause no great surprise. Having one's artwork copied is not the same as being stripped of one's bedding, food, medicines or other personal possessions that form the essentials of a daily existence. This still leaves the issue of how we might conceptualize the relationship between intellectual property norms and human rights. The next section suggests how this might be done.

## 5. Intellectual Property and Human Rights: An Instrumental View

It is now accepted in rights theory that the existence and exercise of some rights presupposes the existence of other rights.<sup>75</sup> Philosophers now agree or concede that the classical negative rights of traditional liberalism require for their exercise other kinds of rights. Rights of freedom need to be accompanied by welfare rights. Rights, as it were, come in clusters. It is also clear that important complementarities obtain between rights. So, for instance, the right to education, on the face of it, aids the meaningful exercise of a right of freedom of speech.

Some rights, then, are instrumental in securing the feasibility of claiming other types of rights. The central claim of this section is that the rights created through the enactment of intellectual property laws are instrumental rights. Ideally, under conditions of democratic sovereignty, such rights should serve the interests and needs that citizens identify through the language of human rights as being fundamental. On this view, human rights would guide the development of intellectual property rights; intellectual property rights would be pressed into service on behalf of human rights.

Of course, the history of intellectual property does not square with this ideal. It has as much to do with powerful elites using such privileges to obtain economic rents for themselves as it has to do with parliaments working on behalf of citizens to design rights

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<sup>74</sup> One might note in passing here that human rights activists could easily claim that intellectual property rights are indirectly implicated in human rights abuses. So, for example, the argument would run that the global protection of intellectual property rights forms part of the structure that allows multinationals to locate in those poor countries where labor standards are low or non-existent.

<sup>75</sup> See, for example, H. Shue, *Basic Rights* (Princeton University Press, Princeton, 1980).

that maximize social welfare. This should not surprise us. The economic theory of legislation, the theory of public choice, argues that legislation is essentially a market process in which legislators and interest groups transact business in a way that sees the public interest subordinated to private interest.<sup>76</sup>

Yet the ugly truths that public choice scholars reveal about this or that bit of legislation should not blind us to a broader historical truth concerning the way in which property rights have in the long sweep of the history of western states come to serve humanist values. Moving across a history that begins roughly in the fifteenth century we can advance three generalizations.<sup>77</sup> States have made increasing use of property rules, both civil and criminal, for a variety of purposes. Property rights have become progressively more secure and progressively more immune from arbitrary confiscation by the ruling power. The evolution of the law of contract has made it more possible to negotiate transfers of property with certainty of effect.

These trends towards the expansion, security and negotiability of property have been more or less universal. States which did not guarantee property and contract did not flourish economically compared to states that did. Those states that failed to pursue the goal of efficient property rights paid the price in terms of reduced growth and loss of hegemony.<sup>78</sup> Property and contract law have indeed been foundational to enabling capitalism to take off. While some states were slow to learn this, today there is no national regime on the globe that has not accepted it as a lesson of history. (Although it should be said that, while the formal law of every state stands behind secure property rights and the enforcement of contracts by courts that are independent of the state, in many parts of the world the independence of the judiciary is a fiction.)

The emergence of well defined, secure property rights was a part of a much broader historical process in which absolute monarchies and their legitimating political philosophies lost their institutional dominance to be replaced by the institution of the modern state and secular political philosophies that recognized the rights of individuals within and against the state.<sup>79</sup> Peasants, serfs and vassals became citizens and citizens came to hold property rights created by the sovereign of the state. Women stopped being property of their husbands and became property owners. In all this the creation of secure, well defined property rights that citizens could trade gave expression to a deeper philosophy of the equality and freedom of man. The idea of a natural right of property was one crucial premise in John Locke's rejection of the absolute authority of Kings. Redefining, rethinking, redistributing property has always been one way, perhaps the most important way, in which political ideas and philosophies have made themselves concrete in the world.

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<sup>76</sup> For an introduction to the economic literature see I. Mclean, *Public Choice* (OUP, Oxford, 1991); D.A Farber, and P.P Frickey, *Law and Public Choice* (University of Chicago Press, Chicago, 1991).

<sup>77</sup> For a further discussion see J. Braithwaite and P. Drahos, *Global Business Regulation* (forthcoming 1999), Ch. 2.

<sup>78</sup> D. C. North, *Institutions, Institutional Change And Economic Performance* (Cambridge University Press, Cambridge, 1990) p. 139.

<sup>79</sup> The change in ideological thinking that accompanied these processes is traced by Skinner, *op. cit.*

We now live in an era when capitalist economies, led by the U.S.A., have progressively become information economies. Intellectual property regimes have moved to the center stage of trade regulation and global markets. The old capitalism was a capitalism of goods, factories and labor. These days, factories and labor, even skilled labor, are in abundant supply. The new capitalism is at its core about the control of information and knowledge. It is for this reason that issues concerning the design of intellectual property rights and contract have become so important and pressing.

The institutional design issues raised by intellectual property (and contract) are not simply issues of legal technicality or even economic ones. Property, as this section has argued, is an instrument on which the deeper notes of our political philosophies are to be sounded. Property regimes should serve those values, those needs and interests we identify as fundamental through our moral and political philosophies.<sup>80</sup> The problem we face in the present time is that the institution of intellectual property has globalized without some set of shared understandings concerning the role that that institution is to play in the employment, health, education and culture of citizens around the world. Linking intellectual property to human rights discourse is a crucial step in the project of articulating theories and policies that will guide us in the adjustment of existing intellectual property rights and the creation of new ones. Human rights in its present state of development offers us at least a common vocabulary with which to begin this project, even if, for the time being, not a common language.

Generally speaking, those thinkers whom we regard as having an important role in the formation of modern political thought said nothing or very little about intellectual property. To illustrate: John Locke's discussion of property in Chapter V of the *Second Treatise* has inspired discussions of Lockean theories of intellectual property,<sup>81</sup> but there is not one mention of intellectual property in that chapter. Hegel in his *Philosophy of Right* makes some brief passing observations concerning property and products of the mind.<sup>82</sup> Kant, despite being given the credit for inspiring the system of authors' rights, wrote about authors and the nature of genius rather than intellectual property law.<sup>83</sup> The truth is that, at best, intellectual property has been little more than a side-show in our broader intellectual traditions. Even within economics the role of information has, until comparatively recently, been largely ignored.<sup>84</sup>

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<sup>80</sup> See J. Waldron, "Nonsense upon stilts? - a reply" in J. Waldron (Ed.), *'Nonsense Upon Stilts': Bentham, Burke and Marx on the Rights of Man* (Methuen, London and New York) p. 174.

<sup>81</sup> See, for example, J. Hughes, "The Philosophy of Intellectual Property", 77 (1998) *Georgetown Law Journal*, pp. 287-366; H. M. Spector, "An Outline of a Theory Justifying Intellectual and Industrial Property Rights", (1989) 8 *EIPR*, pp. 270-273; W. J. Gordon, "A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property", 102 (1993) *Yale Law Journal*, p. 1533.

<sup>82</sup> G.W.F. Hegel, *Philosophy of Right*, T.M. Knox, tr., (Clarendon Press, Oxford 1952, 1st ed., 1967) p. 68.

<sup>83</sup> S. Strömholm, "Droit Moral - The International and Comparative Scene from a Scandinavian Viewpoint", 14 (1983) *International Review of Industrial Property and Copyright Law* 1, p. 11.

<sup>84</sup> For the history of the economics of information see D. M. Lambertson, "The Economics of Information and Organization", in M. E. Williams (Ed.), *Annual Review of Information Science and Technology*, Vol. 19, (American Society for Information Science and Technology, White Plains, NY, 1984) pp. 3-30.



One factor which helps to explain this neglect is the fact that the development of intellectual property policy and law has been dominated by an epistemic community comprised largely of technically minded lawyers. In their hands intellectual property has grown into highly differentiated and complex systems of rules. The development of these systems has been influenced in important ways by the narrow and often unarticulated professional values of this particular group. For policy makers around the world, the challenge of the coming bio-digital millennium will be to define efficient property rights in information. The precise nature and scope of these property rights will affect not only the workings of the intellectual property regime, but the trade and competition regimes.<sup>85</sup> No legislature, no policy-maker can, in the quest for efficient property rights, afford to rely on a narrowly constituted epistemic community. The stakes are too high.

Ideally the human rights community and the intellectual property community should begin a dialogue. The two communities have a great deal to learn from each other. Viewing intellectual property through the prism of human rights discourse will encourage us to think about ways in which the property mechanism might be reshaped to include interests and needs that it currently does not. Intellectual property experts can bring to the aspiration of human rights discourse regulatory specificity. At some point the diffuse principles that ground human rights claims to new forms of intellectual property will have to be made concrete in the world through models of regulation. These models will have to operate in a world of great cultural diversity. Moreover, the politics of culture is deeply factional, globally, regionally and locally. It is in this world that the practical issues of ownership, use, access, exploitation and duration of new intellectual property forms will have to be decided. It is here that intellectual property experts can make a contribution.

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<sup>85</sup> See C. Arup, "Competition over Competition Policy for International Trade and Intellectual Property"; W. A. Rothnie, "Trade, Competition and Intellectual Property"; J. Walker, "The Interface between Intellectual Property Rights and Competition Law and Policy: An Australian Perspective", all contained in P. Drahos (Ed.) Special Issue of Vol. 16 (1998) of *Prometheus* on Trade and Intellectual Property, pp. 351-393.

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