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The Confucian Challenge to Intellectual Property Reforms

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☞ Asia; China; Counterfeiting; Culture; Infringing copies; Intellectual property

Introduction

The protection and enforcement of intellectual property rights concerns not only law and policy, but also a country's political, social, economic and cultural systems. The impact of such protection on cultural development is significant—whether the relevant culture is national, regional or global, parochial or cosmopolitan, traditional or non-traditional. Nevertheless, such impact is often hard to measure. As Raymond Williams observed, the word “culture” is so elusive that it has become “one of the two or three most complicated words in the English language”.¹

In the past decade, the interrelationship between intellectual property and culture has featured with increasing frequency and prominence in the global policy debate. In September 2000, WIPO established the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore to provide “a forum for international policy debate and development of legal mechanisms and practical tools concerning the protection of traditional knowledge ... and traditional cultural expressions (folklore) against misappropriation and misuse, and the intellectual property ... aspects of access to and benefit-sharing in genetic resources”.² As of this writing, the WIPO membership is actively evaluating the need to develop an international instrument (or instruments) to protect traditional knowledge, traditional cultural expressions and genetic resources.

Outside WIPO, important international documents emerged to address issues at the intersection of intellectual property and culture. For example, in 2003, United Nations Educational, Scientific and Cultural Organization (UNESCO) established the Convention on the Safeguarding of Intangible Cultural Heritage to safeguard intangible cultural heritage, ensure its respect and provide appreciation. This instrument sought to raise awareness of the importance of intangible cultural heritage while providing for international cooperation and assistance. Two years later, UNESCO further established the Convention on the Protection and Promotion of the Diversity of Cultural Expressions to “create the conditions for cultures to flourish and to freely interact in a mutually beneficial manner”. The Convention sought to “maintain, adopt and implement policies and measures ... for the protection and promotion of the diversity of cultural expressions on their territory”.

In addition, the General Assembly of the United Nations adopted the Declaration on the Rights of Indigenous Peoples in September 2007. Article 31(1) of the Declaration provides:

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¹ Raymond Williams, *Keywords: A Vocabulary of Culture and Society*, rev. ed. (Oxford: Oxford University Press, 1985), p.87.

² Peter K. Yu, “Cultural Relics, Intellectual Property, and Intangible Heritage” (2008) 81 Temp. L. Rev. 433, 437.

“Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.”

Two years later, the Committee on Economic, Social and Cultural Rights released the General Comment No. 21. This document provided an authoritative interpretation of art. 15(1)(a) of the International Covenant on Economic, Social and Cultural Rights. Paragraph 2 explicitly notes the close interrelationship between the right to “take part in cultural life” and the right to “benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he [or she] is the author”. Understanding this interrelationship is highly important, because the latter provides the human rights basis of existing intellectual property norms.³

Given the many important international developments both inside and outside WIPO, it is high time we pay greater attention to the complex interface between intellectual property and culture. In the past three volumes, this *Journal* devoted the first issue to a special topic: law and policy, economics and politics. Volume 4 will continue this tradition by focusing on the interrelationship between intellectual property and culture.

As an introduction to this special issue, this essay examines the longstanding claim that culture presents a major barrier to intellectual property reforms. In the context of Asia—China, in particular—this claim invokes Confucianism, a non-Western philosophy, to account for the region’s—or the country’s—continued struggle with massive piracy and counterfeiting problems. The claim draws on a century-old tradition of condemning Confucianism for being antithetical to modernity—or, more precisely, Western modernity.⁴ Within China, for example, the May Fourth Movement was characterised by the widespread critique of “China’s Confucian heritage as an obstacle to its modernization and quest for power and wealth in competition with the nations of the world”.⁵

The study of Confucianism in the intellectual property context is important for our purposes because it provides an excellent illustration of the complex interface between intellectual property and culture. The discussion is also timely in light of the growing attention on China’s rapid technological rise,⁶ the rejuvenated interest in Confucianism (due in no small part to the proliferation of Confucius Institutes from around the world),⁷ the ongoing discussions of regional trade matters in Asia, and the negotiation of the Trans-Pacific Partnership Agreement.⁸

The first half of this essay focuses on the Confucian challenge to intellectual property reforms in China. Drawing on the important distinction between the *strong* and *weak* forms of the cultural explanation, this

³ On the Author’s earlier discussions of the latter right, see Peter K. Yu, “Intellectual Property and Human Rights in the Nonmultilateral Era” (2012) 64 Fla. L. Rev. 1043; Peter K. Yu, “Reconceptualizing Intellectual Property Interests in a Human Rights Framework” (2007) 40 U.C. Davis L. Rev. 1039; Peter K. Yu, “Ten Common Questions about Intellectual Property and Human Rights” (2007) 23 Ga. St. U. L. Rev. 709.

⁴ Daniel A. Bell, “Preface” in Daniel A. Bell (ed.), *Confucian Political Ethics* (Princeton: Princeton University Press, 2008), pp.ix-xiv, x.

⁵ Albert H.Y. Chen, “Three Political Confucianisms and Half a Century” in Fan Ruiping (ed.), *The Renaissance of Confucianism in Contemporary China* (Dordrecht: Springer, 2011), pp.205–223, 205.

⁶ Peter K. Yu, “The Middle Intellectual Property Powers” in Tom Ginsburg and Randall Peerenboom (eds), *Law and Development in Middle-Income Countries* (Cambridge: Cambridge University Press, 2013) (forthcoming); Peter K. Yu, “The Rise and Decline of the Intellectual Property Powers” (2012) 34 Campbell L. Rev. 525.

⁷ E.g. Fan (ed.), *The Renaissance of Confucianism in Contemporary China* (2011); Jiang Qing, *A Confucian Constitutional Order: How China’s Ancient Past Can Shape Its Political Future* (Princeton: Princeton University Press, 2012); Yu Dan, *Confucius from the Heart: Ancient Wisdom for Today’s World*, translated by Esther Tyldesley (New York: Atria Books: 2009).

⁸ On the Trans-Pacific Partnership Agreement, see Jane Kelsey (ed.), *No Ordinary Deal: Unmasking the Trans-Pacific Partnership Free Trade Agreement* (Crows Nest: Allen & Unwin, 2011); C.L. Lim, Deborah K. Elms and Patrick Low (eds), *The Trans-Pacific Partnership: A Quest for a Twenty-first Century Trade Agreement* (Cambridge: Cambridge University Press, 2012); Meredith Kolsky Lewis, “The Trans-Pacific Partnership: New Paradigm or Wolf in Sheep’s Clothing?” (2011) 34 B.C. Int’l & Comp. L. Rev. 27; Peter K. Yu, “The Alphabet Soup of Transborder Intellectual Property Enforcement” (2012) 60 Drake L. Rev. Discourse 16, 24–28.

part argues that the latter is more consistent with reality. The second half of the essay expands the discussion to cover other Asian countries. Implicating the decades-old debate on “Asian values”, this part points out how Confucianism provides an even greater mismatch with Asian cultures than with Chinese culture. The essay therefore calls for caution in attributing the piracy and counterfeiting problems in Asia to Confucianism.

China and the Confucian Challenge

In the past two decades, commentators have invoked cultural explanations to account for the massive piracy and counterfeiting problems in Asia. Very typical are discussions of how Asian cultures, in particular Confucianism, have militated against intellectual property reforms.⁹ Similar discussions have also been made of the familial and community values and strong protection of the public interest as embodied in Islam.¹⁰ Although the latter discussions focus primarily on countries in the Middle East, they have high relevance to many Muslim-majority countries in Asia, such as Indonesia, Malaysia and Pakistan.

As far as the Confucian challenge to intellectual property reforms is concerned, the starting point of most discussions is William Alford’s seminal work, *To Steal a Book Is an Elegant Offense*.¹¹ Although this provocative book has inspired a whole generation of intellectual property scholars studying developments in East Asia, myself included, it has also attracted some pointed criticisms. For example, Shi Wei questioned whether the book’s catchy title actually created a misleading impression about the cultural values in China, including Confucianism. As he wrote:

“‘To Steal a Book is an Elegant Offense’ (*Qie Shu Bu Suan Tou*) ... is a concept unknown to Confucianism and was only popularized with the 1919 publication of the popular fictional book *Kong Yi Ji*, written by the famous novelist Lu Xun. In his book, Lu exemplifies his belief that literature should be socially relevant, and attempts to avoid the ‘clichés’ of traditional Chinese linguistics that, in his view, had hampered and restrained people’s creative thinking for centuries. In Lu Xun’s portrayal, Kong Yi Ji was depicted as a poor harlequin, who was ‘a big, pallid man whose wrinkled face often bore scars,’ and was made fun of by everybody. He earned a living from copying manuscripts for rich patrons and sometimes stole books to trade for wine. His behavior drew on his being soundly beaten. ‘To Steal a Book Is an Elegant Offense’ was his argument when he was taunted. His personal character and way of thinking are thus far removed from the Confucian values.... Indeed, the phrase ‘To Steal a Book Is an Elegant Offense’ was unknown to Chinese until Kong Yi Ji as a fictional character appeared in the early twentieth century and, interestingly, it was unpopular with foreigners until Professor Alford’s book ... made its debut in the mid 1990s.”¹²

Ken Shao also reminded us of the many developments in China that Professor Alford did not cover. Questioning whether the latter had presented an incomplete picture, he encouraged us to reassess the

⁹ E.g. William P. Alford, *To Steal a Book Is an Elegant Offense: Intellectual Property Law in Chinese Civilization* (Stanford: Stanford University Press, 1995), pp.19–29; R. Michael Gadbaw, “Republic of Korea” in R. Michael Gadbaw and Timothy J. Richards (eds), *Intellectual Property Rights: Global Consensus, Global Conflict?* (Boulder: Westview Press, 1988), p.275; Patrick H. Hu, “‘Mickey Mouse’ in China: Legal and Cultural Implications in Protecting U.S. Copyrights” (1996) 14 B.U. Int’l L.J. 81, 104; Peter K. Yu, “Piracy, Prejudice, and Perspectives: An Attempt to Use Shakespeare to Reconfigure the U.S.-China Intellectual Property Debate” (2001) 19 B.U. Int’l. L.J. 1, 16–21.

¹⁰ E.g. Lise Buranen, “‘But I Wasn’t Cheating’: Plagiarism and Cross-Cultural Mythology” in Lise Buranen and Alice M. Roy (eds), *Perspectives on Plagiarism and Intellectual Property in a Postmodern World* (Albany: State University of New York Press, 1999), p.66; Richard E. Vaughan, “Defining Terms in the Intellectual Property Protection Debate: Are the North and South Arguing Past Each Other When We Say ‘Property’? A Lockean, Confucian, and Islamic Comparison” (1996) 2 ILSA J. Int’l & Comp. L. 307, 336.

¹¹ Alford, *To Steal a Book Is an Elegant Offense* (1995).

¹² Shi Wei, “Cultural Perplexity in Intellectual Property: Is Stealing a Book an Elegant Offense?” (2006) 32 N.C. J. Int’l L. & Com. Reg. 1, 11. *Kong Yi Ji* was collected in Lu Xun, *The Real Story of Ah-Q and Other Tales of China: The Complete Fiction of Lu Xun*, translated by Julia Lovell (London: Penguin Books, 2009).

impact of Confucianism on intellectual property protection and enforcement in China.¹³ As more research and archival records become available, this spirited debate will likely advance further.

To fully understand the debate Professor Alford's book has sparked, it is important to distinguish the *weak* form of his claim from its *strong* form. The strong form states that Confucianism militates against intellectual property reforms in China. It accounts for the failure of the many reforms pushed by foreign countries and intellectual property rights holders to induce improvements in intellectual property protection and enforcement. Although provocative, the strong form of Professor Alford's claim is unlikely to be supported by the reality on Chinese soil.

As I pointed out in the past, there are striking similarities between Confucianism and what is generally regarded as the public domain in the West.¹⁴ While copying may be an important living process for a Confucian Chinese to understand human behaviour, to improve life through self-cultivation and to transmit knowledge to the posterity, Chinese poets and literary theorists widely disagreed on the appropriate extent of copying.¹⁵ If the Chinese did not subscribe to intellectual property notions, it is only those notions that were derived from a maximalist tradition, where the importance of the public domain is largely ignored.

Moreover, traditional Chinese culture does not always call for verbatim copying, the means by which massive piracy and counterfeiting are often conducted. Rather, Confucianism has called for the transformative use of preexisting works that is tailored to the user's needs and conditions. To be certain, Confucius admitted in the *Analects (Lunyu)*—a record of “selected sayings” collected by his students—that he had only “transmitted what was taught to [him] without making up anything of [his] own” (*shu er bu zuo*).¹⁶ While this admission could have implied his discouragement of creativity, his primary motive was to emphasize his respect for and faithfulness to the *Classics* and the ancient tradition. As he continued in the next four words of the sentence, “I have been faithful to and loved the Ancients” (*xin er hao gu*).

When that sentence is properly understood, it is therefore no surprise that Confucius also declared elsewhere in the *Analects* that “He who by reanimating the Old can gain knowledge of the New is fit to be a teacher” (*wen gu er zhi xin, keyi wei shi yi*).¹⁷ Indeed, as Professor Alford pointed out, through the editing of the *Classics* and his comments in the *Analects*, Confucius demonstrated that “transmission, far from being a passive endeavor, entailed selection and adaptation if it was to be meaningful to oneself, one's contemporaries, and one's successors”.¹⁸ Joseph Chan went even further to note that “it was Confucius who most creatively interpreted the rich tradition that he had inherited, gave it a new meaning, and expounded it so effectively that his views have influenced a great number of generations of *Ru* to come”.¹⁹ As shown by Confucius and others, the ability to make transformative use of preexisting works can demonstrate one's comprehension of and devotion to the core of the Chinese culture as well as the ability to distinguish the present from the past through original thoughts.

To some extent, the need for meaningful transmission in traditional Chinese culture can be analogised to the transformative use doctrine pronounced by the US Supreme Court in *Campbell v Acuff-Rose Music, Inc.*²⁰ In *Campbell*, a music publisher brought a copyright infringement action against the rap band 2 Live Crew for its salacious parody of Roy Orbison's *Oh, Pretty Woman*. Emphasizing that transformative works are socially important and exploring whether fair use covers the contested parody, Justice David Souter noted the importance of transformative works:

¹³ Ken Shao, “The Global Debates on Intellectual Property: What If China Is Not a Born Pirate?” [2010] *Intell. Prop. Q.* 341.

¹⁴ Peter K. Yu, “From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-first Century” (2000) 50 *Am. U. L. Rev.* 131, 224–225.

¹⁵ Alford, *To Steal a Book Is an Elegant Offense* (1995), pp.26–29.

¹⁶ *The Analects of Confucius*, translated and annotated by Arthur Waley (New York: Vintage Books, 1989), Book VII, para.1.

¹⁷ *The Analects of Confucius* (1989), Book II, para.11.

¹⁸ Alford, *To Steal a Book Is an Elegant Offense* (1995), p.25.

¹⁹ Joseph Chan, “Territorial Boundaries and Confucianism” in Bell (ed.), *Confucian Political Ethics* (2008), pp.61–84, 63. As Professor Chan points out, “The Chinese term *Ru jia* means a school of *Ru*, ‘a type of man who is cultural, moral, and responsible for religious rites, and hence religious’”.

²⁰ *Campbell v Acuff-Rose Music, Inc* (1994) 510 U.S. 569.

“Although ... transformative use is not absolutely necessary for a finding of fair use, the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright, and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.”

In the end, the Court suggested that 2 Live Crew’s rendition of the song might have constituted fair use and remanded the case to the lower court.

Just as it is important to ask what the Confucian position of copying is, it is equally important to examine the Western position in intellectual property law and policy, if such a position exists at all. Individualism alone, for example, does not fully summarise the Western intellectual property position. In the past decade, intellectual property scholars have widely questioned the narrow and incomplete definition of intellectual property rights advanced by developed countries and their supportive rights holders. As the West develops more sophisticated notions of intellectual property rights, these notions may be more compatible with Confucianism than one anticipates.²¹ Creative Commons and open source licensing, for instance, provide greater compatibility with Confucianism than proprietary models.

Compared with the strong form of Professor Alford’s claim, its weak form seems to be more in line with reality, although native Chinese scholars continue to disagree with such an assessment.²² The weak form of this claim states that Confucianism has prevented Western notions of intellectual property rights from taking root in China. Nevertheless, it does not suggest any incompatibility between the two notions. Nor does it contend that Confucianism will militate against intellectual property reforms. Thus, if reforms are introduced—either internally through the borrowing of foreign ideas or externally in response to foreign pressure—such reforms may help China establish an exogenously developed intellectual property system.

In fact, legal transplants from abroad and trade pressure from the United States were the primary means by which the modern Chinese intellectual property regime was established.²³ It is therefore no surprise that foreign legal transplants were also a key focus of Professor Alford’s book.²⁴ Although the level of overall intellectual property protection in China has yet to satisfy the US government and its rights holders, improvements in such protection have been quite significant in the past two decades.

In sum, although one could not reject outright the challenge Confucianism has posed to intellectual property reforms in China, it is probably incorrect to attribute the country’s massive piracy and counterfeiting problems to Confucianism alone. Confucianism may have prevented Western notions of intellectual property rights from taking root in China (a continuously debated proposition!). However, it certainly does not militate against intellectual property reforms. The country’s many impressive recent developments in the intellectual property arena provide a testament to the success of these reforms.²⁵

²¹ Yu, “From Pirates to Partners” (2000) 50 Am. U. L. Rev. 131, 223–225; Peter K. Yu, “Piracy, Prejudice, and Perspectives” (2001) 19 B.U. Int’l L.J. 1, 76–77.

²² On historical documents on Chinese copyright law, see Zhou Lin and Li Mingshan (eds), *Historical Documents of China’s Copyright Law* (Beijing: Zhongguo Fangzheng Publishing, 1999).

²³ Peter K. Yu, “Building the Ladder: Three Decades of Development of the Chinese Patent System” in Margo Bagley and Ruth Okediji (eds), *Global Perspectives on Patent Law* (Oxford: Oxford University Press, 2013) (forthcoming); Peter K. Yu, “Intellectual Property, Economic Development, and the China Puzzle” in Daniel J. Gervais (ed.), *Intellectual Property, Trade and Development: Strategies to Optimize Economic Development in a TRIPS Plus Era* (Oxford: Oxford University Press, 2007), pp.185–188.

²⁴ Alford, *To Steal a Book Is an Elegant Offense* (1995), pp.30–55.

²⁵ Consider, for example, the developments in the patent area. Today, China is already among the top five countries filing patent applications through the Patent Cooperation Treaty (PCT). In 2011, the number of PCT applications increased by 33.4 per cent to 16,406, earning China the fourth spot, behind only the United States, Japan and Germany. Among all the applicants, ZTE Corp. (formerly Zhongxing Telecommunication Equipment Corp.) and Huawei Technologies, respectively, had the largest and third largest number of PCT applications, with Panasonic ranking in the second.

From Confucianism to Asian Values

When discussing the potential challenge Confucianism has posed to the development of intellectual property rights, some commentators have gone beyond the discussion of reform challenges in China to provide generalization for similar challenges in Asia. Such generalization, to some extent, recalls the decades-old and highly controversial debate on “Asian values”.²⁶ By embracing cultural relativism, that debate “present[ed] a challenge to the normative claim that human rights should be interpreted and implemented in a similar manner everywhere”.²⁷ It also raised challenging questions about whether Asian countries could use their “special” values to provide cultural excuses for disappointing human rights records.²⁸

Although cultural explanations have been advanced in the debate on piracy and counterfeiting in Asia, the previous discussion suggests the challenge of identifying specific Confucian values in the intellectual property debate. That challenge becomes even more acute when “Asian values” are involved. Indeed, regardless of whether one accepts the cultural explanation for China’s massive piracy and counterfeiting problems, four additional reasons exist to explain why it would be ill-advised to generalise the Confucianism debate to cover intellectual property developments in Asia.

First, as pointed out earlier, Confucianism only forms the cultural basis of a small number of countries in East Asia. Islam, for example, is important to countries such as Indonesia, Malaysia and Pakistan. Hinduism is very important to South Asia, covering places such as Bangladesh, India and Nepal. Buddhism is also very important to Southeast Asian countries, such as Cambodia, Laos, Myanmar, Thailand and Sri Lanka. Indeed, as David Kang observed, “the states of Southeast Asia experienced twin cultural influences, from India and from China”.²⁹

Even in China, Confucianism is only one of the three dominant philosophies in traditional Chinese society. Buddhism and Daoism (which drew on the teachings of Laozi and Zhuangzi) had and continue to have very significant influence. Together, these three schools have been described as *sanjiao*.³⁰ As one commentator observed, “the bulk of early book publishing in China was in fact inspired by Buddhism, not Confucianism, and was directed at the acquisition of religious merit that appears to have been unrelated, and was perhaps even antithetical, to what we today would consider a property right”.³¹ Also present in the Chinese territory are many minority cultures and beliefs, including the Zhuang, Hui, Uygur, Yi, Tibetan, Miao, Manchu, Mongol and Buyei.³²

Secondly, even if we focus only on Confucianism, that philosophy continues to evolve. In fact, “views of Confucianism differ according to the level of society and the social class one considers”.³³ What we find in Confucianism today is actually quite different from the teachings of Confucius.³⁴ From the *Analects* to Neo-Confucianism propounded by Zhu Xi (1130–1200) to the living principles used in modern Asian societies, Confucian teachings have undergone many significant transformations. It is therefore no surprise

²⁶ Although it is hard to pinpoint which values are included in these so-called “Asian values”, commentators have generally defined Asian values to include “authoritarianism, cooperation, harmony, and order”. Michael C. Davis, “Constitutionalism and Political Culture: The Debate over Human Rights and Asian Values” (1998) 11 Harv. Hum. Rts. J. 109, 109.

²⁷ Randall Peerenboom, “Beyond Universalism and Relativism: The Evolving Debates about ‘Values in Asia’” (2003) 14 Ind. Int’l & Comp. L. Rev. 1, 7.

²⁸ Simon S.C. Tay, “Human Rights, Culture, and the Singapore Example” (1996) 41 McGill L.J. 743, 747.

²⁹ David C. Kang, *East Asia before the West: Five Centuries of Trade and Tribute* (New York: Columbia University Press, 2010), p.52.

³⁰ John Kieschnick, *The Impact of Buddhism on Chinese Material Culture* (Princeton: Princeton University Press, 2003); Livia Kohn, *Daoism and Chinese Culture* (St. Petersburg: Three Pines Press, 2001); Arthur F. Wright, *Buddhism in Chinese History* (Stanford: Stanford University Press, 1979). On the dominant schools of philosophies in ancient China, see Benjamin I. Schwartz, *The World of Thought in Ancient China* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1985).

³¹ Charles R. Stone, “What Plagiarism Was Not: Some Preliminary Observations on Classical Chinese Attitudes toward What the West Calls Intellectual Property” (2008) 92 Marq. L. Rev. 199, 202.

³² James C.F. Wang, *Contemporary Chinese Politics: An Introduction*, 6th edn (Upper Saddle River: Prentice Hall, 1999), p.176.

³³ “The Confucian Problematic: An Overview” in Tu Weiming, Milan Hejtmanek and Alan Wachman (eds), *The Confucian World Observed: A Contemporary Discussion of Confucian Humanism in East Asia* (Honolulu: East-West Center, 1992), pp.1–13, 5.

³⁴ Wm. Theodore de Bary, *The Trouble with Confucianism* (Cambridge, Mass.: Harvard University Press, 1991), p.xi; Wm. Theodore de Bary, *Asian Values and Human Rights: A Confucian Communitarian Perspective* (Cambridge, Mass.: Harvard University Press, 1998), p.11.

that Arthur Waley noted carefully in the introduction to his widely used translation of the *Analects* that “The Confucius of whom I shall speak here is the Confucius of the *Analects*”.³⁵ He also recalled historian Gu Jiegang’s admonition that scholars should study “one Confucius at a time”.³⁶

Even in the time of Han Feizhi, only two short centuries after Confucius’ death, eight different sects of Confucianism had emerged, with “all of them consider[ing] themselves as faithful followers of Confucius” notwithstanding the fact that they “developed Confucian doctrines in manifestly different directions”.³⁷ In fact, it is worth recalling that Confucianism emerged at a time when “hundred schools” of thought (*zhuzi baijia*) flourished in China, following the decline of the feudal system toward the end of the Western Zhou Dynasty (1122–771 BC). In the last chapter of *Historical Records (Shiji)*, Sima Qian, the grand historian in the Han Dynasty (206 BC–220 AD), recalled an essay of his late father classifying Chinese philosophies into six dominant schools. In addition to Confucianism and Daoism, these dominant schools included Yin-Yang, Mohism (*Mojia*), Nominalism (*Mingjia*) and Legalism (*Fajia*).³⁸ In the preface to Volume 2 of his famous trilogy, *Confucian China and Its Modern Fate*, noted Confucian scholar Joseph Levenson also reminded us that “Confucianism ... was never alone in the Chinese universe” and that it “interacted [with other bodies of thought and institutions], in a system with a history”.³⁹

As with any cultural tradition that has lasted for such a long period of time, Confucianism has many different strands and variants. The noted Confucian scholar Wm. Theodore de Bary observed that a strong liberal tradition existed in at least one strand of Confucianism, even though commentators generally do not identify Confucianism with liberal theories.⁴⁰ Likewise, Professor Alford reminded us that “approaches rooted in portrayals of culture as essentially impervious to change, whether from within or beyond the society being examined”, run the risk of “being unidimensional”.⁴¹

Within the Asian region, those countries that adopt Confucianism embrace it for different reasons and to varying extents. As Professor Kang noted:

“[T]he main secondary states of East Asia chose Confucianism and Chinese ideas more for their own reasons than from Chinese pressure. In Korea, Vietnam, and Japan, the debate about how to organize government and society occurred between warriors and scholars, with the Confucian literati winning in Korea and Vietnam and the warriors ultimately winning in Japan. Although Chinese ideas were deeply embedded from the founding of these states, just as significantly, Chinese ideas were grafted onto what indigenous cultures, and the two coexisted—sometimes uncomfortably—resulting in only partial Sinicization.”⁴²

One scholar even went further to suggest, somewhat controversially, that Confucianism was a Western construct that Matteo Ricci, Michele Ruggieri and other early Italian Jesuits “manufactured” to facilitate their own adaptation to China.⁴³

Thirdly, by focusing on the discrete values in Asia—whether as Asian values or simply as “values in Asia”⁴⁴—the “Asian values” debate “underestimates both the historical ruptures of colonization and the

³⁵ *The Analects of Confucius* (1989), p.13.

³⁶ *The Analects of Confucius* (1989), p.14.

³⁷ Yao Xinzong, *An Introduction to Confucianism* (Cambridge: Cambridge University Press, 2000), p.27.

³⁸ Fung Yu-lan, *A Short History of Chinese Philosophy: A Systematic Account of Chinese Thought from Its Origins to the Present Day*, translated by Derk Bodde (New York: Free Press, 1948), pp.30–31.

³⁹ Joseph R. Levenson, *Confucian China and Its Modern Fate: A Trilogy* (Berkeley: University of California Press, 1964), Vol. 2, p.vii.

⁴⁰ Wm. Theodore De Bary, *The Liberal Tradition in China* (New York: Columbia University Press, 1983).

⁴¹ Alford, *To Steal a Book Is an Elegant Offense* (1995), p.6.

⁴² Kang, *East Asia before the West* (2010), p.26. On the adoption of Confucianism across Chinese and non-Chinese cultures, see Paul A. Cohen and Merle Goldman (eds), *Ideas Across Cultures: Essays on Chinese Thought in Honor of Benjamin I. Schwartz* (Cambridge, Mass.: Council on East Asian Studies at Harvard University: 1990).

⁴³ Lionel M. Jensen, *Manufacturing Confucianism: Chinese Traditions and Universal Civilization* (Durham: Duke University Press, 1997).

⁴⁴ Daniel Bell, *Beyond Liberal Democracy: Political Thinking for an East Asian Context* (Princeton: Princeton University Press, 2006), p.54; Peerenboom, “Beyond Universalism and Relativism” (2003) 14 *Ind. Int’l & Comp. L. Rev.* 1, 7.

present forces of global interaction”.⁴⁵ In Michael Davis’ view, “cultural relativist theories ... are tautological and overly deterministic because they fail to appreciate the roles of both human agency and institutions in the transformative processes of cultural discourse”.⁴⁶ The “Asian values” debate also ignores the fact that “there are different views of human rights voiced in Asia, by opposition politicians, scholars, and non-government organizations”.⁴⁷

A case in point is the Bangkok Non-Governmental Organizations Declaration of March 27, 1993 (N.G.O. Declaration), which contrasted significantly with the Bangkok Declaration—or, to be more precise, the Bangkok Governmental Declaration. The latter document stated explicitly that, “while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds”. As Simon Tay explained:

“[T]he N.G.O. Declaration differs significantly both from the Bangkok Declaration by governments and what ... has, for convenience, termed the ‘Asian view’. This Declaration places a stronger emphasis on civil and political rights than does the Declaration by government representatives. It calls for democracy to be ‘fostered and guaranteed in all countries’ and for Asian governments to ‘lift constraints on political rights ... by repealing repressive laws ... and liberalising the political system.’ Like the Bangkok Declaration by the Asian governments, it calls for cultural rights to be recognized on the basis that ‘there is emerging a new understanding of universalism encompassing the richness and wisdom of Asia-Pacific cultures’. The N.G.O. Declaration explicitly stipulates, however, that ‘cultural practices which derogate from universally accepted human rights ... must not be tolerated.’”⁴⁸

Indeed, the drafters of the Non-Governmental Declaration criticised the Governmental Declaration for “reflecting the continued attempt by many Governments of the Asia-Pacific region to avoid their human rights obligations, to put the state before the people and to avoid acknowledging their obligations to account for their failures in the promotion and protection of human rights”.⁴⁹

Fourthly, as important as the influence of Confucianism is in East Asian countries—or for that matter, Islam in the Middle East and some parts of Asia—one has to wonder whether the discussion of this influence is just based on convenient cultural stereotypes. Communitarian philosophies are not unique to the Chinese or Muslims; they can be found in civilizations around the world.⁵⁰ While most in Western societies would find it misleading or overly simplistic to attribute the massive internet file-sharing in their countries to the communitarian underpinnings of Judeo-Christianity, it is equally problematic to attribute piracy and counterfeiting in Asia to Asian cultures. Simply put, it is just misleading and overly simplistic to describe piracy and counterfeiting as a cultural problem.⁵¹

In sum, the cultures in Asia are just too diverse to be neatly classified into the so-called “Asian values”. Given the considerable mismatch between Confucianism and Asian cultures, it is also logical to question the impact of Confucianism on the development of intellectual property rights in the region. If cultural explanations do not bode well for China, as shown in the first half of this essay, those explanations will do much worse for a complex multi-cultural region like Asia.

⁴⁵ Tay, “Human Rights, Culture, and the Singapore Example” (1996) 41 McGill L.J. 743, 747.

⁴⁶ Davis, “Constitutionalism and Political Culture” (1998) 11 Harv. Hum. Rts. J. 109, 110.

⁴⁷ Tay, “Human Rights, Culture, and the Singapore Example” (1996) 41 McGill L.J. 743, 747.

⁴⁸ Tay, “Human Rights, Culture, and the Singapore Example” (1996) 41 McGill L.J. 743, 747.

⁴⁹ The Nongovernmental Organizations’ Response to the Bangkok Declaration is reprinted in James T.H. Tang (ed.), *Human Rights and International Relations in the Asia-Pacific Region* (London: Pinter Publishers, 1995), pp.208–212.

⁵⁰ Rein Mullerson, *Human Rights Diplomacy* (New York: Routledge, 1997), p.87; Aryeh Neier, “Asia’s Unacceptable Standard”, *Foreign Policy*, Autumn 1993, p.42.

⁵¹ Peter K. Yu, “Four Common Misconceptions about Copyright Piracy” (2003) 26 Loy. L.A. Int’l & Comp. L. Rev. 127, 131–134.

Conclusion

Confucianism provides one of the most widely cited cultural explanations for intellectual property piracy and counterfeiting in Asia. Such an explanation has received renewed attention in light of China's rapid technological rise, the rejuvenated interest in Confucianism, the ongoing discussions of regional trade matters in Asia, and the negotiation of the Trans-Pacific Partnership Agreement. Yet, upon close scrutiny, that explanation has grossly oversimplified the complex interface between intellectual property and culture. Although it is hard to deny that Confucianism has coloured the development of intellectual property rights in China—and, perhaps, even some parts of East Asia—one should be very cautious in using Confucianism as a cultural explanation for the massive piracy and counterfeiting problems in Asia.

Before intellectual property issues enter the mainstream policy debate, most scholars in the area tend to focus on either law or economics. However, as these issues become more important, and as new issues arise, a growing number of scholars have begun to explore the interrelationship between intellectual property and culture. Some emerge from disciplines that do not traditionally conduct intellectual property research, such as anthropology and media and communication studies. Even for those within the discipline of law or economics, they have slowly expanded their research to bring in inter- and multi-disciplinary perspectives. This special issue seeks to capture some of the emerging debates on intellectual property and culture. I hope it will generate greater interest in research in the area.

Intellectual Property and Conceptions of Culture

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☞ Culture; Intellectual property; International law; Traditional knowledge

Underlying conceptions about culture continue to play an important and often not sufficiently recognised role in intellectual property theory and practice. For example, ideas about cultural progress and culture as autonomous are key conceptions underlying intellectual property doctrine that have continuing resonance. Conceptions of culture and cultural value have also played an important role in determining the shape of intellectual property frameworks and types of cultural production that have come to benefit from intellectual property protection. Intellectual property frameworks also have an impact on culture that merits greater attention.

Intellectual property laws today reflect an increasing emphasis on depicting knowledge and culture within a property rights paradigm.¹ This emphasis is most evident in approaches to intellectual property that treat cultural material as primarily constituting a valuable asset. Such perspectives tend to coalesce around views of intellectual property that highlight its role in protecting commercial value. Valuable asset approaches to cultural material may reflect an incomplete understanding of the potentially varied and multifaceted roles of culture. In contrast, understanding culture from an anthropological perspective may shed insight on the critical role played by cultural elements that intellectual property may protect in cultural creation and the transmission of culture both contemporaneously and between generations.

Perceiving culture as a vibrant and living force draws attention to the many potential ways in which culture is shared. The “valuable asset” and “vibrant force” approaches to cultural material account quite differently for the role of context in the culture and intellectual property arenas. As a result, an emphasis on culture as a valuable asset often leads to treatment that may be inconsistent with the ways in which culture is frequently recycled as a vibrant aspect in new creations and new uses of existing cultural elements. This article will discuss how conceptions of culture and cultural progress are important for understanding critical aspects of intellectual property theory and its implementation in varied contexts. It will also discuss the implications for culture of underlying assumptions based on valuable asset conceptions that continue to shape intellectual property frameworks.

Sacred cultures: Cultural progress and intellectual property

The centuries starting from the 16th century were characterised by increasing European awareness of the differences among humans, particularly with regard to technology and political organisation.² These differences were thought to be a result of innate differences, an assumption that continues to have some resonance even today. Nineteenth century categorisations of human differences in an evolutionary light were connected to experiences of ethnographic travellers (armchair anthropologists) on whom many proponents of evolutionary ideas based their writings.³ Although progressivist discourse was prevalent prior to the 19th century, the broader discourse during that time and increasing knowledge about encounters with “others” made the 19th century a particularly fertile time for development of conceptions of progress

¹ Mark A. Lemley, “Property, Intellectual Property and Free Riding” (2005) 83 Tex. L. Rev. 1031.

² Jared Diamond, *Guns, Germs and Steel: The Fates of Human Societies* (New York: W.W. Norton, 1997), p.18.

³ George W. Stocking Jr., *Victorian Anthropology* (New York: Free Press, 1987), p.79.

that are yet with us.⁴ This intellectual history is an important starting point for understanding the development of formal intellectual property frameworks in the 18th and 19th centuries as well as fundamental underlying conceptions about culture imbedded within such frameworks.

The creation of hierarchies was an important feature of 19th century European and American views of society and was associated with emergence of the industrial economy.⁵ Evolutionary views were a characteristic feature of 19th century social theory, both from the perspective of those who glorified in the accomplishments of the industrial economy,⁶ as well as those who foresaw its demise, such as Marxists.⁷ From the perspective of both ideological views, the “primitive” was a reflection of an earlier and retrograde state.⁸

The advent of an industrial economy highlighted the relative technological advancement of European countries and the United States as compared to the rest of the world. The cultural hierarchies that subsequently developed were based on the questionable assumption that technological superiority extended to all aspects of socio-cultural formations.⁹ These hierarchies assumed that culture was unitary, autonomous and characterised by universal stages of development. Existing cultures and societies could then be categorised according to their position in an assumed evolutionary chain. Human history thus came to be viewed “as a single evolutionary development through a series of stages which were often loosely referred to as savagery, barbarism and civilization”,¹⁰ despite the fact that many components of a culture or society are not cumulative in this way and are not measurable on a unidimensional scale.¹¹

The idea of progress in civilisation was closely tied to European and American notions of cultural and racial superiority.¹² This led in turn to notions about the linkage of civilization and particular cultural forms.¹³ In the decades following Darwin’s 1859 publication of *The Origin of Species*, theories of social and cultural evolution and progress, which predated Darwin,¹⁴ became even more popular.

Hierarchies of cultures: Progress and intellectual property frameworks

Nineteenth century evolutionary assumptions profoundly shaped discourse in a number of areas in ways that continue to resonate today. The evolutionary progression of humans towards civilisation was often seen as accompanied by the regression of folklore.¹⁵ Under such devolutionary views, the cultural production of “savages” and “barbarians” was seen in many respects as retrograde survivals of a past era that the “civilised” had left behind. This devolutionary ethos, which suggested that societies were destined to lose their folklore as they progressed, was inextricably connected to evolutionary theories.¹⁶ This led 19th and early 20th century folklorists and anthropologists to believe that their societies had no local knowledge (the actual term used during that time was folklore) because they were “civilised” and such forms only existed in lower stages of development,¹⁷ a view that persisted until well into the 20th century.¹⁸ As a result,

⁴ Michael D. Birnhack, “The Idea of Progress in Copyright Law” (2001) 1 Buff. Intell. Prop. L.J. 3, 41.

⁵ Lawrence W. Levine, *High Brow, Low Brow: The Emergence of Cultural Hierarchy in America* (Cambridge, Mass.: Harvard University Press, 1988), p.9.

⁶ Robert H. Wiebe, *The Search for Order 1877–1920* (New York: Hill and Wang, 1967), p.141; Lewis Henry Morgan, *Ancient Society* (1877).

⁷ Friedrich Engels, *The Origin of the Family, Private Property and the State* (1902).

⁸ John J. Honigsmann, *The Development of Anthropological Ideas* (Homewood: Dorsey Press, 1976), p.121.

⁹ Eric R. Wolf, “The Study of Evolution” in Sol Tax (ed.), *Horizons of Anthropology*, 2nd edn (Chicago: Aldine Publishing, 1977), pp.33, 40.

¹⁰ George Stocking, *Race, Culture and Evolution: Essays in the History of Anthropology* (Chicago: University of Chicago Press, 1968), p.114; Edward B. Tylor, *Primitive Culture* (1871).

¹¹ Wolf, “The Study of Evolution” in *Horizons of Anthropology* (1977), p.41.

¹² Stocking, *Victorian Anthropology* (1987), pp.18, 27, 49; Stephen J. Gould, *The Mismeasure of Man* (New York: W.W. Norton, 1981).

¹³ Stocking, *Victorian Anthropology* (1987), p.10.

¹⁴ Alfred O. Lovejoy, *The Great Chain of Being* (1936); Charles Darwin, *On the Origin of Species* (1859).

¹⁵ Andrew Lang, *Custom and Myth* (1893), p.11.

¹⁶ Alan Dundes, “The Devolutionary Premise in Folklore Theory” in *Analytic Essays in Folklore* (1975), pp.17, 19.

¹⁷ Dundes, “The Devolutionary Premise in Folklore Theory” in *Analytic Essays in Folklore* (1975), pp.19–21.

¹⁸ Regina Bendix, *In Search of Authenticity: The Formation of Folklore Studies* (Madison: University of Wisconsin Press, 1997), p.198; Alan Dundes, *Interpreting Folklore* (Bloomington: Indiana University Press, 1980), pp.1–19.

evolutionary theories were as much about a progressive view of the development of cultures as a statement about the evolution out of forms of local knowledge such as folklore.¹⁹

This view of folklore as dying, dead or vestigial significantly influenced treatment of folklore under existing social norms. As a result of the association of folklore with a past age, folklore was conceived as synonymous with ignorance, leading to efforts to eradicate it and the establishment of a conception of an opposition between education and folklore.²⁰ This dichotomy between valid and invalid knowledge is echoed today in attitudes towards and treatment of local knowledge in legal and other areas.

Modern society, which celebrated science, was conceived in the 19th century as the apex of this evolutionary hierarchy.²¹ World Fairs played an important role in crystallising recognition of the progress evident in scientific discoveries of the time. These fairs also offered countries presenting exhibits the opportunity to showcase their technological achievements for the rest of the world. For a relatively new country such as the United States, these fairs offered a chance to impress Europeans with American industrial accomplishments and advances.²² The first international fair at London's Crystal Palace in 1851 provoked dialogue about "the origins and progress of the civilization it epitomized".²³ The Chicago World's Fair in 1893 constituted the apex of American ideology of industry and enterprise and evolutionary folklore studies.²⁴ Taken together, World Fairs underscored the glorification of scientific progress and validation of the imposition of power and authority over the "backward" and "uncivilised".²⁵

Hierarchical assumptions at such events were reflected in treatment of African American contributions to American society, which were, for example, excluded from the 1893 Columbian Exposition.²⁶ At the Columbian Exposition, live displays of the "primitive" were presented in contrast to the progress of industrial advancement evident in the manufactures halls, which were the main feature of such fairs.²⁷ Every American international fair between the 1893 Columbian Exposition and World War I included ethnological villages sanctioned by prominent anthropologists. These displays highlighted a mixture of derogation and appropriation that is linked to treatment of local knowledge as essentially public domain resources from which borrowing is permissible, if not desirable.

Not uncoincidentally, the 19th century was also the time period during which global intellectual property frameworks based upon existing national intellectual property systems in Europe and the United States began to emerge.²⁸ The Vienna World's Fair, the 1873 International Exhibition of Inventions, led to a defining moment in international intellectual property law as well. The Paris Convention of 1883 was an outgrowth of the Congress of Vienna for Patent Reform in 1873, which dealt with inconsistencies in national patent regimes and the need for international reform.²⁹ The 1873 Vienna Congress occurred because delegates at the 1873 World's Fair "refused to exhibit their designs for fear that other participants

¹⁹ Dundes, "The Devolutionary Premise in Folklore Theory" in *Analytic Essays in Folklore* (1975), p.21.

²⁰ Dundes, "The Devolutionary Premise in Folklore Theory" in *Analytic Essays in Folklore* (1975), p.22.

²¹ Stephen J. Gould, *Ever Since Darwin: Reflections in Natural History* (New York: W.W. Norton, 1977), p.101.

²² Merle Curti, "America at the World Fairs, 1851–1893" (1950) 55 *Am. Hist. Rev.* 833, 856; Robert W. Rydell, "The Culture of Imperial Abundance: World's Fairs in the Making of American Culture" in Simon J. Bronner (ed.), *Consuming Visions: Accumulation and Display of Goods in America 1880–1920* (New York: W.W. Norton, 1989), pp.191, 194.

²³ Stocking, *Victorian Anthropology* (1987), p.5.

²⁴ Simon J. Bronner, *Following Tradition* (Logan: Utah State University Press, 1998), p.85.

²⁵ W.A. Holmes, "The World's Fair Congress of Anthropology" (1893) 6 *Am. Anthropologist* 423, 424.

²⁶ Robert Muccigrosso, *Celebrating the New World: Chicago's Columbian Exposition of 1893 at 150* (Chicago: Ivan R Dee, 1993), p.220; Alan Trachtenberg, *The Incorporation of America: Culture and Society in the Gilded Age* (New York: Hill & Wang, 1982); Ida B. Wells, Frederick Douglass, Irvine Garland Penn and Ferdinand L. Barnett, *The Reason Why the Colored American Is Not—in the World's Columbian Exposition* (Robert W. Rydell ed., 1999).

²⁷ Bronner, *Following Tradition* (1998), p.91; Robert W. Rydell, *World of Fairs: The Century-of-Progress Expositions* (Chicago: University of Chicago Press, 1993), pp.20–21.

²⁸ Such global frameworks were developed notwithstanding the fact that a significant debate occurred in the 19th century concerning whether patent systems should be abolished. See Fritz Machlup and Edith Penrose, "The Patent Controversy in the Nineteenth Century" (1950) 10 *J. Econ. Hist.* 1, 9.

²⁹ M. Bruce Harper, "TRIPS Article 27.2: An Argument for Caution" (1997) 21 *Wm. & Mary Envtl. L. & Pol'y Rev.* 381, 389.

would steal them”.³⁰ The situation in Austria-Hungary at the time of the 1873 World’s Fair reflects the fact that Austria-Hungary, like the United States, had historically used piracy for commercial advancement.³¹ As a result of the protests, Austria-Hungary made temporary modifications of its patent law to accommodate the concerns of exhibitors.³²

Thus, World Fairs, which showcased the contrast between “civilization” and “savagery”, were an important factor leading to recognition of the need for global intellectual property protection, which in turn led to adoption of the first of a series of international intellectual property conventions in the last quarter of the 19th century.³³ The next international exposition following the Vienna World’s Fair, the 1878 Universal Exposition in Paris, hosted a second meeting, the International Congress on Industrial Property at Paris, which led to the formation of the Paris Convention for the Protection of Industrial Property of March 20, 1883, the parent of the modern Paris Convention. This event marked “the birth of concepts for intellectual property protection that still survive today.”³⁴

Later 19th century conventions addressed copyright.³⁵ Prevention of international piracy by countries such as the United States, which persistently refused to protect foreign works in the 18th and 19th centuries, was a principal reason for the development of international copyright law as reflected in the Berne Convention.³⁶ The arguments advanced in these 19th century debates in the copyright area were analogous to those made today in the context of developing countries.³⁷

These international intellectual property frameworks reflected the national systems of the countries at the negotiating table, which in turn reflected hierarchical value assignments of different types of knowledge. Such national frameworks also reflected the role of commercial interests within those countries which sought to promote the adoption of systems for their benefit. The influence of such interests is evident in the music area in the United States,³⁸ where US music publishers began to focus to a greater extent on legal protection³⁹ at the beginning of the era of American dominance of mainstream popular music.⁴⁰

Although protection under a number of such national systems was extended to geographical indications, no protection was otherwise given to other forms of local knowledge, reflecting prevailing views concerning the devolution of folklore. Because of judgments about the cultural production contained in local knowledge, such systems were treated as entirely appropriable knowledge but not as valid systems in and of themselves and certainly not comparable to science or other products of civilisation. These value assignments were evident in Frederick W. Root’s explanation to a meeting of folklorists at the 1893 Columbian Exposition that “the utterances of the savage people were omitted, these being hardly developed to the point at which they might be called music”.⁴¹

As a result of the lack of protection of local knowledge, the appropriation of such knowledge was made possible and even encouraged by intellectual property laws, which were based on assignments of value that mirrored hierarchies of cultures and their accompanying structures of power. An essential power

³⁰ Polyanna E. Folkins, “Has the Lab Coat Become the Modern Day Eye Patch? Thwarting Biopiracy of Indigenous Resources by Modifying International Patenting Systems” (2003) 13 *Transnat’l L. & Contemp. Probs.* 339, 340.

³¹ Joel Sachs, “Hummel and the Pirates: The Struggle for Musical Copyright” (1973) 59 *Mus. Q.* 31, 32.

³² Harper, “TRIPS Article 27.2” (1997) 21 *Wm. & Mary Envtl. L. & Pol’y Rev.* 381, 390; Peter Drahos, “The Universality of Intellectual Property Rights: Origins and Development” in *Intellectual Property and Human Rights* (Geneva: WIPO, 1998), pp.13, 17–18.

³³ Harper, “TRIPS Article 27.2” (1997) 21 *Wm. & Mary Envtl. L. & Pol’y Rev.* 381, 390.

³⁴ Harper, “TRIPS Article 27.2” (1997) 21 *Wm. & Mary Envtl. L. & Pol’y Rev.* 381, 390.

³⁵ Berne Convention for the Protection of Literary and Artistic Works 1886.

³⁶ Sam Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886–1986* (Oxford: Oxford University Press, 1987),

p.19; Doron S. Ben-Atar, *Trade Secrets: Intellectual Piracy and the Origins of American Industrial Power* (New Haven: Yale University Press, 2004).

³⁷ Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works* (1987), p.19.

³⁸ Reebee Garofalo, “From Music Publishing to MP3: Music and Industry in the Twentieth Century” (1999) 17 *Am. Mus.* 318, 321.

³⁹ Garofalo, “From Music Publishing to MP3” (1999) 17 *Am. Mus.* 318, 322.

⁴⁰ Garofalo, “From Music Publishing to MP3” (1999) 17 *Am. Mus.* 318, 321; Charles Hamm, *Yesterdays: Popular Song in America* (New York:

W.W. Norton, 1983), pp.285–286; Jeffrey Kallbert, “Chopin in the Marketplace: Aspects of the International Music Publishing Industry in the First

Half of the Nineteenth Century: Part I: France and England” (1983) 39 *Notes* 535, 536.

⁴¹ Frederick W. Root, “Folk-Music” in Helen Wheeler Basset and Frederick Star (eds), *The International Folklore Congress of the World’s Columbian Exposition* (1893), pp.424, 425.

asymmetry characterised 19th century encounters between holders of appropriable knowledge and those who appropriated such knowledge. These hierarchical power relationships and dynamics are mirrored in contemporary relationships.⁴²

Hierarchies of power: Justifications for political domination

Hierarchies of cultures were intimately linked to 19th century global hierarchies of power.⁴³ Evolutionary doctrine was also used as a basis for justifying political domination of a “spreading empire of industrialized countries to ‘backward’ countries” and was used, for example, to justify US annexation of the Philippines.⁴⁴ This rationale was also the basis for active intervention by the British in their colonies.⁴⁵ Hierarchies of cultures and a presumed evolutionary progression were thus used to justify political domination through imperialism and colonialism and the creation of structures to enable appropriation of economic value.⁴⁶ Imperialism and colonialism were more than “a simple act of accumulation and acquisition” and are supported by ideologies and a supporting vocabulary that made domination an imperative.⁴⁷

The Berlin Conference of 1884–1885 formalised the partitioning of Africa among European powers, in a process that has been characterised as akin to a form of Imperial Monopoly.⁴⁸ The Berlin Conference illustrates the underlying power dynamics between the holders of power and those subject to the dominion of such imperial and colonial powers. These asymmetries of power were pervasive to the point that the subjects were denied not only the freedom to make choices about their own destiny, but even the opportunity to have their voices heard at the negotiating table where their futures were being decided.⁴⁹

The hierarchical assumptions underlying Imperial Monopoly carried over to other spheres of international relations and international lawmaking as well, and were reflected in the constitution and process of adoption of international intellectual property agreements such as the Paris and Berne Conventions. Legal structures thus emerged to complement and implement hierarchical worldviews.⁵⁰ Hierarchies of power reinforced the exclusion of local knowledge from global intellectual property frameworks, partly by replicating and continuing the exclusion of representatives of the vast majority of the world’s population from the negotiating table.⁵¹ They are also a factor in the fact that developing country legal structures still often mirror the legal frameworks of colonial powers.⁵²

As former colonies moved toward and achieved independence, the former colonies increasingly exercised a voice that reflected issues of concern that diverged in many respects from those of countries in the West, although hierarchies of power erected during the era of colonialism and imperialism still dominated. This was evident in discussions about control of natural resources and efforts of newly independent states to renegotiate or void the “extraordinarily inequitable arrangements that had been imposed upon them during the colonial period”.⁵³

⁴² R.A. Mashelkar, “Intellectual Property Rights and the Third World” (2001) 81 Current Sci. 955, 956.

⁴³ Ruth L. Gana, “Has Creativity Died in the Third World? Some Implications of the Internationalization of Intellectual Property” (1995) 24 Denver J. Int’l L. & Pol’y 109, 114.

⁴⁴ Bronner, *Following Tradition* (1998), p.90.

⁴⁵ Stocking, *Victorian Anthropology* (1987), p.85.

⁴⁶ Bronner, *Following Tradition* (1998), p.20; Edward Said, *Orientalism* (New York: Vintage, 1979), p.6.

⁴⁷ Said, *Orientalism* (1979), p.9.

⁴⁸ Niall Ferguson, *Empire: How Britain Made the Modern World* (New York: Penguin, 2003), p.233.

⁴⁹ Ferguson, *Empire* (2003), p.238.

⁵⁰ James O. Odek, “Bio-Piracy: Creating Proprietary Rights in Plant Genetic Resources” (1994) 2 J. Intell Prop. L. 141, 157; Erica-Irene Daes, *Human Rights of Indigenous Peoples: Indigenous People and Their Relationship to Land* (1997), p.4, Commission on Human Rights, *Sub-Commission on Prevention of Discrimination and Protection of Minorities*, E/CN.4/Sub.2/1997/17, para.20.

⁵¹ Daniel J. Gervais, “The Internationalization of Intellectual Property: New Challenges from the Very Old and the Very New” (2002) 12 Fordham Intell. Prop. Media & Ent. L.J. 929, 941; Ruth L. Okediji, “The International Relations of Intellectual Property: Narratives of Developing Country Participation in the Global Intellectual Property System” (2003) 7 Singapore J. Int’l & Comp. L. 315.

⁵² Adebambo Adewopo, “The Global Intellectual Property System and Sub-Saharan Africa: A Prognostic Reflection” (2002) 33 U. Tol. L. Rev. 749, 750.

⁵³ Ruth E. Gordon and Jon H. Sylvester, “Deconstructing Development” (2004) 22 Wis. Int’l L.J. 1.

In the intellectual property realm, the first major revision conference for the Berne Convention after the emergence of newly independent former colonies reflected their different agenda. Events during the 1967 Stockholm Revision Conference signalled that developing countries, most of which had become independent after World War II, had a markedly different agenda from that of countries in the West in certain specific areas.⁵⁴ The lack of protection of folklore was raised by the Indian delegation at the 1967 Stockholm Conference.⁵⁵ As a result of these concerns, the 1971 amendment to the Berne Convention authorised adoption of protections for folklore by member nations.⁵⁶

Hierarchies of cultures and power helped define what was deemed protectable within the framework of existing national and emerging global intellectual property frameworks. In addition to further contributing to these definitions, hierarchies of taste were an important factor in delineating hierarchical distinctions within the category of the “civilised” as well as in establishing the shape and texture of national intellectual property frameworks within countries such as the United States.

Hierarchies of taste: Expressive culture and the separation of high and low cultural forms

Hierarchies of taste, which are particularly relevant to conceptions of copyright, are yet a third aspect of 19th century hierarchies that have continuing resonance today. Hierarchies of taste are distinguished by being largely internal and relating primarily to the “civilised” and thus further refining hierarchies of cultures. Although hierarchies of taste are largely internal, the cultural values contained in such hierarchies have significant implications for local knowledge.

Although often conceived of as eternal and unchanging, certain high cultural categories in the United States are contextual and contingent rather than fixed and determinate. Shakespeare and opera were popular forms of entertainment well into the 19th century and were in no way permeated with the high culture aesthetic connected to such forms of expressive culture in the United States today.⁵⁷ Historian Lawrence Levine has outlined the processes in the United States in the 19th century whereby hierarchical cultural categories began to emerge.⁵⁸ The processes he describes involved the decline of a rich shared public culture,⁵⁹ and creation of hierarchies of cultural forms.⁶⁰ As a result of these processes, forms of cultural production such as Shakespeare, Dickens and opera and places such as museums became increasingly separated from the broader world of everyday culture.⁶¹

Sacralisation was also connected to the conversion of audiences “into a collection of people reacting individually rather than collectively, [which] was increasingly realized by the twentieth century”.⁶² Since the sacred sphere of a culture involves denial of less elevated forms and affirmation of the superiority of

⁵⁴ Peter Burger, “The Berne Convention: Its History and Its Role in the Future (1988) 3 J.L. & Tech 1, 38–41.

⁵⁵ Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works* (1987), p.314; Silke von Lewinski, “The Protection of Folklore” (2003) 11 Cardozo J. Int’l & Comp. L. 747, 751.

⁵⁶ Article 15(4) of the 1971 Paris Act of the Berne Convention authorized protection of folklore. Graeme W. Austin, “Re-Treating Intellectual Property? The WAI 262 Proceeding and the Heuristics of Intellectual Property Law” (2003) 11 Cardozo J. Int’l & Comp. L. 333, 336; Paul Kuruk, “Protecting Folklore under Modern Intellectual Property Regimes: A Reappraisal of the Tensions between Individual and Communal Rights in Africa and the United States” (1999) 48 Am. U. L. Rev. 769, 778–779.

⁵⁷ Levine, *High Brow; Low Brow* (1988).

⁵⁸ Levine, *High Brow; Low Brow* (1988), p.224.

⁵⁹ Levine, *High Brow; Low Brow* (1988), p.9; Russel Nye, *The Unembarrassed Muse: The Popular Arts in America* (New York: The Dial Press, 1970), p.245.

⁶⁰ Levine, *High Brow; Low Brow* (1988), p.207.

⁶¹ Roberts, “Gilt, Gingerbread, and Realism: The Public and Its Taste” in H. Wayne Morgan (ed.), *The Gilded Age: A Reappraisal* (Syracuse: Syracuse University Press 1963), p.172; Steven Conn, “From South Kensington to the Louvre: Art Museums and the Creation of Fine Art” in *Museums and American Intellectual Life, 1876–1926* (Chicago: University of Chicago Press, 1998), pp.192, 193–194.

⁶² Conn, “From South Kensington to the Louvre” in *Museums and American Intellectual Life, 1876–1926* (1998), p.195.

those who have the ability to appreciate such elevated forms,⁶³ it fulfils an important social function of legitimating social differences by naturalising differences.⁶⁴

Sacred texts: Borrowing and autonomous cultures

Evolution, devolution and appropriation

Unitary views of the evolutionary development of societies from savagery to civilisation have profoundly influenced treatment of various types of cultural production. In addition to being a basis for denial of value and thus of intellectual property protection, the view of local knowledge such as folklore as connected to earlier stages of societies has been used to justify the taking of and widespread borrowing from local knowledge for various reasons, including the assumption that such knowledge would disappear with progress.⁶⁵ Although the reasons for the disappearance of such products were often intimately tied to the actions of the “civilised” with respect to such “savages”, this aspect was typically ignored. In any case, the relative impotence of those seen as the producers of such knowledge with respect to the colonialist and imperialist powers that directly and indirectly governed them meant that no justification was even required. These fundamentally asymmetrical power relationships have not essentially changed in the years since developing countries gained independence.⁶⁶

Most former colonies had a significant quantity of their material culture taken, much of which is now found in museums and private collections in the United States and Europe.⁶⁷ In the United States, one of the primary objectives of emerging museums in the late 19th and early 20th centuries was the collection of Native American cultural objects.⁶⁸ Missionaries, soldiers and explorers and later anthropologists, ethnologists and government officials took cultural objects.⁶⁹ In addition to tangible cultural property, intangible knowledge was also collected and borrowed, including oral traditions, ethnobotanical and ethnomedical data, information on religious ceremonies and rituals, beliefs, traditions and practices, and other technological, environmental and related information. The collection of such tangible and intangible material remains an issue of contention in discussions of the use of Native American local knowledge.⁷⁰

Foreshadowing practices that now lead to debates about “biopiracy” and misappropriation more than a century later, Stewart Culin, holder of positions in Philadelphia and New York museums and president and curator of the American Folklore Society, thought that objects collected from “lower” races such as Native Americans should be put to practical use to benefit American industry.⁷¹ Culin had a “guiding hand in the commercial packaging of the traditional game Parcheesi by Selchow and Righter”,⁷² game manufacturers who copyrighted the Asian game Parcheesi in the 1870s.⁷³ Culin collected such objects with an eye towards their practical uses for American industry.⁷⁴

⁶³ Regina Lee Blaszczyk, *The Aesthetic Movement: China Decorators, Consumer Demand, and Technological Change in the American Pottery Industry, 1865–1900* (Winterthur: Winterthur Portfolio, 1994), pp.29, 121, 122; Pierre Bourdieu, *Distinction: A Social Critique of the Judgement of Taste* (Cambridge, Mass.: Harvard University Press, 1984), pp.6–7; Simon J. Bronner, “Reading Consumer Culture” in Simon J. Bronner (ed.), *Consuming Visions* (New York: Winterthur/W. W. Norton, 1989), pp.13–53.

⁶⁴ Bourdieu, *Distinction* (1984), pp.6, 68.

⁶⁵ Bronner, *Following Tradition* (1998), p.79.

⁶⁶ Amartya Sen, *Development as Freedom* (Oxford: Oxford University Press, 1999), p.240.

⁶⁷ Robert K. Paterson, “Claiming Possession of the Material Culture of Indigenous Peoples” (2001) 16 Conn. J. Int’l L. 283, 285.

⁶⁸ Bronner, *Following Tradition* (1998), p.79.

⁶⁹ Paterson, “Claiming Possession of the Material Culture of Indigenous Peoples” (2001) 16 Conn. J. Int’l L. 283, 285.

⁷⁰ David B. Jordan, “Square Pegs and Round Holes: Domestic Intellectual Property Law and Native American Economic and Cultural Policy: Can It Fit?” (2000–2001) 25 Am. Indian L. Rev. 93, 94–95; James D. Nason, “Traditional Property and Modern Laws: The Need for Native American Community Intellectual Property Rights Legislation” (2001) 12 Stan. L. & Pol’y Rev. 255, 260.

⁷¹ Bronner, *Following Tradition* (1998), p.81.

⁷² Bronner, *Following Tradition* (1998), p.81.

⁷³ Bronner, *Following Tradition* (1998), p.92.

⁷⁴ Bronner, *Following Tradition* (1998), p.92.

As is the case today, use of the fruits of local knowledge existed simultaneously with a discourse that diminished the significance of local knowledge holders' contributions to the development of such knowledge. This was evident in 19th century devolutionary views of folklore, as well as the denial of creativity of those categorized as "folk", "savage" or "barbarian", evident in the view that folklore produced by "savages", involved no creativity and that the texts somehow produced themselves.⁷⁵ This view of "primitives" and "barbarians" meant that their knowledge could be used to contribute to the products of "civilised" manufacturing. These derogatory views of local knowledge and its holders were widely accepted explicitly in 19th century and often remain at least implicit assumption of discussions about local knowledge.⁷⁶ In discussing W.R. Grace's filing of neem tree patents based on Indian local knowledge, a representative of the company dismissed such knowledge as "folk medicine".⁷⁷ Until as late as the 1970s, "development planning and conservation policies were usually based on very negative assumptions about traditional rural societies".⁷⁸

Derogatory discourses based on evolutionary conceptions about the development of cultural knowledge are closely linked to sacralised views of culture. Sacralised visions of culture, however, often do not take account of the actual dynamics by which culture is transmitted. As a result, such visions may also distort conceptions of how culture should be accessed and used and issues related to cultural transmission and cultural dynamics more generally. Intellectual property approaches that focus on transmission and the regulation of the range of acceptable borrowing rather than the delineation of status through ownership rights to property would likely lead to greater attention to the cultural implications of intellectual property frameworks.

Borrowing and the diffusion of knowledge: Creolization and appropriation as cultural norms

A focus on transmission inextricably brings attention to borrowing and how forces of diffusion interact with and affect cultural systems. Cultural systems are not discrete and autonomous units that can be separated by clear lines analogous to delineating territories on a map. Instead, cultural boundaries are fluid and shifting, and cultural systems significantly affected by outside forces and influences.⁷⁹

Further, as a result of borrowing, diffusion and other factors, cultural elements are often shared among multiple cultural systems.⁸⁰ Much of the approach in legal discourse reflects assumptions about cultural systems that are no longer accepted in disciplines such as anthropology and folklore.⁸¹ In fact, borrowing, creolisation and cultural mixture are normal aspects of the development of cultural systems.⁸² Creolisation is "most vividly manifested and represented in the expressive forms and artistic behaviors of everyday and ceremonial life as folklore".⁸³ Cultural mixture can also be an important force in innovation.⁸⁴

Borrowing and cultural mixture are not just products of colonial and post-colonial encounters, but are characteristic of human history and evident in language, religion, diseases, agricultural practices and crops,

⁷⁵ Rosemary Lévy Zumwalt, *American Folklore Scholarship* (Bloomington: Indiana University Press, 1988), p.103.

⁷⁶ Diamond, *Guns, Germs and Steel* (1997), p.19.

⁷⁷ Roht Naomi Roht-Arriaza, "Of Seeds and Shamans: The Appropriation of the Scientific and Technical Knowledge of Indigenous and Local Communities" (1996) 17 *Mich. J. Int'l L.* 919, 922; Sandy Tolan, "Against the Grain", *L.A. Times Mag.*, July 10, 1994, pp.18, 20.

⁷⁸ Graham Dutfield, *Indigenous Peoples, Bioprospecting and the TRIPs Agreement: Threats and Opportunities*, available at http://www.iatp.org/files/Indigenous_Peoples_Bioprospecting_and_the_TRIPs_Agreement [Accessed November 6, 2012].

⁷⁹ Jane Eva Baxter, "Commentary on 'Fear, Hope, and Longing for the Future of Authorship and Revitalized Public Domain in Global Regimes of Intellectual Property'" (2003) 52 *DePaul L. Rev.* 1235, 1237.

⁸⁰ Rosemary J. Coombe, "Intellectual Property, Human Rights & Sovereignty: New Dilemmas in International Law Posed by the Recognition of Indigenous Knowledge and the Conservation of Biodiversity" (1998) 6 *Ind. J. Global Leg. Stud.* 59, 77.

⁸¹ Robert Baron and Ana C. Cara, "Introduction: Creolization and Folklore—Cultural Creativity in Process" (2003) 116 *J. Am. Folklore* 4, 6.

⁸² Baron and Cara, "Introduction: Creolization and Folklore—Cultural Creativity in Process" (2003) 116 *J. Am. Folklore* 4, 4.

⁸³ Baron and Cara, "Introduction: Creolization and Folklore—Cultural Creativity in Process" (2003) 116 *J. Am. Folklore* 4, 5.

⁸⁴ Bruno Nettl, "World Music in the Twentieth Century: A Survey of Research on Western Influence" (1986) 58 *Acta Musicologica* 360, 361.

folklore and a myriad of other cultural elements that may form local knowledge.⁸⁵ In addition, isolation from the influences of diffusion from outside of a specific area does not mean that cultural system within that area remained static.⁸⁶

Borrowing and expressive culture: The distribution of folktales

Any process of borrowing necessarily involves acts of appropriation, which are a means by which such borrowing occurs. In addition, folktales and other types of cultural expression that are cited as being part of the cultural heritage of a people may in fact be a result of borrowing and may also exist simultaneously in many different versions among many different groups. The widespread diffusion of folktales is one reason why folklorists developed reference sources called tale type indexes,⁸⁷ which are classification tools that compile tale types and indicate the geographic distribution of certain specified tales.⁸⁸ Tale type indexes highlight the fact that particular tales are often not exclusive elements of the cultural patrimony or heritage of specific groups.⁸⁹

In most cases, a given item of folklore “will not be limited to a single culture, nor will it be worldwide”.⁹⁰ The distribution of a particular item of folklore cannot be known in advance.⁹¹ Some Indo-European folktales have been reported from India to Ireland.⁹² Such Indo-European tales would typically exist in multiple variants across their range of distribution, but would likely not be found, at least prior to the colonial period, among Australian Aborigines or South American Indians. Diffusion of tales may also reflect patterns of population movements and are reflected in the transmission of African oral narratives to African American folklore traditions,⁹³ as well as folktales such as Cinderella to the New World. In the case of Cinderella,⁹⁴ variants have been reported from China to Europe.⁹⁵

Conclusion

Visions of culture play a critical and at times insufficiently recognised role in intellectual property doctrine and practice. Conceptions of culture in intellectual property have long been shaped to a significant degree by evolutionary perspectives on human society. Intellectual property discourse also reflects assumptions about the nature and constitution of the elements of culture regulated by intellectual property. Conceptions of culture play an important role in determining policy outcomes. Policy choices informed by recognition of culture as a vibrant force draw attention to the ways in which culture is transmitted and shared and give needed attention to questions of cultural value. Policy choices rooted in a conception of culture as a valuable asset often give priority to questions of economic and business value and minimise or ignore the cultural consequences of such choices.⁹⁶

Cultural resources may be simultaneously both valuable assets and essential elements in living cultures. Reconciling these two potentially conflicting conceptions of culture remains a key element to restoring

⁸⁵ Jerry H. Bentley, *Old World Encounters: Cross-Cultural Contacts and Exchanges in Pre-Modern Times* (Oxford: Oxford University Press, 1993); Nettl, “World Music in the Twentieth Century” (1986) 58 *Acta Musicologica* 360, 361–362.

⁸⁶ Ronald Sackville, “Legal Protection of Indigenous Culture in Australia” (2003) 11 *Cardozo J. Int’l & Comp. L.* 711, 714.

⁸⁷ Zumwalt, *American Folklore Scholarship* (1988), p.56.

⁸⁸ Antti Aarne and Stith Thompson, *The Types of the Folk-tale: A Classification and Bibliography* (Helsinki: Suomalainen tiedeakatemia, 1927).

⁸⁹ Stith Thompson, *Tales of the North American Indians* (1929), pp.201–266.

⁹⁰ Alan Dundes (ed.), *Cinderella: A Folklore Casebook* (New York: Garland Publishing, 1982), pp.v-vi.

⁹¹ Dundes (ed.), *Cinderella* (1982), pp.v-vi; Anna Birgitta Rooth, *The Cinderella Cycle* (Arno Press, 1951).

⁹² Dundes (ed.), *Cinderella* (1982), p.vi.

⁹³ Zumwalt, *American Folklore Scholarship* (1988), pp.130–135.

⁹⁴ Dundes (ed.), *Cinderella* (1982), p.xiv; Jack Zipes, *Fairy Tale as Myth/Myth as Fairy Tale* (Lexington: University Press of Kentucky, 1994), pp.10–12.

⁹⁵ R.D. Jameson, “Cinderella in China” in Dundas (ed.), *Cinderella* (1982), pp.71–97; Anna Birgitta Rooth, “Tradition Areas in Eurasia” in Dundas (ed.), *Cinderella* (1982), pp.129, 133; Stith Thompson, *The Folktale* (1946), p.127; Nai-Tung Ting, “The Cinderella Cycle in China and Indo-China” (1974) *FF Communications* No.213.

⁹⁶ Jessica Litman, “Revising Copyright Law for the Information Age” (1996) 75 *Or. L. Rev.* 19, 22–23.

what many consider to be needed balance to intellectual property frameworks. The operation of cultural resources today as valuable assets cannot be denied given the business structure of the cultural industries and other intellectual property intensive industries and the economic and business importance of intangible resources generally. However, intellectual property discussions and doctrine must take greater account of the dual nature of cultural resources as both valuable assets and potentially essential cultural elements that have significant cultural value that should not be dismissed or ignored.

Recognising and balancing valuable asset and vibrant force and economic, business and cultural aspects of cultural products entails greater recognition of the implications of shared culture, which includes understanding the nature and types of borrowing and collaboration that are often inherent parts of creation and invention processes. Such recognition can be incorporated in a number of ways, including by addressing the scope, power and duration of intellectual property rights, incorporating liability rule in intellectual property rights frameworks in certain instances, and generally giving greater recognition to the importance of borrowing and collaboration in creation and invention. Solutions that fully acknowledge the dual nature of the cultural knowledge underlying intellectual property rights may potentially help resolve persistent tensions and conflicts between competing visions of culture in intellectual property.

From Free Culture to Fair Culture¹

Madhavi Sunder

☞ Cultural property; Intellectual property; International law; Musical works; South Africa

As a young child in the South African hinterlands, Solomon Linda spent his nights protecting cattle from lions in the jungle. Later, when he was living in a squalid Johannesburg hostel reserved for black migrant workers, he recalled this time and composed a song called “Mbube”, which means “lion” in Zulu. “Mbube” was sung *a cappella*, but Linda borrowed the syncopation of contemporaneous American music and added his own haunting falsetto overlay. It was 1939. The song became Africa’s first pop hit.

“Mbube” would cross the Atlantic and be reborn first as “Wimoweh” and later, “The Lion Sleeps Tonight”. It would go on to be recorded more than 170 times, generating millions of dollars, and was eventually incorporated into Disney’s immensely profitable movie *The Lion King*. The “most famous melody ever to emerge from Africa”² added to the wealth of many, especially in the United States, but not its composer, who died destitute from a curable kidney disease in 1962 at the age of 53, with less than US \$25 to his name. Linda’s children had heard their father’s song playing over the radio, but remained unaware of their intellectual property claims until a South African writer chronicled the injustice in 2000. In February 2006, the publishing house, which claimed the song on the basis of an apartheid-era assignment from Linda that paid him less than US \$1, settled with Linda’s family. The settlement would come too late for his daughter Adelaide, who died of AIDS in 2001, lacking the resources to purchase antiretroviral treatment. Two of Linda’s other children had died as babies, one of malnutrition.

The international circuit travelled by “Mbube” links north and south, past and present, copyrights and patents, songs and medicines, intellectual property and development. This story of international injustice illustrates a number of points. First, it demonstrates the *intercultural dimensions of creativity*. Linda’s creation offers an exemplar of Paul Gilroy’s “Black Atlantic” thesis, evidencing the interchange of cultures across the African diaspora. Secondly, it shows that *cultural exchanges can take place in the presence of sharp differences in power and knowledge*. Taking the warning of Linda’s story to heart, African lawyers today urge local creators to protect themselves from a similar fate by learning their rights. Thirdly, Linda’s tale tragically illustrates the *interrelationships among intellectual property rights and other freedoms*. Linda’s failure to be recognised and remunerated for his contribution to our shared culture in turn prevented him and his family from having the resources to access life-saving medicines, first for himself, and then for his daughter. Intellectual property law both incentivised the creation and, in due course, exacted a high price for their retroviral drugs, a price his family could not afford even to save a life.

In this article, I will try to articulate a vision of intellectual property that comprehends the complexities and import of cultural production in a global context and, in so doing, helps to promote more just global social relations. Intellectual property does not merely incentivise and reward creators; it structures cultural and social relations. Intellectual property not only governs the production of life-saving medicines or work-saving machines, but also disciplines their distribution. The relationship between intellectual property and development goes well beyond GDP. Economic, social and cultural rights are interconnected and mutually reinforcing: as in the case of Solomon Linda, intellectual property rights affect one’s social standing, health and overall well-being.

¹ Adapted from Madhavi Sunder, *From Goods to a Good Life: Intellectual Property and Global Justice* (New Haven: Yale University Press, 2012).

² Rian Malan, *In the Jungle* (ColdType, 2000), p.3.

Intellectual property utilitarianism neglects these deeper connections between culture and economics. Law's focus on the economics of cultural activity is narrow, recognising law's role in stimulating the optimal level of creative production (however elusive this goal may be), and the market's role in rationing distribution. The goal is creating the greatest number of cultural artifacts to be trickled down to the greatest number of people. The utilitarian approach to intellectual property does not ask: Who makes the goods? Who profits, and at whose expense? The approach ignores the moral failure to widely distribute essential knowledge goods, from textbooks to medicines, so long as there is no market failure afoot. The current narrow economic approach to intellectual property has failed to comprehend the broad effects that this law has on structuring cultural and social relations, and how differences in power and knowledge, in turn, affect one's ability to acquire intellectual property. Intellectual property recognises some authors and inventors, and misrecognises others. In turn, law apportioned the material spoils of creativity unequally. Cultural standing ultimately affects social standing and individual well-being, as some people come to lack the resources to furnish themselves with the basic accoutrements to live a healthy and fulfilling life.

Furthermore, the economic approach, with its reliance on the market to distribute cultural and social benefit, has failed to recognise asymmetries in the world, including the unequal capacity to participate on fair terms in global markets. The Solomon Linda story illustrates how intellectual property laws exacerbate these incapacities rather than relieve them. This must no longer be the case. Today, WIPO has pledged to reorient intellectual property law from its exclusive focus on incentives to the broader promotion of development. Meeting this ambitious goal will require a theory of culture and development that goes beyond those that have been offered by contemporary intellectual property scholars.

Why free culture is not enough

A principal critique of the intellectual-property-as-incentives story is that broad and durable property rights might jeopardise further creation. Lawrence Lessig and James Boyle have demonstrated the risk that maximalist intellectual property laws pose to innovation.³ Their concern resonates with the economists' concern for efficiency. The fear is that property rights that are too many and too broad will stifle innovation. A maximalist intellectual property law proves to be poor innovation policy. Before we can stand on the shoulders of giants, we will need to beg their permission. The libertarian might respond by arguing that one should not borrow—that one should be clever enough to make one's point without relying on others' production. But scholars such as Suzanne Scotchmer have shown that innovation is often incremental with new discoveries building on older ones.⁴ Requiring downstream innovators to purchase licenses from upstream ones might at times run aground on the difficulty of assembling (and paying for) all the necessary licenses. A vibrant public domain, however, becomes a fount of creativity, and thus preservation of such a domain is vital to innovation.

Lessig's insight goes beyond innovation policy to consider the requirements of a free society. In his book *Free Culture*, he worries about the development of a culture where we will need permission to speak if that speech involves borrowing someone else's words. A free culture is not merely efficient; it is essential to a democratic society. Lessig affirms the value of freedom to participate "in culture and its growth".⁵

But there are several reasons why Lessig's passionate plea to protect a free culture is yet incomplete. First, the dynamics of culture itself remain unexplored in Lessig's account; the cultural vision embedded within the call for a free culture remains obscure. But without a cultural account we cannot fully understand the relationships among intellectual property, culture and freedom.

³ Lawrence, Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (New York: Penguin Books, 2004).

⁴ Suzanne Scotchmer, *Innovation and Incentives* (Cambridge, MA: MIT Press, 2004).

⁵ Lessig, *Free Culture* (2004), p.94.

Secondly, Lessig's account fails to acknowledge people's unequal capacity to exercise the freedoms that law provides. Freedom in theory is not freedom in fact. Contemporary public domain scholars hold as their paradigm figure the "commoner" who easily appropriates popular art and innovations for his or her own purposes. But this conception fails to acknowledge disparities in the ability of individuals to exercise their freedoms. In truth, the public domain movement leaves the common person to the mercy of an unregulated marketplace where she must struggle to realise her rights. Public domain advocates seem to accept that because a resource is open to all by force of law, that resource will indeed be exploited by all. In practice, however, differing circumstances—including knowledge, wealth, power and ability—render some better able than others to exploit a common resource.

Thirdly, Lessig's vision of freedom sometimes leads him to give short shrift to other values. In 2004, the Creative Commons, which Lessig and Boyle helped found, introduced a Developing Nation's License, which would allow authors to commit their work for free use in the developing world, but retain their full rights in the developed world. Lessig praised the license as allowing creators to participate firsthand "in reforming global information policy". But the license was quickly retired for failing to "meet the minimum standards of the Open Access Movement" because it "does not free work in any way" in the West. In short, Lessig's libertarian vision of "free culture" would give up on those authors who hoped to use copyright to promote more egalitarian values and development.

Fourthly, the vision of freedom embedded in Lessig's free culture is ultimately expressed through the marketplace. This leaves cultural and other knowledge production to the mercies of the market. Governments must consider directly whether knowledge production requires more direct support, through alternative mechanisms such as prizes and subsidies. The US Congress recognised that certain diseases may affect too few people to incentive drug companies to invest the enormous resources required to produce treatment. The Orphan Drug Act of 1983 offers tax breaks to drug companies that produce treatments for such diseases (though it is unclear whether the tax benefit is greater than the resources required to produce the drugs). The realisation that states may need to step in to support some cultural activity applies to minority cultures as well. Markets may not be the best mechanism for stimulating poetry in the vernaculars of less economically powerful communities. The support of the arts often has many knock-on economic and cultural benefits, and is often regarded by governments as key to a successful economic development policy.

Fifthly, Lessig's theory of free culture tends to romanticise freedom in the past. Lessig begins from the premise that a "free culture has been our past".⁶ But the story of Solomon Linda begs the question: even when copyright terms were shorter, were people equally free? Who could participate, and who was left out? A more critical historical account would recognise that we have traditions of both freedom and oppression, and that not all of our traditions are worth preserving; indeed, our public domain tradition is rife with examples of exploitation of the knowledge and creativity of traditionally disadvantaged groups and the poor. Furthermore, Lessig's privileging of free culture in the past does not acknowledge the important ways in which our conceptions of culture *have changed*. For more than a century the prevailing view of culture has been one of static tradition and imposed authority—a far cry from free culture.

Finally, public domain advocates do not sufficiently acknowledge the extent to which the romantic rhetoric of the public domain obscures unjust appropriation. Pioneering public domain scholars such as Boyle point out that the rise of the "romantic author" helped to mask the importance of the public domain for innovation. The romantic author presumed that artists create out of thin air, rather than borrow from a rich and diverse public domain. In truth, however, most innovation is derivative, building on earlier works and discoveries. Even the world's most famous copyright owner, Disney, thrived by mining the works of past creators, from Rudyard Kipling to Victor Hugo to Robert Louis Stevenson. But the romance of the public domain is guilty of its own subterfuges. Unlike the works of Kipling that Disney appropriated,

⁶ Lessig, *Free Culture* (2004), p.xv.

Solomon Linda's song suffered the common fate of being *falsely* and conveniently cast as belonging to the public domain. Linda's composition was performed *and recorded* by the Original Evening Birds. But recording artists across the Atlantic treated the song as African "folklore" and therefore as part of the public domain and free for the taking. Pete Seeger, one of the fathers of American folk music and world music, heard the African hit. He turned "Mbube" into "Wimoweh" in the 1950s and registered the copyright in the new composition under his alias Paul Campbell. (Seeger has recently decried this apparently common practice on Tin Pan Alley, and I will return to his confessional at the end.) A decade later, by the time "Wimoweh" was being rewritten as "The Lion Sleeps Tonight" by the American music legend George Weiss, Weiss "leapt to the obvious conclusion: 'Wimoweh' was based on an old African folk song that didn't belong to anyone. As such, it was fair game."⁷ The South African journalist Rian Malan notes that the liner notes to the song by Weiss, who later rose to become president of the Songwriter's Guild of America, described "Mbube" as "a familiar Zulu song about a lion hunt".⁸ Lest one think that I am testing the actions of earlier generations with the copyright ethics of our generation, I should point out that Seeger's father, Charles Seeger, published an article titled "Who Owns Folklore?" in 1962. "American and European copyright law has been designed to encourage the acquisition and retention of property under rules favouring the more enterprising citizens", he wrote. But he concluded, the folk song is "entirely a product of plagiarism" and the act of claiming copyright in it "unethical".⁹

Solomon Linda's story serves as a warning that intellectual property should not be the law of the jungle. As Linda's tale shows, simply leaving a resource in the public domain is not enough to satisfy societal ideals. Our laws must serve to facilitate the free flow of culture but on fair terms. This will require, first, recognising inequalities in people's capacity to participate in cultural production, and secondly, ensuring fairness in cultural exchanges, which may otherwise exploit innovators with unequal wealth, knowledge or social status.

The sceptic will object. Solomon Linda's tragic story is one of the past, and a distant past at that. Apartheid is no longer; no limits to freedom of contracting exist for Africans even in South Africa. Moreover, does Linda's story not prove the importance of economic compensation as essential to intellectual property? Thus, does it not underline the economic rationale for intellectual property offered by contemporary law and economics accounts of the subject? Indeed, does it not link that account with the view of justice?

Solomon Linda's tale is the grossly magnified version of commonplace inequities. Today, creativity around the world flourishes, but few have the knowledge to commercialise on fair terms and sustain a livelihood. Even the Beatles sued their publisher for unpaid royalties. Furthermore, Linda's story shows that respecting a creator's rights can sustain livelihoods, even if exclusive rights prove unnecessary to incentivise the original creation. At the same time, unequal marketplace treatment can discourage people from sharing their knowledge, leaving creators to adopt the strategy that intellectual property lawyers call trade secret. This defeats the central purpose of culture—sharing, participating and making meaning together.

Toward a fair culture

The critique of free culture must be supplemented with a more complex vision of the relationship between culture and freedom. My vision builds upon Lessig's free culture, but seeks a role for law in promoting equal capacity to meaningfully participate in making our culture. Others have spoken of the importance of *fair culture*. A report by the Finnish Ministry of Education, Science, and Culture defines "fair culture" as "the realization of cultural rights and the inclusion of everyone in cultural signification, irrespective of

⁷ Malan, *In the Jungle* (2000), p.24.

⁸ Malan, *In the Jungle* (2000), p.31.

⁹ Charles Seeger, "Who Owns Folklore?—A Rejoinder" (1962) 21 *Western Folklore* 93, 97.

their age, gender, ability, or ethnic, religious or cultural background”.¹⁰ I adopt that definition here, and elaborate on the normative vision that underlies fair culture.

Like free culture, a central value animating fair culture is still freedom. But where Lessig found his inspiration for free culture in the writings of technological guru Richard Stallman, who decried permissions to access software code from a largely libertarian position, I find my inspiration in Amartya Sen’s concept of “development as freedom”, an idea that relies on Sen’s and Martha Nussbaum’s focus on expanding human capabilities.¹¹ Both Stallman and Sen take freedom as their touchstone value. “Greater freedom enhances the ability of people to help themselves and also to influence the world”, Sen explains.¹² Sen’s conception thus sees freedom not only as an end but also as a means of development. Sen praises “agency-oriented” programmes for development, whereby the poor improve themselves not by being the passive beneficiaries of “cunning benefit programs”, but rather by freely exercising their capacity to work and participate in markets. Hence freedom is both a right and a tool for advancing further freedom. Moreover, Sen’s approach recognises that differences in individuals’ social, cultural and economic standing affect their capacity for exercising freedom. Like free culture, fair culture values freedom but, going further, seeks to spread the capacity for citizens to meaningfully exercise their freedom.

I argue that participatory culture is normatively valuable in its own right. As Amartya Sen has shown, development requires far more than meeting basic needs and enhancing GDP. Sen’s vision of development as freedom requires improving each person’s capacity to make choices and meaningfully participate in political, economic and cultural life. The capacity to participate in *cultural* life has particularly important implications for human flourishing. First, the cultural spheres of life are those we typically associate with the communities or experiences that give one’s life *meaning*. Participating in a religious or cultural community; listening to or making music with others; posting a video to YouTube of your child dancing or creating a “video response” to someone else’s post; reading, watching and then rewriting *Harry Potter*—promoting freedom to partake in these activities may be thought of as central to *what development is for*, that is, the opportunity to innovate, share ideas and enjoy life with others. Singing, reading, writing, innovating and sharing: these cultural activities are crucial to human flourishing. Indeed, the right to freely “participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits”, is recognised in art.27 of the Universal Declaration of Human Rights and countless other human rights instruments.

At the same time, freedom to create and share with others in work and play has important implications for other freedoms. Here I elaborate how enhancing participation in culture can also serve as a means of development. A central insight of Sen’s theory of development as freedom is the recognition of “the mutually reinforcing connection between freedoms of different kinds”.¹³ Let me consider two important connections here. First, cultural participation helps secure *livelihood*. As Solomon Linda’s story illustrates, all people—rich and poor, from North or South, white or black—may serve as the source of culture that can be shared globally. Additionally, Linda’s story illustrates that tremendous wealth may be generated from cultural knowledge production; experts value Linda’s single song in millions of dollars. This wealth may, in turn, be used to promote basic needs, such as health and safety. In short, at the turn of the millennium, the Participation Age and the goal of poverty eradication have dovetailed. The concept of fair culture yokes together meaning and livelihood. Indeed, as knowledge in the new millennium leads to social and economic power, the role of culture in development promises to be profound.

¹⁰ Hannele Koivunen and Leena Marsio, “Ethics and Policy” (2008) D’Art Topics in Arts Policy No. 24, available at <http://www.ifacca.org/topic/ethics-in-cultural-policy/> [Accessed November 6, 2012].

¹¹ Amartya Sen, *Development as Freedom* (New York: Anchor Books, 1999); Martha C. Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge: Cambridge University Press, 2000).

¹² Sen, *Development as Freedom* (1999), p.18.

¹³ Sen, *Development as Freedom* (1999), p.4.

Ironically, the law-and-economics analysis often gives short shrift to the actual economic consequences of intellectual property. Of course, property rights facilitate marketplace transactions that generate wealth. But the vision pays little heed to questions about who has access to life-saving medicines, who earns money from her creativity or industry, and whether the legal system promotes innovation in cosmetics or vaccines for tropical diseases. As Linda's story shows, the answers to these questions are interrelated.

There is another important connection between participatory culture and social and economic well-being. Social power derives from controlling knowledge, or discourse. Who is speaking matters. We may reconsider one of the most important recent decisions in US copyright law with this in mind. For much of a century, the most popular account of life on a slave plantation has been *Gone with the Wind*. That was until one Alice Randall disturbed Margaret Mitchell's idyll by retelling the story from the perspective of a slave protagonist on the O'Hara plantation, and thereby laying bare the racism and objectification of the original.¹⁴ A US appellate court held Randall's *The Wind Done Gone* to be a parody, and therefore a "fair use" of the original. Most accounts of this case champion the decision as enhancing free speech in the form of criticism, and promoting the production of more intellectual works (viewing copyright as the "engine of free speech"). But they have missed the novel's act of cultural revolution. *The Wind Done Gone* represents a shift in the distribution of power in cultural production and meaning-making. We must see intellectual property law as regulation of meaning and, in turn, of the social relations that flow from how we envision our world. Indeed there are even claims, likely exaggerated, that the depiction of black presidents in Hollywood media paved the way for President Obama (a particularly surprising claim given Hollywood's resistance to calls for greater diversity in its casting).

These claims reflect the rise of the late 20th century social movement that Charles Taylor calls "the politics of recognition". Taylor eloquently described the emergence of a new paradigm for understanding equality, where minority groups decried not material deprivation but psychological injury deriving from demeaning and misleading cultural images expressed in mainstream media and markets. "Nonrecognition or misrecognition" of one's identity, Taylor wrote, "can inflict harm, can be a form of oppression, imprisoning someone in a false, distorted, and reduced mode of being".¹⁵ Power derives from the ability to shape and influence culture; inversely, those who do not have the power to create and contest culture "truly are powerless".¹⁶

Some critique identity politics for its temptation to place representation above other concerns, such as the distribution of social and economic power. The challenge, as Iris Marion Young described it, is when "misrecognition" becomes a "problem independent of other forms of inequality or oppression".¹⁷ I embrace an understanding of identity politics that recognises the "interpenetration" of culture and economics. Cultural representation—in the form of who is represented, how and under what terms—affects economic and social power, and vice versa. To be sure, analyses of "cultural differences" are often overblown and essentialising; for this reason, some scholars are wary of cultural analysis altogether. But the mere fact that many have taken an overly simplistic or erroneous view of identity and culture does not mean that we ought to turn our heads from the important ways in which a cultural analysis matters. We ought not to discard cultural analysis but rather we should employ it more critically, retaining a commitment to recognising the heterogeneity, dynamism and interconnectedness of cultures. We must avoid the trap of viewing "culture" as separate from other factors related to inequality. As Arjun Appadurai writes, "The challenge today... is how to bring the politics of dignity and the politics of poverty into a single framework".¹⁸

¹⁴ *SunTrust Bank v Houghton Mifflin Co.* 268 F.3d 1257 (11th Cir. 2001).

¹⁵ Charles Taylor, "The Politics of Recognition" in Amy Gutmann (ed.), *Multiculturalism: Examining the Politics of Recognition* (Princeton: Princeton University Press, 1994), p.25.

¹⁶ Salman Rushdie, "Excerpts from Rushdie's Address: 1,000 Days 'Trapped Inside a Metaphor'", *New York Times*, Dec. 12, 1991, p.B8.

¹⁷ Iris Marion Young, *Inclusion and Democracy* (Oxford: Oxford University Press, 2000), p.105.

¹⁸ Arjun Appadurai, "The Capacity to Aspire: Culture and the Terms of Recognition" in Vijayendra Rao and Michael Walton (eds.), *Culture and Public Action* (Stanford: Stanford University Press, 2004), pp.62–63.

This is beginning to happen. Nancy Fraser has led the charge that identity politics, with its focus on representation and dignity, abandoned the traditional goal of social movements: redressing material inequality. But the more recent linking of identity politics to *intellectual property* brings social movements back, full circle, to issues of distribution. In India, local artisans apply for “geographical indications” in Darjeeling tea and Mysore silk, which would grant an exclusive right to peddle goods under these names. In Australia, aboriginal communities assert copyright in their artwork. And Ethiopians have trademarked the names of their specialty coffees, often praised as the best coffees in the world, in the hopes of retaining more control over the global social meaning of the coffees and hearty profits they command in global markets. Diasporas, the Internet and international travel have brought the danger of distant foreign exploitation to the attention of local artisans. Increasingly today, diverse authors and inventors seek recognition and to benefit materially from their cultural production, especially where recognition and material benefit were denied in the past.

These claims suggest, as a UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions makes plain, the complementary nature of the cultural and economic aspects of development. The UNESCO Convention urges that the cultural contributions of the poor be encouraged, recognised and materially rewarded. These new claims for intellectual property understand rights not just in the familiar terms of incentives for creation, but also as tools for both recognition and remuneration. Tracking a shift in human-rights thinking away from first-generation rights (civil and political rights) toward second-generation rights (culture, development and distributive justice), new claims for intellectual property rights by the historically disadvantaged tether social justice movements to the attainment of greater cultural, social and economic power. Intellectual property is increasingly understood as a legal vehicle for facilitating (or thwarting) the recognition of diverse contributors to cultural and scientific discourse. Call it the property turn in identity politics. Wielders of this law increasingly deploy the law to create and benefit from the processes of meaning-making.

Current intellectual property law addresses economic incentives but focuses little on livelihood. Current law’s *raison d’être* is to promote culture but it pays no heed to the value of participating in communities or the importance of shared meaning. Law is concerned with producing more goods but is indifferent to the kinds of goods being produced, or more aptly, to which goods fail to get produced in the absence of market incentive. This need not be the case. Intellectual property law can be understood through a broader cultural and economic lens focused on livelihoods, social relations and well-being. Solomon Linda here becomes a metonym for those human beings involved in the transnational processes of collaboration, cultural production and wealth creation. Cultural theory takes as a starting point that human beings creative, continually seeking to make and remake our world, contributing to commerce and culture, science and spirituality. Individuals demand and deserve both recognition and remuneration for their intellectual production. As a United Nations report puts it:

“At its best, the Knowledge Society involves all members of a community in knowledge creation and utilization. The Knowledge Society is not only about technological innovations, but also about human beings, their personal growth, and their individual creativity, experience and participation.”¹⁹

To repeat: the vision of culture here is not one of enclaves fenced off from one another seeking “protection” or making claims for “survival”. Recall that “fair culture” is committed to free culture in the sense of facilitating open cultural exchanges. Fair culture promotes the view that individuals can claim the world’s heritage as one’s own. “Whatever we understand and enjoy in human products instantly becomes ours, wherever they might have their origin”, Rabindranath Tagore famously asserted:

¹⁹U.N. Dep’t of Economic and Social Affairs, *Understanding Knowledge Societies: In Twenty Questions and Answers with the Index of Knowledge Societies* (New York: 2005), pp.141, 150.

“I am proud of my humanity when I can acknowledge the poets and artists of other countries as my own. Let me feel with unalloyed gladness that all the great glories of man are mine.”

Indeed, the impact of “Mbube” has been truly global. The song has appeared at Navajo pow-wows, President John F. Kennedy’s last birthday party and the Apollo space launch. It has been rendered by generations of artists, from Glen Campbell to R.E.M. to Phish. Solomon Linda’s tune, journalist Rian Malan writes, “has penetrated so deep into the human consciousness over so many generations, that one can truly say, here is a song the whole world knows”.²⁰ Furthermore, in order to create new cultural or scientific works, individuals need access to globally produced knowledge, which serve as building blocks for this future innovation. Solomon Linda himself relied on American jazz for his innovation.

At the same time, a cultural approach would acknowledge that global asymmetries of capability threaten cultural production and sharing, and raise important ethical questions about global culture flows. Not everyone can realise his or her creative aspirations if, for example, the home country lacks a research and development infrastructure, funding for innovations, adequate health care, access to information or a lack of access to capital, especially venture capital. Moreover, dominant culture industries have economies of scale that enable easier production and dissemination of cultural products around the world. Thus, some cultures are more capable than others of being heard and having influence.

Now in his nineties, Pete Seeger is spearheading what he calls the Committee for Public Domain Reform. In a letter to the United Nations, he decries the standard practice in the music industry of copyrighting songs supposedly in the public domain. Many of these works are not public domain at all, Seeger argues. He quotes Joseph Shabalala of the South African vocal group Ladysmith Black Mambazo, who notes that when the word “traditional” is used, “it means the money stays in New York”. Seeger proposes that a share of subsequent copyright royalties “go to the place and people where the song originated”.²¹

On the ground, international actors are developing new understandings of intellectual property as a tool for promoting not just free culture, but also fair culture. No human domain should be immune from the claims of social justice. Intellectual property, like property law, structures social relations and has profound social effects. If the 21st century will be the Age of Knowledge and Participation, surely we must acknowledge and grapple with the reality that intellectual property law will help define the possibilities and human capabilities of this age. Intellectual property regulates the production and distribution of culture. Considerations of social justice cannot be peripheral to such a central human enterprise.

²⁰ Malan, *In the Jungle* (2000), p.7.

²¹ Mike Miller, “At 85, Pete Seeger Still Hammers Out Justice,” *Reuters*, May 12, 2004.

Cultivating Intellectual Property

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☞ Colonies; Culture; India; Intellectual property; Legal history

Culture and intellectual property are connected. Culture, etymologically, is related to the work cultivate, or to work the soil.¹ Creations of individuals, words, images, music, serve as building blocks for the symbolic system used to interpret the world which is also referred to as culture. Similarly, intellectual property starts, at least within a Lockean conception, from individual labour and develops into a system that reflects the personalities of the creators, joined together in communities. Intellectual property and culture is not a surprising topic for a special issue, and arguably not a controversial one.

Where controversy emerges is in the challenge of a cultural view of intellectual property to the more accepted utilitarian theory of intellectual property. Whether in the United States, or in global institutions, intellectual property law and policy are shaped by the balancing of interests with respect to the production and use of creations and inventions. Reducing intellectual property law to a set of interests ignores the role of intellectual property in shaping the various dimensions of culture: artistic artifacts, scientific understandings, shared values and outlooks, linguistic and religious symbols. Furthermore, these dimensions of culture inform what legal and policy analysts may reduce to interests. Recognising the cultural dimensions of intellectual property provides a curative to a body of law and policy shaped solely by considerations of utilitarianism.

At the same time, however, cultural and utilitarian theories should not be seen in opposition. The danger is that culture and interests can be viewed as fixed and unchanging categories when in fact there are many dimensions to what we might refer to as culture and what we might characterise as interests. To see the latter point, the interests of identified intellectual property owners are not simply aligned towards preventing uncompensated uses of the work. Instead, identified owners may also be users in other circumstances when interests might support allowing uncompensated uses. Similarly, culture is not an undifferentiated and homogeneous concept. Artists and scientists, creative people of all stripes, do not represent one culture, which might coalesce into an interest group supporting strong intellectual property rights (or for that matter user rights). Instead, the practices of different creative groups would reflect those of the particular fields within which they operate, and the corresponding interest might have multiple dimensions. The challenge for scholars and policymakers is to recognise this complexity without becoming lost in it.

As further illustration about my point on cultural and utilitarian approaches to intellectual property, consider the often overused, yet under-appreciated, concept of the market. When policymakers refer to a market for intellectual property, the reference is to a world in which the products of the creative fields (art, literature and scientific breakthroughs) are turned into commodities that are distributed to consumers through a price mechanism. Negotiating, transacting, buying, selling and licensing are the action words that describe the workings of the market. These acts serve to transform interests into quantifiable value captured in transferable objects. But, of course, there is a culture to the market mechanism. That culture may be characterised as crass and commercial, but it also may be important for the development of a public sphere. The agora, or the forum, were public spaces, defined by its own rules of comportment and

¹ Richard R. Wilk, *Economics and Culture: Foundations of Economic Anthropology* (Boulder: Westview Press, 1996), pp.103–104; David Throsby, *Economics and Culture* (Cambridge: Cambridge University Press, 2001), pp.7–12.

decorum. The modern notion of the market as a domain for the realisation of pure self-interest and greed is only one manifestation of the market institution, one that may reflect other aspects of contemporary culture as opposed to any inherent characteristic of the market.

Just as the market has a culture, what we refer to as culture has overlap with the transactional features of the marketplace. Culture is not static; as stated above, it has many dimensions. The dimensions of culture, whether artifact or deep seeded, and intangible norms and customs represent a negotiation, a tacit agreement among people on how to behave and how to agree on what is acceptable and what is not. This negotiation is of course different from a price mediated market negotiation, but like any negotiation, it entails sacrifice and trade-offs. If a group agrees that marriage or religion or linguistic systems have one meaning, then options are foreclosed until the group rethinks these meanings. The trade-offs may not reflect an application of utilitarian principles, but they have utilitarian implications. Some are made worse off, and some are made better off by cultural choices. Just as markets have implicit norms of behaviours, cultures represent a transaction among people on how to organise the world and give it meaning.

The point of this discussion is to show that binary oppositions between cultural and utilitarian theories and between culture and market may offer misdirection for the creation of intellectual property law and policy. By focusing on markets, we ignore values beyond price. By focusing on culture, we ignore how the market serves as an institution that can free individuals from arrangements such as patronage. Designing intellectual property law and policy requires a keen attention to history and the context within which law-making and creating occur.

Of course, it is not possible to simply reduce my points to an exegesis of a paradigm for this cultural-utilitarian analysis of intellectual property (to coin an awkward phrase). Instead, I would like to show by example through a description of an ongoing research project on the historical roots of copyright and patent in contemporary India. The project traces contemporary copyright and patent to colonial India. The goal is to identify the roots of contemporary debates and to illustrate how today's policy concerns have analogues in past policy debates.

Within the context of this special issue, the example of intellectual property in Colonial India illustrates the relationship between cultural and utilitarian approaches to intellectual property policy. Interests are not only static, but also have a cultural context. The rest of this article demonstrates the interplay between interests and culture.

Cultural contours of copyright in Colonial India

India's relationship with Great Britain started as an economic one with the East India Company entering into a trading agreement in 1615 with the Mughal emperor governing territorial India at the time.² This economic relationship turned into one of governance and control as the East India Company, chartered by the Crown in 1600, expanded its dominion over the territory, and the Mughal rulers ceded their sovereignty to the Company, which eventually obtained sovereignty over India in 1757 after the defeat of the French on Indian soil in the Battle of Plassey.³ Governance by the East India Company was pursuant to the common law of England which was introduced into India. Concern over corruption by the East India Company led the British Parliament to enact the Government of India Act of 1833, which established the Governor General of India.⁴ The Governor General was empowered to enact laws for India which did not interfere with or contradict British law. Under the Government of India Act of 1858, England directly governed India, maintaining the Governor General to enact local Indian legislation pursuant to British

² Ramachandra Guha, *India after Gandhi: The History of the World's Largest Democracy* (Oxford: Ecco, 2007), p.53.

³ Guha, *India after Gandhi* (2007), p.287.

⁴ Rajesh Sagar, "Introduction of Exclusive Privileges/Patents in Colonial India: Why and for Whose Benefit?" (2007) 164 I.P.Q. 164, 165–166.

law. Through this Act, India obtained dominion status in the British Empire, meaning it was not fully self-governing and was subject to control by the Home Office in London.⁵

Copyright legislation entered India through the Copyright Act of 1847, enacted pursuant to the copyright law reform in England passed in 1842. Three issues motivated the enactment of Indian copyright law.⁶ First was the enforcement of copyrights under English common law as introduced into India under the East India Company. Second was the enforcement of copyright under principle of equity in Indian courts. Third was the jurisdiction of English copyright law in India. Legislation in India was necessary to clarify these three issues and allow for protection of UK copyrights in India. Under the terms of the Copyright Acts of 1842 and 1847, works published anywhere in the colonies would be subject to protection under English copyright law. Indian copyright law governed infringement within India of works first published in the United Kingdom. The Indian Copyright Act of 1847 followed the details of English copyright law as far as duration of rights, but copyright extended only to literary and artistic works, and not to musical or dramatic works.⁷ Furthermore, registration of copyright was with the Secretary of State's Office in India, rather than the Copyright Office in the United Kingdom. Most importantly, the Indian copyright act did not treat unauthorised importation of works copyrighted under UK law as infringement. It thereby created a ready market for what was deemed to be pirated literary works from the United Kingdom.⁸

Copyright reform did not stop with the 1842 and 1847 statutes, which created controversy as well as addressing some issues. The Imperial Copyright Act of 1911 and the subsequent Indian Copyright Act of 1914 were the next set of copyright legislation during the colonial period. The reforms responded to three challenges in the international environment.

First was the need for uniformity of copyright laws across the colonies in order to deal with the unauthorised importation of copyrighted works into the local colonial marketplace.⁹ Under the International Copyright Act of 1886, any work produced in the colonies was given the same copyright protection as a work created in the United Kingdom.

The second challenge came from unauthorised translations of UK copyrighted works in the colonies. A letter from John R. MacGrath, Vice-Chancellor of the University of Oxford, to Secretary of State for India, dated January 24, 1896, reported on a decision by the High Court of Mumbai against MacMillan Press, which had brought a copyright challenge against the publisher of an unauthorised translation of books.¹⁰ The High Court had ruled that a translation was not copyright infringement. MacGrath, representing the interests of Oxford University and Clarendon presses, noted that a British copyright holder had less protection in the colonies than a non-British copyright holder and recommended reforms of Indian copyright law. In a separate letter, dated November 30, 1885, the Under Secretary of State rejected an appeal from the Governor General of India, urging for copyright reform in India.¹¹ The Under Secretary, citing commentary from Sir Henry Maine on copyright reform, stated that copyright reform in India should co-ordinate with reform efforts in Britain. The translation issue was addressed by the Indian Copyright Act of 1914, which created a compulsory license system for translations.¹²

The third challenge came from the Berne Convention of 1896 and the 1908 Berlin Act of that Convention, each of which required revisions of copyright law to conform to international standards. These treaties

⁵ John Darwin, *The Empire Project: The Rise and Fall of the British World System 1830–1970* (Cambridge: Cambridge University Press, 2009), p.81.

⁶ Walter Arthur Copinger, *The Law of Copyright* (London: Stevens and Haynes, 1893), pp.812–813.

⁷ Copinger, *The Law of Copyright* (1893), p.814.

⁸ Copinger, *The Law of Copyright* (1893), p.815.

⁹ J.M. Easton, *Copinger on the Law of Copyrights* (1915), p.332.

¹⁰ Letter from John R. MaGrath, Vice-Chancellor, University of Oxford to Secretary of State for India, January 24, 1896 (available in the British Library).

¹¹ Letter from Board of Trade, November 30, 1885 (available in the British Library), rejecting copyright reform in India until bill introduced in England.

¹² Lionel Bently, "Copyright, Translations, and Relations between Britain and India in the Nineteenth and Early Twentieth Centuries" (2007) 82 Chi.-Kent L. Rev. 1181.

required amendments to address issues of duration and moral rights.¹³ The Berlin Act specifically required copyright protection for cinematographic works as either a literary or artistic work. The Imperial Copyright Act of 1911 and the Indian Copyright Act of 1914 responded to these challenges by attempting to harmonize the copyright law of the colonies. At the same time, the Imperial Copyright Act of 1911 allowed dominions to diverge from the Imperial Copyright Act in local application of its copyright laws.

Professor Lionel Bently and other academics have provided details of the Imperial Copyright Act and its Indian companion.¹⁴ Here I will focus on how the two copyright acts addressed film in order to comply with the Berlin Act. Indian law on this point tracked the Imperial Copyright Act without variation. The Imperial Copyright Act defined a cinematographic work as “a series of instantaneous photographs projected on the screen in rapid succession so as to give effect of motion”.¹⁵ The Act defined the work as an artistic work and “entitled [it] to copyright as such”. The statute also treated a cinematographic work as a dramatic work since the photographs “may also be arranged in a particular way or they may represent original acting form or combination of incidents”. The Act, however, excluded from protection the filming of single or different incidents in real life or of a non-copyrighted play unless the film creator gave the material an original form. Finally, the Imperial Copyright Act recognised that “the author of a literary dramatic or musical work has the sole right to make a Cinematograph of his work”.

Like the 1909 Copyright Act in the United States, neither the Imperial Copyright Act nor the Indian Copyright Act recognised film as a separate copyrighted work. However, the treatment of film under copyright law was confusingly complex under Imperial Copyright and therefore under Indian Copyright. In the United States, a motion picture was categorized as a dramatic work. The Imperial Copyright Act, by contrast, treated film as both a dramatic work and an artistic work. This dual treatment created confusion in the resulting case law.¹⁶ The case law was confounded by film’s dual status as both an original work and a derivative work. For example, courts split on whether selling a movie constituted a public performance and hence an infringement of copyright.¹⁷ However, promotion of a movie was viewed as contributory infringement of copyright.¹⁸ The film’s dual status as dramatic and artistic works also created confusion as to copyright ownership with one British court splitting copyright ownership in film between the producer (who was deemed to own copyright in the photographic elements) and the screenwriter (who was deemed to own copyright in the dramatic elements).¹⁹

Indian copyright during the Colonial period shows an intimate connection between copyright reform in Britain with the emerging understanding of copyright in the colonies. This connection was flexible, with the dominion colonies, like India, given latitude in the development of copyright. However, with respect to the emerging area of film copyright, India adopted British law without variation. The confusion in British film copyright law became a source of debate within India after Independence and shaped post-Independence copyright reform.

The pro-copyright orientation of contemporary Indian jurisprudence comes across in the 2009 Delhi High Court decision in *Warner Bros Entertainment v Santosh*.²⁰ At issue was an online movie DVD rental business created by the defendant using DVD’s purchased legally overseas. The online service was aimed at the Indian consumer interested in watching non-vernacular movies, meaning American films. Warner Brothers sued in the High Court of Delhi, raising claims under the Indian Copyright Act which grants

¹³ Pascal Kamina, *Film Copyright in the European Union* (Cambridge: Cambridge University Press, 2002), pp.18–21.

¹⁴ Isabella Alexander, *Copyright Law and the Public Interest in the Nineteenth Century* (Cambridge: Cambridge University Press, 2010), pp.142–143; Bently, “Copyright, Translations, and Relations between Britain and India in the Nineteenth and Early Twentieth Centuries” (2007) 82 Chi.-Kent L. Rev. 1181.

¹⁵ Harish Chandra Mital and Bhagwan Das Jain, *The Law of Copyright in India* (Calcutta: Eastern Law House, 1939), p.85.

¹⁶ F.E. Skone Jones, *Copinger on Copyright* (London: Sweet & Maxwell, 1927), p.218.

¹⁷ See *Glenville v Selig Polyscope* (1911) 27 T.L.R. 554 (no infringement); *Kurno v Pathe Freres* (1909) 100 L.T. 260 (no infringement); *Kilmer v Harper Brothers* 222 U.S.R. 55 (1911) (infringement).

¹⁸ *Falcon v Famous Players Film Co* [1926] 2 K.B. 474; *Fenning Film Source v Wolverhampton Co Cinemas* [1914] 3 K.B. 1171.

¹⁹ *Milligan v Broadway Cinema Palace Co* (1923) S.L.T. 35.

²⁰ *Warner Bros Entertainment v Santosh* 2009 INDLAW DEL 970.

film copyright owners the exclusive right to “sell, or offer for sale any copy of the film, regardless of whether such copy has been sold or hired earlier”.²¹ Although the Indian Copyright Act does not grant rental rights, Warner Brothers read this rights provision to include rental rights. The High Court ruled in favour of Warner Brothers and enjoined the defendant’s business.

A critical issue in the case was the limitation on the copyright owner’s rights from the first sale doctrine. The Indian Copyright Act does not recognize a general first sale doctrine as existed under US Copyright law. Instead, the first sale doctrine is applied on a case by case and work by work basis. Santosh raised an exhaustion, or first sale, defence before the High Court of Delhi, arguing that the legitimate purchase of the DVD’s overseas exhausted the copyright holders’ rights in the work. The High Court, looking to US²² and Canadian²³ case law on copyright exhaustion as well as the language of the Indian Copyright Act, ruled against Santosh. Looking to the text of the Indian Copyright Act, the High Court reasoned that limitations on the copyright holders’ rights for works in circulation applied to literary, artistic, dramatic or musical works, and not to cinematographic works. The statute provides the owner of a cinematographic copyright the right to distribute “whether such copy has been sold or hired earlier”. The qualifying clause meant that the first sale doctrine did not apply to film.

Furthermore, the High Court distinguished the various applications of the first sale doctrine. Contrasting the European approach with the US approach, the High Court describes the former as adopting regional exhaustion, applying only to sales within the European Union, and the latter as adopting international exhaustion, applying to sales made by the US copyright owner anywhere in the world. The High Court remained silent on the scope of exhaustion under Indian law, but relied on the distinction between Europe and the United States to conclude that the scope of the first sale doctrine depends on national law. Accordingly, the court looked to the treatment of film copyright under the Indian statute to find against the defendant’s first sale doctrine defence. Under Indian law, the sale of a film does not exhaust distribution rights, and the film copyright owner retains the right to rent and resell the work.

The High Court also addressed the importation as well as the rental issue. Warner Brothers had argued that the importation of the copyrighted films into India after the purchase from the United States violated its importation rights. Once again, the court delved into the structure and language of the statute to determine the scope of an Indian copyright holder’s importation right. Starting from the provisions of the statute on licensing and the power of the Copyright Board to control imports,²⁴ the court concluded that the importation right was a separate right of the copyright holder and was not exhausted by Santosh’s purchases of the DVD’s in the United States.

On the point of whether the first sale doctrine limited the importation right, the court relied on US case law, which held that the first sale doctrine applied only to the distribution right and not to other rights like reproduction or adaptation. Since the importation right was a separate right, the High Court reasoned that the first sale doctrine did not exhaust the distribution right. In its analysis of the importation right, the court’s decision did not rest on language specific to cinematographic works as it did with respect to the scope of the first sale doctrine. Consequently, the High Court’s holding on importation arguably applies to all works while its analysis on resale and rental would apply only to film.

The 2009 Delhi High Court opinion in Warner Brothers represents a pro-copyright decision, grounded in a strict application of copyright legislation. However, there are clear policy goals that inform the court’s decision. To understand these policy inclinations, consider the policy argument raised by Santosh in defence of his online service:

²¹ Indian Copyright Act 1957 §14(1)(d).

²² *Bobbs-Merrill Co v Straus* 210 U.S. 339 (1908); *Quality King Distributors v Lanza Research International Inc* 523 U.S. 135 (1988).

²³ *Euro-Excellence Inc v Kraft Canada Inc* 2007 S.C.C. 37.

²⁴ Indian Copyright Act 1957 §53.

“The defendant ... submits that this Court should also take into account the Constitutional imperative that providing entertainment is a part of the fundamental right of freedom of speech and expression. Therefore, when a business seeks to exercise its fundamental right to provide entertainment as part of its freedom of speech and expression limitations should be restricted to those based on societal needs and benefits.”²⁵

The defendant characterised these societal needs and benefits as creating a video club which allowed Indian consumers to have access to non-vernacular films, access that was limited by the inadequate number of theatres screening English language films in India. The defendant concluded that not finding an exception under copyright law that would allow the distribution of the films would make the Indian Copyright Act unconstitutional.

The High Court dismissed the defendant’s constitutional argument. Relying on US case law, the court points out that the US copyright jurisprudence also noted the tension between copyright and constitutional values like free speech. “Yet”, the High Court reasons,

“the express terms of the US Constitution enjoin Congress to enable copyrights, to promote creativity. It is therefore a long held view, in academic quarters, as well as by the courts, that copyright law promotes free speech, by promoting originality of expression”.²⁶

The Indian Constitution, it should be pointed out, does not have an express provision granting Parliament the power to enact copyright legislation. Although the High Court does not acknowledge this point, it does address the policies inherent in copyright law:

“Copyright law, and the protections afforded to owners and those entitled to it ... is a balance struck between the need to protect expression of an idea, in a given form to promote creativity, on the one hand, and ensure that such protection does not stifle the objective, i.e. creativity itself. Copyrights are part of intellectual property, which are but a species of property law ... Just as the owner of real property ... is entitled to legitimately assert his domain over it, and protect it from unfair appropriation by another, the intellectual property owner is, by these laws, enabled to protect unwarranted exploitation or unauthorized use of what are his property rights.”²⁷

Copyright law affirms property rights for the purpose of promoting creativity. This policy objective supports protection of copyright owner’s rights over other social and public policy goals, including freedom of expression. Although this policy analysis is writ large, the strong protection the court finds for film copyright under the Indian Copyright Act vindicates the nearly century long criticism of Indian copyright law, starting with the Cinematograph Committee of 1928. These criticisms culminate and are assuaged by the 2009 decision.

Culture, interests and intellectual property

The discussion of copyright in India is an excerpt from a larger project exploring the colonial roots of contemporary intellectual property law in India. The excerpt also provides a glimpse into the relationships among law, interests and culture. Contemporary debates in copyright are longstanding, illustrating contested issues about markets, rights and the distribution of expressive materials. Informing both cultural and utilitarian understandings of intellectual property is the fundamental problem of how individuals manage to deal with artifacts, with technologies and with each other.

²⁵ *Warner Bros* 2009 INDLAW DEL 970 at [14].

²⁶ *Warner Bros* 2009 INDLAW DEL 970 at [85].

²⁷ *Warner Bros* 2009 INDLAW DEL 970 at [86].

Cultural approaches are often presented in opposition to utilitarian theories of intellectual property. This opposition reflects the narrow application of utilitarianism, often used to reduce policies to quantitative comparisons of benefits and costs. But utilitarianism's origin was in support of progressive reform, to expand the reach and benefits of law. However, utilitarianism has developed into a narrow consideration of political interests derived from a reductionist model of rational actors counting benefits and costs. Cultural approaches respond to this narrow view of policy by recognising law making as a cultural phenomenon and law itself as a cultural artifact. Rational actors are placed in social contexts within which law acts and to which law responds.

But cultural approaches to law need to be effective in changing law and reshaping institutions without falling into the traps of utilitarianism. Cultural analyses can readily produce yet another set of interests seeking to assuage. To avoid this, cultural analyses need to be attuned to how interests are shaped by culture and in turn shape legal institutions that define intellectual property law. The example of colonial copyright in India illustrates how to confront this challenge through a more detailed historical and contextual understanding of the dynamic origins of the contemporary landscape.

Collective Rights Management, Competition Policy and Cultural Diversity: EU Lawmaking at a Crossroads

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☞ Collecting societies; Collective licensing; Culture; Digital rights management; Diversity; EU law; Internet; Licensing agreements; Musical works

Introduction

Digital technology and the internet have deeply changed the ways in which cultural content is created, disseminated, accessed and enjoyed. Over time, with the internet becoming the pivot of the information society, consumers have come to expect easy access to digital content at all times, anywhere and through a multitude of devices. Copyright, which remains the foundation of most of the creative economy's business models, is challenged by these developments in at least two respects. First, the premise of copyright law that a licence is required for every use of a work makes the exploitation of certain works rather clumsy. For audiovisual or multimedia works, for example, licences from a multitude of right-holders (authors, performers and producers) would be required. Secondly, for exploitation of works on the internet, worldwide licences would be necessary. In contrast to the needs of a globalising digital culture, copyright remains grounded in a view of the world where the territorial state is the main structural principle. Overall, these structural flaws of global copyright law throttle the establishment of a licit online market for audiovisual media services and may at least partly explain why illicit file-sharing is still thriving.

Under these circumstances, systems of collective rights management (CRM) offering a one-stop shop for global rights clearance would seem to be an attractive solution, in particular where negotiations between users and individual creators would be impractical and entail prohibitive transaction costs. The reality, however, tells a different story. In the European Union (EU), where collective rights management organisations (CMOs) are widespread, they have been put into question by the European Commission, as a consequence of complaints concerning their transparency, governance and the distribution of royalties collected on behalf of right-holders. Legal proceedings, communications and recommendations bear testimony to the many attempts the Commission has made over the last decade, not only to make CMOs work more efficiently, but also to bring them from a system of national licences granted by national monopolies to a system of EU-wide authorisations available from CMOs competing for the most lucrative rights to administer. The question is whether these regulatory attempts at a paradigm change in CMO licensing structures are compatible with cultural diversity interests.

This article aims to briefly reconstruct the main stages of the EU CRM policy and lawmaking process and then criticise the European Commission's position from a cultural diversity perspective. In a third step, the article will ask to what extent the recent proposal of the Commission for a CRM directive would be able to neutralise this critique.

National CMOs and the challenges of EU law and policymaking

CRM and the public interest

The idea of collective rights management originated in France at the end of the 18th century, when playwrights organised themselves as a pressure group, fighting against theatres for the recognition of their economic and moral rights.¹ This movement led to the foundation of the *Bureau de législation dramatique* in 1777, which later was succeeded by the still-existing *Société des auteurs et compositeurs dramatiques* (SACD).² As a consequence of technological development, over the course of time, new collecting societies (today more commonly known as CMOs) came into covering every sector of artistic creation, including music, visual art, literature and audiovisual works as well as productions and performances.³ The early French CMOs served as a model for a network of national authors' societies that eventually spread throughout large parts of the world. By concluding bilateral agreements with sister organisations in the more than 120 countries that are members of the International Confederation of Societies of Authors and Composers (CISAC),⁴ CMOs eventually became able to offer users a one-stop shop for (national) licenses related to a global repertoire. For the administration of works like audiovisual and multimedia works, which are composed of several types of works (including text, music, image, software etc.) and thus require a great number of authorisations, collaboration between CMOs operating in different sectors of artistic creation became necessary. With the advent of a global networked digital environment, CMOs are now facing one of the biggest challenges of their history: to cope with the contradictions between national orders of copyright law and global digital business expectations. Together with a few media companies that are granting licenses directly to individual consumers, CMOs have assumed the role of a major guarantor for a licit online market to build up in the audiovisual and multimedia sectors. As a counterweight to the global oligopoly of vertically integrated transnational entertainment giants, CMOs may offer a scheme of rights management that better respects the specific interests of independent authors and thus promotes the diversity of cultural expressions.

CMOs provide services that are useful to both authors/right-holders and users. For authors/right-holders, CMOs are useful since they act as trustees that usually administer, monitor, collect and distribute the payment of royalties for all right-holders that are directly or indirectly represented by the CMO. Beyond economic functions, CMOs also have important cultural and social roles: The trade union-like spirit of solidarity that was crucial at the beginning of their history⁵ is still present in the cultural and social funds that are operated by most CMOs. These funds are fed out of deductions of approximately 10 per cent from the total revenues of a CMO⁶ and are used to subsidise creative projects of (particularly young) artists or to help members in need of welfare aid. Moreover, the organised power of a CMO assures its members an important bargaining position which can be employed to defend old rights or to strive for the acknowledgment of new ones, if technological development would make this necessary. Users, on the other hand, benefit from CMOs since a centralised rights-clearance facility helps to cut down on transaction

¹ For an illustrative account of the history of collecting societies, see Mihály Ficsor, *Collective Management of Copyright and Related Rights* (Geneva: World Intellectual Property Organization, 2002), pp.18–19, 57–58.

² Ficsor, *Collective Management of Copyright and Related Rights* (2002), p.18. See also Daniel Gervais, "The Evolving Role(s) of Copyright Collectives" in Christoph B. Graber, Carlo Govoni, Michael Girsberger and Mira Nenova (eds), *Digital Rights Management: The End of Collecting Societies?* (Bern: Staempfli, 2005), p.28.

³ For a detailed analysis of collecting societies' main fields of activity, see Ficsor, *Collective Management of Copyright and Related Rights* (2002), pp.37–89.

⁴ CISAC was founded in 1926 as an umbrella organisation for CRM. Today the membership of CISAC encompasses 232 authors' societies from 121 countries.

⁵ See Ficsor, *Collective Management of Copyright and Related Rights* (2002), p.20.

⁶ The CISAC model contract for reciprocal representation agreements between CISAC members provides the possibility to reserve up to 10 per cent of the collections for social or cultural ends: see art.8 II of CISAC model contract, available in Harald Heker (ed.), *GEMA Jahrbuch 2011/2012* (Baden-Baden: Nomos, 2011), pp.246–247.

costs. The availability of a global one-stop shop for global repertoires would be particularly important for internet intermediaries that are out to launch new business models online.

As required by statutory law in many (particularly) European countries, CMOs operate under a double constraint serving the public interest.⁷ First, in relation to creators, they are required to administer all rights falling into their area of competence. Secondly, in relation to users, they are obliged, on request, to grant exploitation rights or authorisations to any person on equitable conditions in respect of the rights they administer.⁸ Moreover, arbitration mechanisms provide access to users and CMOs alike, and supervision procedures serve to prevent possible abuses, where CMOs enjoy a *de iure* or *de facto* monopoly position.⁹ In practice, a *de iure* or *de facto* monopoly position of CMOs is the rule in the European Union, since there is generally only one CMO per Member State to administer the rights of a specific group of right holders.

CRM and competition law

In consideration of these monopolistic structures, the European Court of Justice (ECJ) has further detailed the room to manoeuvre for CMOs from a competition law perspective. That is to say that the ECJ does not consider CMOs to be undertakings entrusted with the operation of services of general economic interest in the sense of art.106 of Treaty on the Functioning of the European Union (TFEU),¹⁰ regardless of the cultural functions they fulfil. Consequently, CMOs are not exempt from the competition rules provided by the TFEU and must comply with antitrust rules (art.101 TFEU) and not abuse the dominant position that is implied by a *de iure* or *de facto* monopoly (art.102 TFEU). From ECJ case law, the following main governance standards for CMOs emerged regarding the relationship: (1) between a CMO and its members (internal relations); (2) between the CMO and users (external relations); and (3) between two or more CMOs.

First, with regard to internal relations, the ECJ held in *BRT v SABAM*¹¹ that art.102 TFEU imposes fair trading obligations on a CMO enjoying a *de facto* monopoly for the management of copyright in a EU Member State. The contract concluded between a CMO and its individual members may thus limit the freedom of the member only to the extent that this would be necessary for effective rights management by the CMO. In *GVL v Commission*, the court ruled that art.102 TFEU prevents a CMO enjoying a *de facto* monopoly from excluding nationals of another EU Member State from membership.¹² The principle of non-discrimination—implicit in this decision and now enshrined in art.18 TFEU—was eventually generalised for the whole of EU copyright law in *Phil Collins*.¹³

Secondly, concerning external relations, the ECJ held in *Basset v SACEM*¹⁴ that a CMO enjoying a *de facto* monopoly is not allowed, under art.102 TFEU, to impose unreasonably high tariffs on users wanting to licence rights in its repertoire. According to *Ministère Public v Tournier*,¹⁵ a CMO may refuse direct access to its repertoire to users established in other EU Member States or may refuse granting licenses

⁷ Daniel J. Gervais, “Collective Management of Copyright: Theory and Practice in the Digital Age” in Daniel J. Gervais (ed.), *Collective Management of Copyright and Related Rights* (Alphen aan den Rijn: Kluwer Law International, 2010), p.6.

⁸ See Thomas Dreier, “Balancing Proprietary and Public Domain Interests: Inside or Outside of Proprietary Rights?” in Rochelle Cooper Dreyfuss, Diane Leenheer Zimmerman and Harry First (eds), *Expanding the Boundaries of Intellectual Property: Innovation Policy for the Knowledge Society* (Oxford: Oxford University Press, 2001), p.301.

⁹ Christoph B. Graber, “Copyright and Access—A Human Rights Perspective” in Christoph B. Graber, Carlo Govoni, Michael Girsberger and Mira Nenova (eds), *Digital Rights Management: The End of Collecting Societies?* (2005), p.73; Ficsor, *Collective Management of Copyright and Related Rights* (2002), pp.144–146.

¹⁰ See *GVL v Commission* (C-7/82) [1983] E.C.R. 483 at [32]; *BRT v SABAM (BRT II)* (C-127/73) [1974] E.C.R. 313 at [23].

¹¹ *BRT v SABAM (BRT II)* (C-127/73) [1974] E.C.R. 313.

¹² *GVL v Commission* (C-7/82) [1983] E.C.R. 483.

¹³ *Phil Collins v Imtrat* (C-92/92 and C-326/92) [1993] E.C.R. I-5145.

¹⁴ *Basset v SACEM* (C-402/85) [1987] E.C.R. 1747.

¹⁵ *Ministère Public v Tournier* (C-395/87) [1989] E.C.R. 2521.

for only parts of their repertoire if this is necessary for reasons of an efficient monitoring and management of contracts.

Finally, concerning the relationship between CMOs, the ECJ decided in *Ministère Public v Tournier* and *Lucazeau v SACEM*¹⁶ that reciprocal representation agreements between CMOs are bound by the antitrust rules of art.101 TFEU. A reciprocal representation agreement providing (directly or indirectly) that users established in Member State B are prevented from direct access to the repertoire of a CMO in Member State A may be considered “concerted practice” within the meaning of art.101 TFEU, if it leads to conditions of trade which do not correspond to the normal conditions of competition. However, if the parallel behaviour is justified by legitimate reasons including reasons of efficient monitoring, the agreement does not violate art.101 TFEU.¹⁷

It is noteworthy that the ECJ, in this case law, has duly recognised that CMOs serve multiple public-policy interests and never squeezed them into a one-sided economic approach.

Simulcasting and challenges of the internet

While this case law evolved under pre-internet conditions, the establishment of a digital networked environment challenged the conventional system of CRM as far as reciprocal representation agreements between CMOs are concerned. A first step in this development was the so-called simulcasting agreement, a model contract concluded between the International Federation of the Phonographic Industry (IFPI) and a considerable number of CMOs with the aim to facilitate the granting of multi-repertoire and multi-territory licenses. Accordingly, the simulcasting agreement provided for each participating CMO to grant, for its represented repertoire, simulcasting¹⁸ licenses to the other participating CMOs.¹⁹ As a novelty, the agreement stipulated reciprocal repertoire licensing that was not limited to the individual CMOs territory but encompassed the whole world. This agreement required the European Commission to reassess the legitimacy of representation contracts under conditions of the internet. In its 2002 *Simulcasting* decision,²⁰ the Commission exempted the agreement from the antitrust rules of art.101 TFEU, after the participating CMOs had agreed to clearly separate copyright royalties from administrative fees. The Commission’s intention was that a requirement of making administrative fees transparent would enhance competition between CMOs. Furthermore, the Commission was concerned with a clause in the agreement providing that royalties are to be calculated as the aggregate of the royalties the participating CMOs would charge individually for their respective territory. Although this solution prevented the grantor CMO from freely determining the royalty level and thus excluded competition between CMOs, the Commission refrained from requiring the clause to be changed. The reason was that a unilateral determination implicated the danger that a participating CMO would engage in a kind of “royalty dumping” in order to attract users.²¹

The *Simulcasting* case leaves us with the impression that the Commission, although having reservations against the existing CRM systems in terms of efficiency and competition, was ultimately unable to present an alternative model that would promise a better solution. However, unabated and fast technological development and the drive of new internet-based business models imposed pressure on the Commission to come up with a solution for a more efficient and user friendly system that would spur growth of the digital economy and restrain piracy in Europe. As a reaction to these pressures, the Commission published a Recommendation on music licensing in 2005 that is briefly introduced in the next section.

¹⁶ *Lucazeau v SACEM* (C-110/88, C-241/88 and C-242/88) [1989] E.C.R. 2811.

¹⁷ *Ministère Public v Tournier* (C-395/87) [1989] E.C.R. 2521 at [24].

¹⁸ Simulcasting is defined as the simultaneous transmission by radio and TV stations via the internet of a sound recording that is included in the broadcasts of radio and/or TV signals.

¹⁹ Commission decision of October 8, 2002 relating to a proceeding under art.81 of the EC Treaty and art.53 of the EEA Agreement [2002] COMP/C2/38.014 at [19] (IFPI “Simulcasting”).

²⁰ IFPI “Simulcasting” [2002] COMP/C2/38.014.

²¹ IFPI “Simulcasting” [2002] COMP/C2/38.014 at [111].

The 2005 Commission Recommendation and the CISAC case

In October 2005, the Commission published Recommendation 2005/737 on collective rights management for music services on the internet.²² The main purpose of this recommendation was to propose a system for cross-border licensing in the online environment that would stimulate competition among CMOs in Europe. To this end, the Commission recommended that right-holders should be empowered to freely choose: (1) the CMO in charge; (2) the rights to be mandated; and (3) the territorial reach of the mandate. In addition, CMOs should be prevented from distinguishing between different categories of right-holders.

The Recommendation, a non-binding instrument of EU law, is clearly favouring a system for the enhancement of competition in the cross-border exploitation of music rights online that is driven by right-holders rather than users. The system of reciprocal representation agreements between CMOs shall eventually be replaced by a system based on CMOs offering multi-territorial licences for their repertoire only. CMOs would no longer be under an obligation to represent all rights falling into their area of competence and could accept or reject the administration of certain rights according to their own preferences. The likely consequence of such a system would be that CMOs will specialise in the representation of the most lucrative rights and aggrandise the repertoire in their field of specialisation. Such a concentration process will allow these CMOs to keep administration costs low and make them attractive to online users who are interested in buying licences as cheaply as possible. While CMOs will compete for works of mainstream music (i.e. pop music in the English language), the situation will become more difficult for less popular music and music in languages that are less widely used.

The Commission confirmed the basic principles of the Recommendation in the 2008 CISAC decision.²³ In this case, the Commission found that the representation agreements concluded between CISAC²⁴ members within the European Economic Area (EEA) violated art.101 TFEU. The case was appealed by the involved CMOs to the General Court of the European Union, where it was still pending when this article went to press.

Overall, the Commission's CRM policy raises strong concerns from a cultural diversity perspective, as several critics have pointed out.²⁵ As a major flaw, the Recommendation looks at CMOs exclusively from an economic perspective and does not care about their cultural and social functions. The only goal of the Commission's initiative seems to be improving the efficiency of the administration services that CMOs provide to right-holders. It does not consider, however, that under conditions of competition, CMOs would have difficulties to fulfil their public interest functions. A further shortcoming is that the Recommendation treats all right-holders the same and does not distinguish between those who create and perform works (the creators) and those who merely exploit the rights which they have acquired from creative people (the successors in title). As we have seen above, CRM provides for an institutional structure that is intended to strengthen the position of independent authors and performers in their business relations with users. The privileges conceded to creators through this structure are justified because users (often big media companies) are generally the stronger partners in these business relationships. Accordingly, the CRM mechanism would be perverted if it were to entail benefiting successors in title, which are often transnational entertainment conglomerates. From a cultural diversity perspective, it would thus be important to make sure that the creative people may continue to play an important role also in the process of rights

²² Commission Recommendation 2005/737 of October 21, 2005 on the collective cross-border management of copyright and related rights for legitimate online music services [2005] OJ L 276.

²³ Commission decision of July 16, 2008 relating to a proceeding under art.81 of the EC Treaty and art.53 of the EEA Agreement, COMP/C2/38.698—CISAC, C(2008) 3435 final.

²⁴ On CISAC, see fn.6.

²⁵ See in particular the comment by the Max Planck Institute for Intellectual Property Rights and Competition law, available in (2006) 3 *GRUR Int.* 222-225. See also Peter Gyertyánfy, "Collective Management of Music Rights in Europe after the CISAC Decision" (2010) 41 *International Review of Intellectual Property and Competition Law* 59, 70-75; Manuela Maria Schmitt, "Die kollektive Verwertung der Online-Musikrechte im Europäischen Binnenmarkt" (2005) 11 *Zeitschrift für Urheber- und Medienrecht* 783.

exploitation online and prevent the transnational entertainment business from further expanding its dominance in this area.

The proposed CRM Directive

Main features of the Proposal

While the Commission announced a Directive on CRM already in a 2004 Communication,²⁶ it took eight more years to eventually come up with a proposal for such an instrument in July 2012.²⁷ The length of the Proposal's "birth process" is in itself a reflection of the difficulties posed by a project that is intended to remedy at least some of the contradictions between territorial copyright law and a global market.

The proposed Directive pursues two objectives. First, it aims at providing for a general framework of regulation for collective rights management in the European Union assuring that all CMOs under the jurisdiction of EU Member States observe minimal standards of governance and transparency (Titles I and II of the Proposal). Secondly, the Proposal aims at encouraging and facilitating "the multi-territorial licensing of the rights of authors in their musical works by collecting societies representing authors" (Title III).²⁸

Titles I and II contain general provisions (including provisions on scope, definitions, governance, transparency and internal and external relations) that apply to any CMO that is based in Europe, irrespective of the sector where it is active. According to art.5 of the Proposal, right-holders have the right to mandate a CMO of their choice with the administration of the rights of their choice for the Member States of their choice. This provision extends the Commission's credo that CMOs should compete from the market of online music to all content markets. The obligation (enshrined in art.6) for CMOs to accept right-holders as members if they fulfil the membership requirements merely codifies confirmed case law of the ECJ. The Proposal breaks new ground in providing detailed rules for cultural and social funds. In this regard, art.11 requires that deductions from revenues must be specified in the agreements governing the relationship of the CMO with its members and right-holders. Decisions on the deduction of amounts reserved for cultural, educational or social purposes must be made in a general meeting of all members (art.7). Article 11 further states that right-holders are entitled to have access to the CMO's cultural, educational and social services on fair conditions. Article 13 prohibits a CMO from discriminating between its members and the members of a represented CMO. According to art.14, CMOs may not apply deductions for cultural and other purposes from the revenues derived from the rights it manages on the basis of a representation agreement unless the other CMO consents to these deductions.

Title III then provides for specific rules on multi-territorial licensing that apply only to the management of online rights in musical works. Beyond these specific rules, CMOs that carry out multi-territorial licensing are also bound by the provisions of Titles I and II.

Among the obligations under Title III, the following stand out in the context of this article: A CMO may mandate another CMO to grant multi-territorial licences for the works in its repertoire. The mandated CMO is required under art.26(4) to transfer the collected royalties to the mandating CMO, which is in charge of distributing the amounts to the right-holders. According to art.26(2), any CMO is required to provide information on the amounts of royalties collected, deductions made and amounts distributed by the CMO. Article 28 provides that representation agreements between CMOs shall be concluded on a non-exclusive basis. The mandated CMO may accumulate repertoires since it may also be mandated by

²⁶ See Commission Communication of April 16, 2004 on the management of copyright and related rights in the internal market, COM(2004) 261 final, pp.22–23.

²⁷ Proposal for a Directive of the European Parliament and of the Council of July 11, 2012 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market, COM(2012) 372 final.

²⁸ Proposal for a Directive of the European Parliament and of the Council of July 11, 2012 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market, COM(2012) 372, final, para.1.1.

other CMOs for the same purpose. Article 29 provides a duty to contract for CMOs engaging in representation agreements for multi-territorial licensing under two conditions. First, there must be a request to do so from a CMO that is not itself engaging in multi-territorial licensing. Secondly, the requested CMO must have been representing the same category of online rights in musical works in the repertoire of one or more other collecting societies.

Comments from a cultural diversity perspective

The proposed Directive provides in Titles I and II for a framework of regulation concerning issues of governance and transparency that applies to all CMOs in Europe. It is an important step that has been long awaited. There have been failures in the regulation of CMOs in several EU Member States that must be remedied if CRM is supposed to assume an important role in future copyright licensing.

From a cultural diversity perspective, however, the Proposal is disappointing. The Commission continues to treat CMOs merely as providers of services to right-holders and without distinguishing between creators and successors in title.²⁹ Despite all the criticism that has been expressed against its previous policy steps, the Commission does not seem willing to learn that CMOs fulfil important non-economic functions. Article 5, the pivot for the establishment of competition between CMOs in all sectors, interferes with EU Member States' sovereignty in the field of cultural policy. Indeed, many Member States have adopted an alternative model of CRM as part of their cultural policy. Quite a few Member States have opted for a scheme of mandatory collective management for certain rights that is not compatible with art.5. Statutory law in many EU Member States provides for a (full or partial) monopoly of CMOs that correlates with their specific obligations in the public interest, including in matters of cultural diversity. According to the EU "constitutional" order, which is contained in its treaties, the Union possesses only limited competences in the area of cultural policy.³⁰ Culture is the domain of the EU Member States, and the Union is obliged under art.167 TFEU to take aspects of the diversity of its cultures into account whenever it becomes active under other provisions of the treaties. Accordingly, when the Union is aiming at establishing an internal market for the exploitation of rights that are protected under (national) copyright law, it must not derogate policy decisions that have been made at Member State level in the field of culture. Several EU Member States consider CRM to be an important component of their national policies aiming at the protection and promotion of the diversity of cultural expressions on their territory. An essential requirement of cultural diversity policy is to secure the supply of diverse cultural content by the market beyond mainstream offers. CRM systems that are based on reciprocal cooperation between national monopoly CMOs contribute to this end since those CMOs are obliged to represent all repertoires (and thus secure an income also to less popular creators) rather than cherry-pick popular works. Consequently, under the regime of the EU treaties, measures of CRM policy that have been taken by Member States as an embodiment of their cultural sovereignty, must be respected by the Commission. Considering the Proposal's policy decisions that ignore the EU Member States' cultural sovereignty, its recital 2, explicitly recalling the Union's obligations under art.167 TFEU,³¹ appears to be rather cynical.

Recital 2 contains more noble words recognising that those CMOs which represent "the smallest and less popular repertoires" have an important role to play in promoting the diversity of cultural expressions. At first glance this seems to be an (implicit) acknowledgement of the problem that commercially less

²⁹ Whereas the Explanatory Memorandum and the Recitals speak a few times of "authors" rather than "right-holders", the distinction between authors and right-holders is not emphasised in the Proposal's 44 articles.

³⁰ According to art.4(1) of the Treaty on European Union (TEU), the Union may legislate and adopt legally binding acts only in those areas where the treaties confer it exclusive or shared competences. Articles 3 and 4 Treaty on the Functioning of the European Union (TFEU), regulating exclusive and shared EU competences respectively, do not mention either culture or copyright. In the field of culture, according to art.6 TFEU, the Union may only carry out actions to support, coordinate or supplement the actions of the Member States. This order of competences is confirmed in art.167 TFEU, providing that the Union shall contribute to the flowering of the cultures of the Member States.

³¹ See also para.1.2 of the Explanatory Memorandum introducing the Proposal.

interesting repertoires are being left out by a policy that is singularly focused on maximising competition between CMOs. The question is how far these concerns for the diversity of cultural expressions have been effectively implemented in the articles of the Proposal. Whereas nothing in Titles I and II of the Proposal contributes to this end, art.29 provides for interesting language as far as multi-territorial licensing of music online is concerned. Article 29 states that CMOs aggregating repertoires across borders may not reject concluding a representation agreement with a CMO that is active in “the same category of online rights in musical works”. The crucial question is what “the same category” means. The aim of helping those CMOs to survive which represent the smallest repertoires is only furthered if rights in popular music and rights in non-mainstream music are considered belonging to the same category of online rights. However, the Proposal fails to clarify this point. To end on a good note, the provisions in the Proposal acknowledging the legitimacy of CMO funds for cultural, educational and social purposes are in principle a positive contribution to the promotion and protection of cultural diversity in Europe. It should, however, not be overlooked that the requirement of art.14, that a represented CMO must consent to deductions operated by a representing CMO, is likely to have the effect that well-established right-holders will choose not to be represented by a CMO engaging in cultural, educational and social services.³²

Conclusion: The uneasy relationship between competition policy and cultural diversity

The Proposal of July 12, 2012 for a directive on CRM is the expression of the European Commission’s conviction that CMOs should compete in a EU-wide market for the administration of copyrights. The Proposal is based on the (implicit) assumption that an oligopoly of CMOs is to be preferred over a system of national-monopoly CMOs that are globally co-operating in a close-mesh net of reciprocal representation agreements. At this point it would be necessary to more fundamentally reflect on the relationship between competition policy and cultural diversity. On this complex topic the limited scope of this article only allows making three brief remarks that are all related to the fact that the Commission’s view is confined to the European market while a more comprehensive perspective of economic and cultural energies interacting in a digital networked environment of global dimension would be required.

First, competition law is one-sidedly economy-oriented whereas audiovisual media are important cultural vectors as well. In this realm it is sufficient to recall that the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions explicitly recognises the dual nature of cultural goods and services as objects of trade and cultural artifacts.³³ Secondly, the competition problem posed by the dominance of a few entertainment giants on the global market for audiovisual content must not be ignored.³⁴ While the Commission carves this problem out,³⁵ the European Parliament emphasised in its seminal Echerer Report that “it is precisely because of their exclusive position that [CMOs] provide a safeguard to prevent any further concentration of intellectual property”.³⁶ The Parliament warned that a “misguided insistence on competition would also lead to further fragmentation of the markets, chaos in the clarification

³² Warner, for example, is assigning its rights within the Pan European Digital Licensing (PEDL) network exclusively to CMOs that fulfil its IT standards and are willing to accept a prohibition of social and cultural deductions.

³³ UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions 2005, para.18 of the Preamble, art.1(g).

³⁴ Lawrence Lessig has pointed out that “never in our history have fewer had a legal right to control more of the development of culture than now”. Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (New York: Penguin Books, 2004), p.170.

³⁵ What is more, the Commission’s CRM policy is playing into the hands of the US music majors who control large parts of the European market. The Commission’s 2005 Recommendation has triggered the establishment of a number of new companies, including CELAS, PEACOL, DEAL and PEDL that are specialising in pan-European music licensing. Strikingly, these new companies are joint ventures between a few European CMOs and US music majors, designed for the representation of rights owned by EMI (cooperating with GEMA and PRS for Music in CELAS), Sony (co-operating with GEMA in PEACOL), Universal (cooperating with SACEM in DEAL) or Warner (co-operating with every CMO accepting Warner’s conditions in PEDL) on the European market.

³⁶ European Parliament, Committee on Legal Affairs and the Internal Market, *Report of December 11, 2003 on a community framework for collecting societies for authors’ rights* (2002/2274(INI)), A5-0478/2003 (final), p.15 (Raina A. Mercedes Echerer). This important report was adopted by the Plenary Session of the European Parliament on January 15, 2004.

of rights and dumping tariffs”.³⁷ Thirdly, the Commission’s attitude towards CMOs is merely negative and overlooks the potential of CRM as a contribution to tackle some of the challenges posed by the internet. In this context it was premature for the Commission to outright exclude from further investigation the establishment by CMOs of a centralised portal to pool their repertoire and offer a one-stop-shop type of global licenses because of competition law concerns.³⁸ Rather than seeing EU competition law as carved in stone, the Commission should learn from the European Parliament, which has emphasised that a restriction of or even exception to competition law could be considered, provided that stringent criteria and conditions of governance, transparency and accountability would regulate monopolistic CMOs and their reciprocal representation agreements.³⁹ Since the Parliament has the power to ask for changes in the Commission’s Proposal there is still a fair chance that things will improve down the track of the lawmaking process.

³⁷ European Parliament, Committee on Legal Affairs and the Internal Market, *Report of December 11, 2003 on a community framework for collecting societies for authors’ rights* (2002/2274(INI)), A5-0478/2003 (final), p.16.

³⁸ Proposal for a Directive of the European Parliament and of the Council of July 11, 2012 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market, COM(2012) 372, final, p.7.

³⁹ European Parliament, Committee on Legal Affairs and the Internal Market, *Report of December 11, 2003 on a community framework for collecting societies for authors’ rights* (2002/2274(INI)), A5-0478/2003 (final), p.8, para.18.

The Demise of Geniality

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“Genius is the introduction of a new element into the intellectual universe: or, if that be not allowed, it is the application of powers to objects on which they had not before been exercised.”¹

Genius, as an individual quality, has a chequered history in intellectual property. The US Supreme Court seemed to have been hit by a passing flash of incantation in 1941 when it stated that private property in technology should be reserved to geniuses.² But it seems that Congress preferred a less lustrous requirement in patent law, and the more pedestrian non-obviousness standard was born in 1952.³

Other intellectual property authors may instead quote Lord Camden in his 1774 opinion.⁴ According to that opinion, the quality of genius does not necessarily qualify for private property, but it does create obligations towards society. Genius, in short, creates public goods.

Some current legal thinking questions these extreme notions of what genius means to intellectual property. Martha Woodmansee and Peter Jaszi produced a vigorously critical discourse on the matter of *individual* romantic authorship.⁵ Margaret Chon also recently analysed the curious notion of present-day *collective* romantic authorship.⁶

Essentially, Professor Chon noticed that setting aside the old notion of individual genius⁷ in favour of a myth of collective origination would not overcome the romantic aftertaste. Beyond geniality, what characterises as authorial romanticism would be the fact that the author is taken as the *arbiter elegantiarum* of culture and scientific knowledge. In the context of *collective* authorship, the *collective* author would become the arbiter.⁸

¹ William Wordsworth, “Essay, Supplementary to the Preface” in *The Prose Works of William Wordsworth* (Oxford: Clarendon Press, 1974) (1876), as taken from Margaret Chon, “The Romantic Collective Author” (2012) 14 *Vanderbilt Journal of Entertainment and Technology Law* 829. This article may be deemed an extended dialogue with Professor Chon’s article.

² *Cuno Engineering Corp v Automatic Devices Corp* 314 U.S. 84, 91 (1941): “That is to say the new device, however useful it may be, must reveal the flash of creative genius not merely the skill of the calling. If it fails, it has not established its right to a private grant on the public domain. Tested by that principle Mead’s device was not patentable. We cannot condescend that his skill in making this contribution reached the level of inventive genius which the Constitution (Art. I, § 8) authorizes Congress to reward.”

³ Giles S. Rich, “Laying the Ghost of the ‘Invention’ Requirement” in Robert P. Merges and Jane C. Ginsburg, *Foundations of Intellectual Property* (New York: Foundation Press, 2004): “On the point of Section 103 being ‘codification’ it is interesting to consider the last sentence of the section which says: ‘Patentability shall not be negated by the manner in which the invention was made.’ The specific intent of that sentence, which courts universally accepted without question, was to overrule the *Cuno* case dictum that a ‘flash of genius was necessary.’”

⁴ Lord Camden, *Donaldson v. Beckett*, *Proceedings in the Lords on the Question of Literary Property*, February 4–22, 1774: “Those great men, those favoured mortals, those sublime spirits, who share that ray of divinity which we call genius, are intrusted by Providence with the delegated power of imparting to their fellow-creatures that instruction which heaven meant for universal benefit; they must not be niggards to the world, or hoard up for themselves the common stock.”

⁵ Martha Woodmansee and Peter Jaszi, “Introduction” in Martha Woodmansee and Peter Jaszi (eds), “The Construction of Authorship: Textual Appropriation in Law and Literature” (Durham: Duke University Press, 1994) pp.10–13.

⁶ Chon, “The Romantic Collective Author” (2012) 14 *Vanderbilt Journal of Entertainment and Technology Law* 829.

⁷ The consequence of raising the idea of genius would be the “current copyright law’s excessive reliance on possessive individualism”. Chon, “The Romantic Collective Author” (2012) 14 *Vanderbilt Journal of Entertainment and Technology Law* 829, 830.

⁸ “[T]he collective author functions as a type of certification authority, whether of authenticity (as in the case of cultural claims) or of truth (as in the case of scientific claims). In both cases, the author serves a pivotal role of shaping culturally acceptable norms.” Chon, “The Romantic Collective Author” (2012) 14 *Vanderbilt Journal of Entertainment and Technology Law* 829, 841.

These discussions are certainly relevant to the ongoing reconstruction of author's rights. They also pass through the unstable border between cultural and legal theories. In Brazil, authorship law has seen the same theme developing in a somewhat different manner, probably because law and culture share very distinct borders here in the country.

Professor Chon's main subject of analysis is Wikipedia, which is certainly the result of *collective* origination. Brazilian law, however, distinguishes this kind of collective construction, where there is an *editor* (an individual or collective arbiter), from the more protean notion of *collaborative* authorship. Wikipedia, from a Brazilian standpoint, would be as collective as a Hollywood film—but for the fact that, as an ongoing work, authors or contributors cannot be displayed in the closing credits.⁹

This collective kind of creation is *organised* and utilised under the organizer's trademark or trade name. That is to say, there is actually some kind of *fuhrerprinzip* (Leader principle), albeit a mild one, to include or exclude contributions. Someone chooses what everyone contributes. Even though he or she is not identified, there is an *arbiter elegantiorum* in Wikipedia, as Professor Chon rightly observed.

From a cultural standpoint, neither genius by the grace of God nor the arbiter by the grace of geniality are new phenomena. What is baffling Brazilian law, and probably many other legal systems, is the multi-author kind of creation. This type of creation may be classified as being *collaborative*,¹⁰ and not only *collective*.¹¹ Collaboration here means something more than the simple joint creation of a work.

The structured collaborative work

Let us explore the notion that some collaborative creative processes involving multiple originators but only an individual or multi-person arbiter are occurring in virtual space—especially but not exclusively there.¹²

Sometimes this happens under some sort of by-laws—for example, “regulations” concerning the appropriation or destination of the work, as stated in GNU/GPL or GFDL licenses. Here, the *fuhrerprinzip* is substituted by an abstract rule. This species of multi-person origination is perhaps more republican than creation under the “initiative, organization and responsibility of a person or entity who publishes it under its name or mark” (as the Brazilian law defines collective works). Nevertheless, there do not seem to be essential differences.

Authorship laws usually do not force benefits upon authors. Except in those circumstances when such laws provide special protection to authors or performers vis-à-vis more privileged editors or other

⁹The Portuguese IP author José Oliveira Ascensão classifies this multi-person creation as an open collective work. See José de Oliveira Ascensão, *Modelos Colaborativos em Direitos Autorais em Ensaios sobre o Direito Imaterial: Estudos dedicados a Newton Silveira* (Rio de Janeiro: Lumen Juris, 2009).

¹⁰With no legal definitions in this context, it would seem adequate to explore the general sense of these words. But this does not work. In *Shorter Oxford English Dictionary*, “collective” brings the quotation from W. Lippmann: “The socialist contention that the collective ownership of the means of production will produce ... men who are purged of acquisitiveness and aggression”. Collaborative has two curiously opposite meanings: “1. Work jointly (with), esp. on a literary or scientific project. 2. Cooperate traitorously with (or with) an enemy.”

¹¹In continuing this discussion, some concepts provided by the Brazilian Authorship Law (9.610/96) are used. Article 5(VII)(h) of the statute defines this kind of work as “collective—[the one] created by the initiative, organization and responsibility of a person or entity who publishes it under its name or mark, which is constituted by the participation of different authors whose contributions merge into an autonomous creation”. There is in the statute no concept of collaborative work, even though co-authorship is defined as the joint creation of a work by more than one author. In Brazil, a compilation is pretty much regulated as it is in US law, but compilation under a collective work system would follow this latter rule. For a recent revision of Brazilian law in this context, see Eduardo Tibau de Vasconcellos Dias, *Autoria e Titularidade nas Obras Colaborativas*, master degree dissertation submitted to the Brazilian PTO Academy, September 27, 2012.

¹²Virtual space is only one effect of technology on the collectivization of creative production. Rochelle Cooper Dreyfuss, “Commodifying Collaborative Research” in Neil Netanel and Niva Elkin-Koren (eds), *The Commodification of Information* (The Hague: Kluwer Law International): “Lost in this debate is the effect of technology on the ways that information and cultural goods are actually produced, particularly on the extent to which individual creativity has been replaced by collaborative effort. In fact, the artist starving in a garret, the scientist madly experimenting in the garage, and the reclusive professor burning midnight oil are all rapidly becoming myths. In a world of increasing technical complexity and intensifying specialization, interdisciplinary investigation has become crucial to progress.”

commercial agents,¹³ preexisting by-laws may limit or require the surrender of patrimonial rights provided that authors or owners voluntarily submit to them. Such by-laws may provide private ordering for the authorship and ownership of creations produced within its scope and authority. These by-laws will also be enforceable without affecting the otherwise applicable statutory regime.¹⁴

Therefore, the scope of present authorship law might easily be wide enough to cover collaborative works resulting from the *participation of different authors whose contributions merge into an autonomous creation according to a preexisting set of rules that filter the included contributions*. Every contributor has an abstract *right of inclusion* according to this preexisting set of rules, yet the relevant by-laws should regulate exclusion rights, if any such rights exist.

Open to all according to internal by-laws, this collaborative environment would provide a fertile field of research in cultural theory, or perhaps political science. Some IP-related economic studies have also dealt with the notion of congestible public goods,¹⁵ which may enlighten a number of aspects of such *structured* collaborative works.

Collective ownership in IP law

It should be noted that, although the by-laws of structured collaborative works relate essentially to authorship, they must necessarily govern ownership—be it positive, negative or neutral. Some other IP rights may also facilitate structured open ownership.

José Oliveira Ascensão indicates that under Portuguese law (and probably also Brazilian Law), geographic indications (GIs) are *owned* by a plurality of persons. One can become an owner without the actual sharing of title: anyone in the assigned geographical limits may be entitled to defend the GI as intellectual property, provided that the owner follows the specific by-laws.¹⁶

Some GIs necessitate the following of a complex set of technical rules, which arguably would preclude authorship. Other GIs, however, are recognised simply on account of the well-known properties of the geographical set.¹⁷ Well-knownness, or fame, is to the same extent the result of a deliberate, continuous creation by the interested parties.¹⁸

¹³ Such protective restrictions are not limited to moral rights. For instance, German and French authorship laws tend to make all assignment of authorship rights null and void. So does Brazilian law, which provides additional restrictions on the neighbouring rights of some performers. Brazilian law also states that authorship contracts shall be restrictively interpreted, that is to say, to protect authors.

¹⁴ The legal grounds for such private ordering may be found in different legal theories. For RAND commitments in standard setting, Jay Kesan and Carol Hayes suggest that voluntary restrictions from statutorily protected IP rights may take the form of servitudes: “Thus, even if patent licenses are viewed as covenants not to sue, this does not detract from the argument that a patent license is a property interest. In the law of servitudes, for example, a ‘real covenant’ is a promise to do or not to do something with one’s land, and it is viewed as a property interest, but it is enforceable at law instead of in equity.” Jay P. Kesan and Carol M. Hayes, “Patent Transfers in the Information Age: RAND Commitments and Transparency”, available at http://sites.nationalacademies.org/xpedio/groups/pgasite/documents/webpage/pgs_072485.pdf [Accessed October 28, 2012]. In *Tratado da Propriedade Intelectual*, I describe the effects of a GNU/GPL license as a public offer binding the offeror under the theory of unilateral obligations—not as a real covenant, just as a patent license provided alongside his offer: “No caso de modelos colaborativos abertos, o titular dos direitos estabelece uma proposta obrigacional receptícia: a renúncia ao seu poder de excluir é uma oferta, que simultaneamente impõe a sujeição daquele que a aceita regras específicas. Nada de novo neste modelo jurídico: a oferta de licença de patentes prevista na lei 9.279/98 (art.64) é um exemplo dessa proposta obrigacional receptícia. Os efeitos econômicos de tal oferta de licença foram extensamente analisados por Edith Penrose. A singularidade do modelo colaborativo é que não só se oferta o uso mas também a co-autoria num processo sucessivo e aberto. Para facilidade negocial e padronização de um negócio sucessivo, a oferta remete a um conjunto de normas que constituem não só um contrato padrão mas um estatuto. Vale dizer, uma norma abstrata e impessoal, mas privada.” Denis Borges Barbosa, *Tratado da Propriedade Intelectual* (Rio de Janeiro: Lumen Juris, 2010), Vol. 3, p.2443.

¹⁵ E.g. David W. Barnes, “A New Economics of Trademarks” (2006) 5 Nw. J. Tech. & Intell. Prop. 22.

¹⁶ José Oliveira Ascensão, “Questões problemáticas em sede de indicações geográficas e de denominações de origem” (2005) 46 RFDL 253.

¹⁷ The recognition of an “Indicação de Procedência” in Brazilian law does not require compliance with any technical standards, but only evidence that the general public knows that the geographic area is the source of the products or services protected by the relevant IP right.

¹⁸ For the deliberate, continuous creation of fame in publicity rights as being analogous to authorial creation, see Denis Borges Barbosa, “Do direito de propriedade intelectual das celebridades”, available at http://www.denisbarbosa.addr.com/arquivos/200/propriedade/pi_celebridades.pdf [Accessed October 28, 2012].

Creation of fame is an essential element of trademark law¹⁹ and especially publicity rights.²⁰ Through the establishment of a consumable myth, fame is a fictional creation through a deliberate, continuous effort of recognised or recognisable persons.²¹ Therefore, the creation of GIs in these specific cases could lead to both collaborative authorship *and* ownership.

Collective ownership of expressive or technical creations may also be discerned in the new and presumably forthcoming protection of traditional knowledge. Some relevant comparison may be drawn here with GIs, although this analysis might be held as politically incorrect.²² Here, a cultural approach would more adequately explain the protection than the idea of creation through genius.

Unstructured collective authorship

Professor Chon's text goes beyond Wikipedia, however. There would be collective authorship even without any *fuehrerprinzip* or its republican version:

“These cultural practices include appropriation art. Artists’ appropriation of other artists’ works is an integral and longstanding part of creative production. But appropriation art came of age in the 1980s as a term used to describe a certain stance towards originality.”²³

Why would this kind of production be considered *collective* (or collaborative)? The appropriated and transformed work represents the sum of two or more productive efforts—the older work is the input of the new, and the new can be “specified” from the prior. *Specificatio* in Roman law covers the transformation of a prior element by someone who is not its owner, with the changes to the new entity so relevant as to

¹⁹ Alex Kozinski, “Trademarks Unplugged” (1993) 68 N.Y.U. L. Rev. 960: “The originator of a trademark or logo cannot simply assert, ‘It’s mine, I own it, and you have to pay for it any time you use it.’ Words and images do not worm their way into our discourse by accident; they’re generally thrust there by well-orchestrated campaigns intended to burn them into our collective consciousness. Having embarked on that endeavor, the originator of the symbol necessarily—and justly—must give up some measure of control. The originator must understand that the mark or symbol or image is no longer entirely its own, and that in some sense it also belongs to all those other minds who have received and integrated it. This does not imply a total loss of control, however, only that the public’s right to make use of the word or image must be considered in the balance as we decide what rights the owner is entitled to assert”. On the other hand, see Jason Bosland, “The Culture of Trade Marks: An Alternative Cultural Theory Perspective, Intellectual Property”, (2005) 10 Media & Arts L. Rev. 99: “Stephen Wilf suggests that by associating a symbol with an object, the public contributes to the authorship of trade marks. Because the meaning of a mark results not from the efforts of an individual trader but the interpretive acts of the public, Wilf argues that the public should be attributed ownership. Trade mark law, on the contrary, is said to incorrectly formalise the trade mark originator as the arbiter of meaning by recognising only the efforts of the originator in generating the meaning and interpretation of a trade mark”. See also Denis Borges Barbosa, *Developing New Technologies: A Changing Intellectual Property System—Policy Options for Latin America* (Caracas: Sistema Economico de la America Latina, 1987): “Some authors have remarked that the building up of a trademark by means of massive advertisement has much in common with the construction of a character in a novel; in both cases only sometimes the result is a ‘roman a clef’ bearing any resemblance to reality.”

²⁰ Rosemary J. Coombe, “Authorizing the Celebrity: Publicity Rights, Postmodern Politics, and Unauthorized Genders” in Woodmansee and Jaszi (eds), *The Construction of Authorship* (1994), pp.101–122: “Star images must be made, and, like other cultural products, their creation occurs in social contexts and draws upon other resources, institutions, and technologies. Star images are authored by studios, the mass media, public relations agencies, fan clubs, gossip columnists, photographers, hairdressers, body-building coaches, athletic trainers, teachers, screenwriters, ghostwriters, directors, lawyers, and doctors. Even if we only consider the production and dissemination of the star image, and see its value as solely the result of human labor, this value cannot be entirely attributed to the efforts of a single author. Moreover, as Richard Dyer shows, the star image is authored by its consumers as well as its producers; the audience makes the celebrity image the unique phenomenon that it is. Selecting from the complexities of the images and texts they encounter they produce new values for the celebrity and find in stars sources of significance that speak to their own experience. These new meanings of the star’s image are freely mined by media producers to further enhance its market value. As Marilyn Monroe said in her last recorded words in public, ‘I want to say that the people—if I am a star—the people made me a star, no studio, no person, but the people did.’”

²¹ “Barthes defines a myth as ‘the complex system of images and beliefs which a society constructs in order to sustain and authenticate its own sense of being’. Myths are carved out of signs, although will provide the symbol with new meaning beyond that of the original sign. As Barthes argues, the associative total of the preexisting sign equals the signifier, or ‘form’ of the myth. This, in conjunction with its signified, or ‘concept’ forms the signification”. Samuel Londesborough, “Should Colours Be Protected by Trade Mark Law? What Problems May Arise in Protecting Them?”, available at http://www.kent.ac.uk/law/ip/resources/ip_dissertations/2004-05/Samuel_Londesborough_IP_Dissertation.doc [Accessed October 28, 2012].

²² “There are three broad ways in which the protection of GIs appears to offer the possibility of providing legal mechanisms to protect traditional knowledge. These are the collective nature of the protection, the indefinite availability of GIs and the connection that GI owners associate between their products and their land. Those seeking protection of traditional knowledge also seek a collective and an indefinite interest and frequently the relationship between their knowledge and the land is important for indigenous peoples. Yet these similarities are superficial. GIs protect names and are used by western farmers and sometimes rural communities to promote their products.” Susy R. Frankel, “The Mismatch of Geographical Indications and Innovative Traditional Knowledge” (2011) 29 *Prometheus* 253.

²³ Chon, “The Romantic Collective Author” (2012) 14 *Vanderbilt Journal of Entertainment and Technology Law* 829, 832.

transfer the property to the transformer. An example is the picture on a canvas, which makes the painter the owner of the canvas.²⁴

This rule was included in art.1270 of the modern Brazilian civil law, art.570 of the Code Napoleon,²⁵ and probably in many other systems, in cases where the transformer makes the changes in good faith.²⁶ In Brazil, this is certainly the general rule applicable to immaterial creations, whenever a specific IP rule is not present.²⁷ It is applicable especially when the *new* thing is an intellectual creation that builds on or *appropriates* prior works.

It must be noted that, in some systems where a patent building upon another may be subject to non-voluntary cross licenses, those licenses require that the new technology be contributive and go beyond simple non-obviousness. The same criterion that the new must be valuable in the face of the old thus applies. In such legal systems (Brazil's being one of them), reinterpretation of technical art is deemed to be legal, and possessive individualism must give way.

The issue here is that authorship laws tend *not* to follow this default Roman rule. However valuable the new or *derivative* work is, it infringes on the old when the owner of the prior work has not granted permission. In this context, the transformer's good faith does not matter much. Therefore, the appropriation art described by Professor Chon is probably a misnomer in most, if not all, legal systems: the artist may have taken from prior art, but he does not appropriate it at all.

Culture does not cease to be culture on account of infringement of some legal rules. After some time and impact, infringing culture sometimes comes to coalesce with mainstream society considerations. Judges may consider legal whatever culture is accepting, cajoling and consecrating²⁸—that is, the shrewdness and knowledge of Justinian or the theological public interest of Lord Camden may eventually win the day.

Now, again, let us suppose that appropriation art—in whatever form—becomes legal. The societal interest in new things or the post-modern proclivity for reinterpretation overcomes the prior owner's objection (as if he or she were to consent there would be no infringement). This hypothetical presumes that the value-added standard of Roman law is present—that is to say, the appropriation artist created a *transformative* and not a *reproductive* new thing.²⁹

To continue with this hypothetical, a new genius who concocts a new entity out of an old one earns the right to express himself or herself legally. But more than that, that genius becomes the owner. The subtle rebalancing of a mandatory cross license in dependent inventions in patent law does not exist here.³⁰

²⁴“Si quis in aliena tabula pinxerit, quidam putant tabulam picturae cedere: aliis videtur pictura, qualiscumque sit, tabulae cedere. sed nobis videtur melius esse, tabulam picturae cedere: ridiculum est enim picturam Apellis vel Parrhasii in accessionem vilissimae tabulae cedere.” Institutiones Justiniani, II, 1, 34.

²⁵ E.g. German BGB § 950; Italian Code art.940.

²⁶ E.g. Portuguese Code art.1336ff; Spanish Code art.383; Swiss Code art.726 II.

²⁷ Borges Barbosa, *Tratado da Propriedade Intelectual* (2010), Vol. 1, [4] § 2.4.

²⁸ Chon, “The Romantic Collective Author” (2012) 14 *Vanderbilt Journal of Entertainment and Technology Law* 829, 831. Peter Jaszi suggested recently that, as a result, judges “may be absorbing an attitude of skepticism about fixed identity and stable point of view—recognizing what has been clear for some time in arts practice and aesthetic theory: that ... constructed culture is fair game for reinterpretation ...”. Peter Jaszi, “Is There Such a Thing as Postmodern Copyright?” in Mario Biagioli, Peter Jaszi and Martha Woodmansee (eds), *Making and Unmaking Intellectual Property Law* (Chicago: University of Chicago Press, 2011), pp.414–415, 421.

²⁹“The Supreme Court [in *Campbell v Acuff-Rose Music, Inc.* 510 U.S. 569, 579 (1994)] has drawn a distinction between derivative uses that are ‘reproductive’ and those that are ‘transformative’. Reproductive uses are those that simply make a verbatim copy of the original work. As such, they are thought to be more likely to compete directly with the original work on which they are based. Transformative use combines the existing work with other elements to create a new work. Derivative uses that are transformative are often thought to be less likely to compete with the original. In addition, protecting transformative uses is often regarded as being more consistent with the goals of copyright, since they necessarily involve additional creativity. Narrowing the derivative use right with respect to transformative works would arguably foster new creativity while having less of an adverse impact on the incentives to create the original work.” Christopher S. Yoo, “Copyright and Public Good Economics: A Misunderstood Relation” (2007) 155 *University of Pennsylvania Law Review* 635.

³⁰ David Lange and Jennifer Lange Anderson, “Copyright, Fair Use and Transformative Critical Appropriation”, available at <http://law.duke.edu/pd/papers/langeand.pdf> [Accessed October 28, 2012]: “There is no question of enjoining the transformative critical appropriation, and no question of punishment, either, for the very idea of punishment is unwarranted; and this is so though harm from the appropriation is possible, even likely, even to be presupposed. Suppression and damages do not sensibly figure in this scenario, then, and cannot sensibly be required. But there may still be reason in some cases to contemplate some provision for sharing with the proprietor of rights in the antecedent work an equitable portion of such profits, if any, as may be reaped from an appropriation.”

Does society actually benefit from this battle among geniuses? An old Brazilian story tells of a truckload of turtles being seized by tax inspectors. The driver explains that this is a gift for the Governor. The Governor is called to check on the information and tells the taxman, “Gubernatorial gifts must be complete: turtles with tax paid.”

Appropriation artists should perhaps follow the same standard: any objection from the owner of the old right should be waived in the name of free expression, to the benefit of the public and free domain. This kind of collaboration should, therefore, be held perhaps as purely cultural: a joint labour exercise where one of the creators is forced to lend their creation to the enrichment of the other would seem to be unequal and outside the boundaries of law or equity, at least in those cases where the purveyor of the unwanted new entity does not dedicate its expression to the general public.

Legal systems would probably be more faithful to the traditions of Justinian or Lord Camden in yielding to the value of new creations by instituting a balanced system where free expression of art and knowledge cannot be hampered by objections founded on patrimonial reasons. However, any new art allowed cannot impact on the integrity of the moral rights of the old, probably by requiring a strong disclaimer of allowed succession.

Do those “genius v. genius” wars exhaust the field of unstructured collective authorship? Abstraction and experience in virtual space indicates that even more protean authorship occurs, if it is authorship at all. Originators of new entities do not bind themselves to a previous by-law, nor are they subject to arbitration. The only applicable rules would be the technical norms of the virtual, or other technical, environment. Collaborative cohesion and consistency are the sub-products of creation, but this phenomenon is too complex for legal analysis at this moment, or at least in this article.

Between Semiotic Democracy and Disobedience: Two views of Branding, Culture and Intellectual Property

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☞ Brand names; Civil disobedience; Culture; Democracy; Intellectual property

Nearly 20 years ago, a prominent media studies professor, John Fiske, coined the term “semiotic democracy” to describe a world where audiences freely and widely engage in the use of cultural symbols in response to the forces of media.¹ A semiotic democracy enables the audience, to a varying degree, to “resist”, “subvert” and “recode” certain cultural symbols to express meanings that are different from the ones intended by their creators, thereby empowering consumers, rather than producers.² At the time, Fiske’s concept was revolutionary; it promised a complete reversal of the monopolistic hierarchy of the author and the presumed passivity of the audience in receiving meaning. The term “semiotic democracy” offered an interesting juxtaposition of ideals—political liberty, freedom of expression and creation—alongside a basic disruption of the common assumptions that inhere in authorial control.

Although Fiske originally referenced the audience’s power in viewing and interpreting television narratives, today, his vision of semiotic democracy has become perhaps the single most important ideal cited by scholars who imagine a utopian relationship between law, technology and democratic culture. Within a semiotic democracy, individuals can become both producers *and* creators, able to reinscribe and recode existing representations, thereby expanding the rich cultural fabric of our nation. Instead of relegating the audience to passive spectatorship, a semiotic democracy would empower individuals to add to the rich and expansive cultural fabric of a *true* public domain, where everyone participates equally in the ongoing process of cultural production.³

Today, the term has become as ubiquitous as it is utopian, permeating commentaries on the relationship between intellectual property and freedom of expression. Typically, scholars who embrace this ideal note that the grand and sweeping vision offered by semiotic democracy profoundly conflicts with the central precepts of exclusive ownership, which has traditionally enabled authors to direct and dictate a wide degree of control over an original image or text. Lawrence Lessig, for example, has claimed that a semiotic democracy must be nurtured, protected and secluded from the authorial control of intellectual property ownership.⁴ Terry Fisher, echoing this view, has explained semiotic democracy as a corollary of political democracy: if “political democracy” describes a system in which individual citizens are able to participate in the exercise of political power, then “semiotic democracy” describes a system in which individual citizens are able to participate in the creation of cultural meaning.⁵

* Parts of this article have been adapted from two previous articles: “Semiotic Disobedience” (2006) 84 Wash. U. L. Rev. 489 and “Stealth Marketing and Antibranding: The Love that Dare Not Speak Its Name” (2010) 58 Buff. L. Rev. 795.

¹ John Fiske, *Television Culture* (London: Routledge, 1999), p.239.

² Michael Madow, “Private Ownership of Public Image: Popular Culture and Publicity Rights” (1993) 81 Cal. L. Rev. 125, 139.

³ William W. Fisher III, *Promises to Keep: Technology, Law, and the Future of Entertainment* (2004); William W. Fisher III, “Property and Contract on the Internet” (1998) 73 Chi.-Kent L. Rev. 1203, 1217–1218.

⁴ Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (New York: Penguin Books, 2004).

⁵ “Scott Rosenberg’s Links & Comment”, available at http://open.salon.com/blog/scott_rosenberg [Accessed November 30, 2012].

Although Fiske's vision is both brilliant and indelibly important, it is also somewhat incomplete. In this article, I seek to introduce another framework to supplement Fiske's important metaphor—the phenomenon of “semiotic disobedience”—and explore how it differs from the contemporary account of semiotic democracy. Three contemporary cultural moments in the world—one corporate, one academic and one artistic—call for a new understanding of the limitations and possibilities of semiotic democracy and underline the need for a supplementary framework.

Now more than ever, the continued production of popular culture rests on the continued presence of corporate sponsorship and branding in many aspects of both public and private life. As public spaces have become converted into vehicles for corporate advertising—ads painted onto sidewalks and into buildings, schools and other public spaces⁶—product placement has soared to new heights of power and subtlety. And throughout, the law has generously offered near-sovereign protection to such symbolism through the ever-expanding vehicle of intellectual property protection. Principles of trademark and copyright ownership have allowed corporations to consecrate their symbols and images, allowing for a particularly robust form of incontestability. Equations between real property and intellectual property are ubiquitous. Underlying these themes is a powerful linkage between intellectual and tangible property: as one expands, so does the other.

In addition to the corporate moment, a second cultural moment has emerged within the legal academy, flowing quite obviously from the first: many scholars have vociferously decried the growing effect of intellectual proprietisation on artistic creativity and First Amendment freedoms. The traditional argument goes something like this: because of the expansion of intellectual property, artists and activists have been forced to abandon artistic projects for fear of being sued for infringement.⁷ The specter of property rights has thus ushered in an unprecedented era of self-censorship, where artists, activists and corporate critics are routinely threatened with lawsuits over samplings of imagery or music and are unequivocally silenced as a result. There are undeniable truths to this story: The Chilling Effects Clearinghouse demonstrates the extent to which corporations exert their influence in silencing the criticism and creativity of others.⁸ Through these commentaries, semiotic democracy becomes the cause célèbre of intellectual property theorists, crystallised into an ideal vision of culture's relationship to media and meaning.

Yet at the same time, there is a third facet that is often left out of the picture, involving the increasing response of artists and activists who have chosen to expand their activities past the boundaries of cultural dissent, and into the boundaries towards occupation. The global emergence of the Occupy Wall Street Movement is the most contemporary example of this trend, but it is also deeply linked to a growing, global concern about the influence of corporate branding on civil society. Whereas previous anti-branding social movements focused mostly on parody, satire and other speech-related forms of activism, today, these same social movements have chosen to explore new forms of activism—often occupying the boundaries of tangible property in the balance.

Today, over a year after Occupy Wall Street was launched, commentators are often tempted to dismiss the movement as a momentary outburst, an episode of global convergence between art, occupation and activism that has since passed. However, to do so would vastly oversimplify what the Occupy movement might be able to teach us about the relationship between social movements, branding and the culture of property rights. Since Occupy was largely borne out of the anti-branding movements in the late 1990s, it is also, I would argue, demonstrative of a significant shift in tactics in the worlds surrounding anti-consumerism and globalisation. While there is much to write—and explore—regarding the nature and purpose of the Occupy movement, I want to focus specifically, in this article, on what the Occupy

⁶ Naomi Klein, *No Logo: Taking Aim at the Brand Bullies* (New York: Picador USA, 2000), p.280.

⁷ Marjorie Heins and Tricia Beckles, *Will Fair Use Survive? Free Expression in the Age of Copyright Control* (New York: Brennan Center for Justice, 2005).

⁸ Chilling Effects Clearinghouse, available at <http://www.chillingeffects.org> [Accessed October 28, 2012].

movement can teach us about tactical shifts in global anti-branding activism and the role of intellectual property and culture.

Part of the birth of Occupy Wall Street, I would argue, comes from the growing resistance to the “intellectual propertization” of culture. As much as Occupy Wall Street was about a lack of political representation for the disenfranchised, it was also motivated, in part, by a structural critique of the role of corporate influence on global society. It had its own “brand”, one might argue, but one that was linked to a stalwart kind of visual resistance to the intellectual propertisation of culture. (The movement, for example, refused to trademark the term “Occupy”). Rather than engaging in purely expressive acts, like parody or satirical treatments of branding, Occupy Wall Street seemed to call for a broader kind of political imagination instead, demonstrating a new relationship between intellectual property and culture. For every movement toward enclosure that the law readily facilitated, Occupy seemed to demonstrate the existence of an opposite, underappreciated movement toward liberation from proprietary values—a moment that exposed the need for alternative political economies of activism and information.

Today, we might argue that the appeal of the Occupy movement represents a framework one step beyond semiotic democracy: a framework of semiotic *disobedience*, a world which importantly differs from, and yet remains in, the shadow of semiotic democracy. And yet the difference between these classifications of expression—one legally protected, one less so—both captures and transcends the foundational differences between democracy and disobedience itself.

Of course, disobedience—even of the semiotic variety—is not always universally defensible, morally or legally.⁹ However, to the extent that we are living in a world populated by consumerism and brand dominance, it makes even more sense to study the ways in which members of the public, especially through the lens of the Occupy movement, have responded with their own set of critiques. These critiques are sometimes satirical, deeply expressive and, at times, illegal—but they all offer some powerful insights into the contemporary relationship between property, intellectual property and culture.

These movements also demonstrate an important shift in the language and focus of civil rights—which today focuses even more on the right to information access and the right to expression in the face of digitisation and intellectual property protections. Just as previous discussions of civil disobedience focused on the need to challenge existing laws by using certain types of public and private property for expressive freedoms, today’s generation of activists seek to alter existing intellectual property by interrupting, appropriating and then replacing the passage of information from creator to consumer. In short, the object of attention is the appropriation and occupation of intellectual, tangible or even bodily property.

I call these recent artistic practices examples of “semiotic disobedience” because they often involve the conscious and deliberate re-creation and occupation of property through appropriative and expressive acts that consciously risk violating the law that governs intellectual or tangible property.¹⁰ While Occupy Wall Street might be an example of this trend, it is by no means the only example. However, because of the way in which semiotic disobedience diverges from semiotic democracy, their differences are worth examining for what they suggest about the changing relationship between intellectual property and culture.

The Legacy of Semiotic Democracy

In a piece in the *New York University Law Review*, Jack Balkin quite eloquently explores the relationship between digital culture and democracy, and extols the virtues of a semiotic democracy in the process. “A democratic culture”, Balkin writes, “is the culture of a democratized society; a democratic culture is a

⁹ For more on this point, see generally Eduardo M. Penalver and Sonia Katyal, *Property Outlaws: How Squatters, Pirates and Protesters Improve the Law of Ownership* (Yale: Yale University Press 2010).

¹⁰ Paul Baines, “A Pie in the Face: Culture Jammers Re-Code, Hijack, Subvert, Un-Cool, De-Myth and Reclaim the Cultural Sphere” (2001) *Alternatives J.* 14, 15.

participatory culture”.¹¹ For Balkin, a wide range of forces engage in the process of democratization—“institutions, practices, customs, mannerisms, speech, and dress”—all of which involve forms of social life that empower “ordinary people [to] gain a greater say over the institutions and practices” that govern and shape them. A semiotic democracy is an integral part of this process because it empowers the art of conversation: it enables individuals to fashion productive and protected responses to the forces of culture which shape and constrain them.

By empowering access to these multiple forces, a semiotic democracy inherently reduces the monopolistic power of an author, allowing the audience to respond by utilising the same channels and symbols as an original owner. Digital technology has revealed the interactive and appropriative features of freedom of expression—in this way, it implicates both individual liberty and collective self-governance. Consider Balkin on this point:

“Freedom of speech is appropriative because it draws on existing cultural resources; it builds on cultural materials that lay to hand. Dissenters draw on what they dislike in order to criticize it; artists borrow from previous examples and build on artistic conventions; even casual conversation draws on common topics and expressions ... In a democratic culture people are free to appropriate elements of culture that lay to hand, criticize them, build upon them, and create something new that is added to the mix of culture and its resources.”¹²

Note, however, that most of Balkin’s observations suggest a culture that appropriates through the copying of information, rather than the subversion of its circulation. As digital technology reduces the costs of copying and distribution, Balkin details, it allows others to modify certain cultural products and illustrates how copying enables annotation, innovation and collage. But Balkin’s examples are limited entirely to the principles of “nonexclusive appropriation”—the idea that any cultural product is open to comment, alteration and innovation so long as it is premised on copying the document first. The end result that is sought is clear: the expansion of First Amendment and fair use principles to support the existence of a semiotic democracy.¹³ Through non-exclusive appropriation, the marketplace of speech expands and grows in both character and diversity.

There is perhaps nowhere better to see the world of semiotic democracy in action than by studying the ongoing conversation between corporations and advertisers who own brands, and the activists and artists who have attempted to subvert them through parody, satire and critique. “In the twenty-first century”, one commentator notes, “brands have acquired a place in the world unimaginable in any previous period of history”.¹⁴ Consumers, too, have fallen in love with the brand. Brands permeate the fabric of our lives—they help construct our identities, our expressions, our desires and our language. Yet inasmuch as they serve as powerful expressions of consumer identity and desire, they are also an important vessel of corporate identity and property.

By inhabiting these two worlds—the world of the consumer and the world of the corporation—brands have come to play an increasingly vexing role in public consciousness. At the same time that brands are expressive, they are also powerful devices of economic power and market dominance, a factor which leads to potent struggles over their meaning and definition. For, aside from the idealised convergence between personal and corporate identity that a brand represents, a brand can also be simultaneously deeply political and deeply commercial. And as part of our cultural consciousness, a brand can often serve as a powerful organizing principle for political action.

¹¹ Jack M. Balkin, “Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society” (2004) 79 N.Y.U. L. Rev. 1, 35.

¹² Balkin, “Digital Speech and Democratic Culture” (2004) 79 N.Y.U. L. Rev. 1, 4–5.

¹³ Balkin, “Digital Speech and Democratic Culture” (2004) 79 N.Y.U. L. Rev. 1, 55.

¹⁴ Majken Shultz, Mary Jo Hatch and Mogens Holten (eds), *The Expressive Organization: Linking Identity, Reputation, and the Corporate Brand* (Oxford: Oxford University Press 2000), p.52.

In just the last few decades, a new movement of activists has sprung up internationally and domestically, engaging in artistic and political activity to challenge the expansion of the brand into public discourse. Some types of “anti-branding” seek to retake public space for their own expression, using graffiti and street art to dissent from the commercialisation of the public sphere; some seek to simply rebrand or recode existing brands for the purposes of humor or social commentary. Sometimes anti-brands might target a certain brand for opposition; at other times, they might utilize a brand for the purposes of satirical or humorous commentary on another subject. And yet, the ways in which these artists have done so have raised complicated questions of identity, language and control—setting up a fascinating clash between freedom of expression and intellectual property.

Today, the modern anti-branding movement is widely associated with the 1990s anti-globalisation movement, even though similar projects regarding an “aesthetics of democracy” have been a significant part of the counter-culture art movements of the 1950s, 1960s and 1970s. These counter-culture movements, from the 1950s to the early 1990s, led to the formation of a new movement in North America and Europe that called itself “culture jamming”, which referred to taking existing media generated text and altering it to say something different, as in classic parody or satire.¹⁵ *Adbusters* says: “We believe [this movement] can be to our era what civil rights was to the 60s, what feminism was to the 70s, what environmental activism was to the 80s.”¹⁶

Anti-branding activism serves to expose, dissect and then recode various messages in advertising. The message of the anti-brand is simple: if images can create a brand, they can also destroy one.¹⁷ As the journalist Naomi Klein recounts in her book, *No Logo*, the anti-branding movement operates at the cross-section between art, labor and anti-globalisation.¹⁸ By targeting companies that have invested millions in building strong global brands, anti-branders seek to expose potential hypocrisy between corporate philosophy and corporate activity to the average consumer. Anti-sweatshop movements were galvanised in 1992 when the United States National Labor Committee performed an exposé of corporate and US Government subsidies of *maquilas*. Afterward, major labels like the GAP, Nike, Disney and Guess were forced to respond to consumer concerns about their labour practices with partners in developing nations, even though they had claimed only years earlier to be “innocent global shoppers”.¹⁹

In addition to a growing concern about corporate social responsibility, a second factor has added to the growth in anti-branding: the increasing force of “consumer sovereignty”, which has led many consumers to respond and publicise their complaints against particular corporations.²⁰ These dynamics have reframed the relationship between advertising and consumers into a much more dialogic relationship, as opposed to a one-way relationship of corporate inculcation. In many cases, anti-branding activists have decidedly turned to the advertising executives’ own arsenal of tools to address consumer concerns, using appropriative strategies to address the increasing dominance of branding strategies in both private and public space.

Finally, another key factor has also contributed to this contestatory dynamic: technology. Digital technology and the internet has created a world that makes copying, pasting and rebranding relatively simple tasks: something that takes hours to create with paper and paintbrush now takes minutes through the ease of graphic technology. And messages are just as easy to disseminate, in seconds, to thousands of individuals. In this way, the internet has effectively transformed the world of brands, trademarks and symbols into something that is largely up for grabs; a “semiotic democracy” that enables individuals to respond to and reframe brand dominance.

¹⁵ For discussion on these projects see Kalle Lasn, *Culture Jam: The Uncooling of America* (New York: Eagle Brook, 1999); Klein, *No Logo* (2000); and Rosemary Coombe, *The Cultural Life of Intellectual Properties* (Durham: Duke University Press 1998).

¹⁶ Laura Barton, “A Job for Consumers: Try to Buy Nothing”, *Guardian Education*, November 20, 2001, p.55.

¹⁷ Mark Dery, “Culture Jamming: Hacking, Slashing, and Sniping in the Empire of Signs”, available at http://project.cyberpunk.ru/idb/culture_jamming.html [Accessed October 28, 2012].

¹⁸ Klein, *No Logo* (2000).

¹⁹ Martin Morris, “Contradictions of Post-modern Consumerism and Resistance” (2001) 64 *Stud. in Pol. Econ.* 25, 26.

²⁰ Robert Lande, “Consumer Choice as the Ultimate Goal of Antitrust” (2001) 62 *Univ. Pitt. L. Rev.* 503.

Admittedly, anti-brands highlight a critical disjunction between the economic rationale of the marketplace and freedom of speech, and the regulatory, mediating role played by law. But the practice of anti-branding also demonstrates how much power the audience actually possesses. One example might be a situation where an individual might appropriate, modify or rebrand an advertising message to critique the product, the corporation or something else. A great example might be the publication *Adbusters*, which targets both particular companies and advertising campaigns, but also targets the more general trend of consumption in both the United States and Canada. In some examples from their magazine and website, particularly their “spoof ads”, an individual might initially take up a proffered message from mainstream advertising, but then later, appropriate and modify an advertising campaign to send a message that diverges from the one intended.

In one example, titled, *Absolut Nonsense*, an image of an Absolut vodka bottle is depicted with the slogan: “Any suggestion that our advertising campaign has contributed to alcoholism, drunk driving, or wife and child beating is absolute nonsense. No one pays any attention to advertising.”²¹ The message of the ad is unmistakably ironic: do not believe that such undesirable activities are tied to the scourge of alcohol consumption and associated advertising.

Parodies like *Absolut Nonsense* raise important textual questions: Is the parody targeting Absolut (the vodka), Absolut’s marketing campaign or the general practice of alcohol consumption? Or is it targeting all three? And if so, should trademark law interfere? The “*Absolut Nonsense*” ad is an example of one particular technique to illustrate the practice of anti-branding: “subvertising”, which is basically ad parody.²² Subvertising involves the conscious recoding of various brand images in order to expose and thereby transgress the proffered construction of social meaning offered by the corporation. Consider these examples:

- A person has created a near-perfect replication of an Old Navy logo on a clothing tag that is usually attached to the inside of a person’s apparel. The subvert, which is designed to replicate the percentage of fibers on a tag, instead says “77% child labor 22% adult labor and ‘Made in Sweatshops’” underneath. The implication of the ad is unmistakable, reminding the consumer that he or she is making a purchase that is not only composed of particular types of fibers, but also a substantial degree of child labour.
- The character of “Joe Chemo” is designed to replicate almost perfectly the infamous figure of “Joe Camel”, who was used to sell Camel cigarettes.²³
- On December 3, 2002, the 18th anniversary of the toxic gas leak at a chemical plant in Bhopal, India, the Yes Men, an anticorporate organisation, emailed thousands of journalists a press release purporting to be from Dow Chemical, which explained Dow’s failure to resolve the health and environmental consequences of the accident. “We understand the anger and the hurt,” claimed an (alleged) Dow spokesman. ‘But Dow does not and cannot acknowledge responsibility.’²⁴ The Yes Men also included a link to their own Dow-Chemical.com, a website resembling the corporation’s real site at www.dow.com [Accessed November 13, 2012].²⁵
- Just this past year, in response to the British Petroleum oil spill in the Gulf, Greenpeace, an environmental awareness group, announced a contest to “Redesign BP’s logo”, explaining:

²¹ Dery, “Culture Jamming”, available at http://project.cyberpunk.ru/idb/culture_jamming.html [Accessed December 3, 2012].

²² Alexander Barley, “Battle of the Image”, *New Statesman*, May 21, 2001, p.45.

²³ See Joe Chemo, <http://www.joechemo.org/> [Accessed October 28, 2012]; Adbusters, “Spoof Ads: Tobacco”, available at <https://www.adbusters.org/gallery/spoofads/tobacco> [Accessed October 28, 2012].

²⁴ Caleb Carr, “Dow v. Thing: A Free-Speech Infringement That’s Worse Than Censorship”, *Village Voice*, January 21, 2003, available at <http://www.villagevoice.com/2003-01-21/news/dow-v-thing/> [Accessed October 28, 2012].

²⁵ In response to Dow’s threats of copyright and trademark infringement, the entire host server was shut down, making it impossible for a variety of organisations to access their network.

“A few years ago, BP rebranded themselves as ‘beyond petroleum’. And yet BP is pursuing ... deepwater drilling, despite the massive environmental damage that’s being caused by their business.

That’s why we want you to rebrand them.”

The campaign concludes:

“BP’s slick green logo doesn’t suit a company that engages in dangerous offshore drilling. We’re inviting you to design them a new logo that’s more suitable for their dirty business.”²⁶

Typically, subvertising can cover a whole variety of different types of ad parody—everything from projects that appropriate particular brands to those that communicate a certain political statement that may or may not be indirectly tied to a corporation. At times, subvertisements can also include “gripe sites” that may resemble an official corporate website. One newspaper reports that “conservatively, more than half of the Fortune 1000 companies have encountered some type of website critical of their business.”²⁷ These sites take on a myriad of different characters—some simply offer various narratives from consumers who have been disappointed by a particular product or company, pairing a trademark with the word “sucks” in a web address—to the most sophisticated and seductive of ad parodies. Many subvertisements, like the Absolut example, reveal a subconscious message in an advertisement, uncovering a perceived deeper meaning or truth hiding behind the euphemism.²⁸

Given the investment that corporations make in branding their identities and products, one could argue that the simple act of anti-branding in the marketplace can be both devastating for trademark monopolies and deeply empowering for critical consumers. Yet intellectual property law is often caught between the need to protect the intellectual property of a certain brand and the imperative to allow for freedom of expression to flourish. The economic arguments against anti-branding are readily understood. According to the traditional view, in order for a trademark to have value, it must exist as separate and unique from all other symbols; it must carry its own qualities that distinguish it from other signs; but this conception of value-from-differentiation is somewhat different than the utilitarian conception that has been historically associated with brands. As applied to modern-day branding philosophy, this conception of value turns on the notion of brand equity and brand image, both of which draw from intangible essences like corporate image, identity and brand personality.

Anti-branding, by its own admission, is designed to both dissect and perhaps weaken the proffered message of the advertisement. It introduces “noise” to the signal of the corporate speaker, and instead suggests a wide array of less desirable (but informative and often humorous) connotations to the buyer. It adds potential costs to the goodwill that is associated with a tightly constructed sign, altering its meaning, and exposing—and potentially making light of—certain hidden messages. In some cases, an anti-brand may actively dilute the meaning of a mark by associating the mark, either with undesirable connotations or with an entirely different issue or product, raising issues of tarnishment as well as potential blurring. In short, an anti-brand performs all of the same functions that a traditional trademark performs—it offers information and signals certain qualities, and it is also expressive of a particular philosophy. In other words, it functions just like any other brand, except that it derives its value, not from differentiation, but from similarity to another brand, and by communicating—and recoding—a particular message that an original brand represents.

²⁶ Greenpeace, “Redesign BP’s Logo”, available at <http://www.greenpeace.org/usa/news/gulf-oil-spill/bp-logo> [Accessed October 28, 2012].

²⁷ Robert Trigaux, “Gripe.Com”, available at <http://www.sptimes.com/News/13199/Business/gripecom.html> [Accessed October 28, 2012].

²⁸ Klein, *No Logo* (2000), p.279.

But while traditional advertising directs itself towards building further economic value, an anti-brand aims towards the opposite result. Anti-branding uses the same arsenal of weapons as advertising—language and image—to flip the social meaning of a brand. By employing speech and visual expression and exploiting the instability of the brander’s reliance on an unstable medium, anti-branding offers the consumer a different way to construct the dialogue, even while still using the brand philosophy and image. The message may be separate and distinct from the original corporate brand message, but it still converges with the mark because it uses the trademark or the sign in order to communicate a particular message. In doing so, a trademark transgresses its own identity as a vessel for corporate identity and property, and instead arguably becomes remade into something else, an anti-brand—constituting expressive speech, a satire or, at other times, a parody.

Because it is most often connected to a particular message, rather than a certain product, an anti-brand demonstrates how a trademark can become transformed from a commodifiable property—part of the marketplace of goods—into a symbolic expression within the marketplace of speech. Rather than existing within a marketplace of goods that derives value from a brand’s association with a product or corporation, the anti-brand participates in the marketplace of ideas that derives its value from its expressive commentary on the brand instead. This transition, from brand to anti-brand, and thus from trademark into speech, in turn highlights another key difference: even though trademark law (by protecting the mark’s stability of essence and identity) suggests that a mark is immutable, the First Amendment’s protection of consumer commentary suggests that trademarks are indeed unstable, immutable entities, open to constant reinterpretation and resignification.

Semiotic disobedience: Between appropriation and occupation

More recently, the world of semiotic disobedience took on a new flourish with the Occupy Wall Street movement, which actually originated from the leaders of the global culture jamming movement—Kalle Lasn and Micah White of the magazine *Adbusters*. In June 2011, Lasn registered the website *occupywallstreet.org* and sent a note to their subscribers, saying: “Are you ready for a Tahrir moment? On September 17, flood into lower Manhattan, set up tents, kitchens, peaceful barricades and occupy Wall Street,” the message said. “It just kind of snowballed from there”, explained *Adbusters* senior editor Micah White shortly after the protests began.²⁹ They selected September 17 as the launch date—America’s Constitution Day. The announcement poster was a classic example of semiotic democracy in action—it displayed a photograph of a female ballerina, perched in a pirouette atop the famed Charging Bull statue on Wall Street, underneath a single question, lettered in red, “What Is Our One Demand?” (The bottom of the poster suggested simply, “Bring Tent”.)

As much as Occupy was focused on actual, tangible occupation, it was also focused on giving rise to a seminal kind of visual resistance to consumerism. One of the most ubiquitous symbols to emerge from the Occupy movement was a satirical American flag, emblazoned with corporate logos, that was made by *Adbusters*, and carried by protesters and photographed widely throughout the occupation of Zuccotti Park. The appearance of the anti-branded flag made a powerful visual statement about what America appeared to have become to the occupiers—a land of brands, logos and unbounded corporate influence.

At the same time, the use of the *Adbusters* flag, in conjunction with the protesters’ actual, physical occupation of quasi-public space, was also quite revealing. Clearly, the object of the Occupy protest movement, unlike most of *Adbusters*’ previous work, was much broader than just the world of advertising—it was a protest against the financial structures that *produced* corporate branding—in addition to the world of Wall Street, income inequality and the increased power of corporate influence over

²⁹ Andrew Fleming, “Adbusters Sparks Wall Street Protest”, *Vancouver Courier*, September 27, 2011, available at <http://www.vancourier.com/Adbusters+sparks+Wall+Street+protest/5466332/story.html#ixzz278skdVKS> [Accessed October 28, 2012].

government. This shift was also foundational in nature in terms of tactics—it symbolised a movement away from communicating through images, parody and satire, and instead towards actual, physical occupation of the tangible structures within the financial world. In fact, one might argue that it reimagined political organisations entirely, as the movement was entirely composed of a horizontal, participatory structure—a leaderless base of activists, modeled after the “Arab Spring”. As one activist, Marina Sitrin, explained:

“The ways in which we organize in these spaces of assemblies and working groups is inextricably linked to the vision of what we are creating. We seek open, horizontal, participatory space where each person can truly speak and be heard. We organize structures, such as facilitation teams, agendas, and variations on the forms of the assembly, from general assemblies to spokes councils, always being open to changing them so as to create the most democratic and participatory space possible ... The creation of alternative institutions and solutions has already begun in the United States. With or without encampments, the constructive phase of the Occupy movement is here, and all indications are that it will not slow down”³⁰

The Occupy movement, although it faced significant challenges, certainly touched a global nerve—at its height, at least 1,000 other cities and localities had formed similar Occupy movements, and became a huge presence across social media networks. Throughout, many encampments were often illegal, but they continued to persist. People kept coming to Zuccotti Park, from other states and countries—and the list of social services kept growing, from a makeshift kitchen, open to all, to a legal services station, a set of tents donated by the rapper Lupe Fiasco, and finally, to the People’s Library, which held several thousand volumes.

But the shift toward actual occupation also demonstrated a new, emergent form of dissent: what I call semiotic disobedience. Although many projects, including Occupy Wall Street, stemmed from an *Adbusters*-like sympathy for anti-branding activism, the tactics that Occupy Wall Street demonstrated took things one step further. Here, the emphasis was on interruption and occupation, as opposed to appropriation. Appropriation usually involves some form of copying; interruption, however, involves something different. Consider the following observation by Johann Hari, building off the work of Umberto Eco, who coined the term “semiotic guerrilla warfare”:

“[Eco proposes] an action [which would] urge the audience to control the message and its multiple possibilities of interpretation. When corporate interests go so far as to employ viral marketing—where, for example, two good-looking, trendy people are employed to walk around public places talking loudly about how great Stella Artois is—subverting these acts seems to some activists the only meaningful way to protest.”³¹

Like yesterday’s civil rights activism, and as our body of First Amendment jurisprudence has plainly recognised, these forms of semiotic disobedience demonstrated that there are spaces for political expression carved outside the boundaries of protected speech like parody.

Occupy Wall Street is just one example of this trend, but the various facets of its movement help us to understand the various ways to engage property rights and culture. Its most obvious tactic demonstrates the actual occupation of tangible, quasi-public space, which facilitated the interruption of the financial world’s everyday operations. By interrupting and occupying the urban spaces devoted to Wall Street and corporate culture, the movement was able to dramatically shift the tenor of the conversation surrounding Wall Street, leading to a much more pointed (and poignant) level of critique.

³⁰ Marina Sitrin, “Occupy Wall Street, Beyond Encampments”, quoted in Timothy Malone, “Occupy Together: the Transnational Foundation of Occupy Wall Street”, available at <http://www.yesmagazine.org/people-power/occupy-wall-street-beyond-encampments> [Accessed October 28, 2012].

³¹ Johann Hari, “How to Beat the Adman at his Own Game”, *New Statesman*, June 17, 2002, p.22.

Prior to the advent of Occupy Wall Street, other forms of “semiotic disobedience” included a number of aggressive approaches to visual and verbal representation—including recoding, subverting and reclaiming certain kinds of government, corporate and private property. These forms of activism have been around for generations, occupying various properties, intellectual and real, with a unique blend of humor, creativity and activism. In San Francisco, a group known as the Billboard Liberation Front (BLF) routinely “liberates” and “improves” billboard advertising by vandalizing and altering messages and logos. The group has been around since 1977.³² Its tactics are anonymously and meticulously arranged and deployed, paying tremendous attention to mimicking actual ads by matching paint colors, letter fonts and other graphics to the original.³³

Internationally, other groups, like “Billboard Utilizing Graffitiists Against Unhealthy Promotions”, or BUGA-UP (in Australia) or Citizens Organized Using Graffiti Hits on Unhealthy Products (COUGH UP) in Britain, targeted tobacco advertising. In the 1990s, in Harlem, Chicago, Detroit and Dallas, parishioners led “billboard-busting blitzes” in which they would paint over the tobacco advertising surrounding their church.³⁴ Countless other artists repaint sign imagery, alter advertising slogans, replicate legal notices,³⁵ scrawl responses on ads³⁶ and “jam” broadcast messages in the media. Others organise massive interruptions in public space,³⁷ fund projects that are directed toward corporate sabotage,³⁸ alter products in the marketplace before they are sold³⁹ and vandalise preexisting works of art.⁴⁰ Still others actively hijack domain names, appropriate online identities and hack into private corporate spaces in cyberspace.⁴¹

Although public-spirited lawbreaking in the United States can be traced back to incidents such as the Boston Tea Party, the emergence of these types of semiotic disobedience created new and particularly vexing problems for lawyers and law enforcement officials, both of whom are often bemused by artists’ increasingly creative and confrontational approaches. In each example, an individual actively transgresses the private, sovereign boundary of corporate property—a billboard, a domain name, an identity or a tangible product—and transforms it into a sort of “public” property open for dialogue and discussion, an entity that is non-sovereign, borderless and thus incapable of excluding alternative meanings.

Another, equally dramatic shift in tactics included Occupy’s complete resistance to the very concept of intellectual property and ownership over the meaning of the term “Occupy”. In October 2011, someone involved with Occupy Wall Street allegedly filed an application to trademark “Occupy Wall Street”. The application was reportedly met with great reluctance from the movement. As some in Occupy Wall Street must have felt, just as the movement never meant to stand for a list of central demands or message, it also never meant to become a brand on its own. For many reasons, Occupy Wall Street had every reason to fear privatising—owning—what it means to be part of the 99 per cent, or even to occupy Wall Street. In grappling with the question of whether to trademark its brand, Occupy Wall Street has had to confront

³² Billboard Liberation Front Creative Group, “The Art and Science of Billboard Improvement: A Comprehensive Guide to the Alteration of Outdoor Advertising”, available at <http://www.billboardliberation.com/guidebook.html> [Accessed October 28, 2012]; Matthew Kauffman, “Bushwhacked Billboards”, *Hartford Courant*, September 25, 2002, p.E1.

³³ Kauffman, “Bushwhacked Billboards”, *Hartford Courant*, September 25, 2002, p.E1.

³⁴ Klein, *No Logo* (2000), p.290.

³⁵ See “But Wait, There’s More”, *Autoweek*, May 27, 2002, p.48; Stay Free Magazine, “Park Slope Public Works”, available at <http://www.stayfreemagazine.org/suv> [Accessed October 28, 2012].

³⁶ Klein, *No Logo* (2000), pp.289–290.

³⁷ For examples of organized interruptions in public space, see *Critical Mass*, available at <http://www.critical-mass.net> [Accessed December 3, 2012]; Leander Kahney, “E-Mail Mobs Materialize All Over”, *Wired News*, July 5, 2003, available at <http://www.wired.com/news/culture/0,1284,59518,00.html> [Accessed October 28, 2012].

³⁸ The artist-activist group @TMark (pronounced “artmark”) imitates the operation of a corporation and has created a host of anti-corporate projects and parody websites at www.gatt.org [Accessed October 28, 2012], www.gwbush.com, www.microsoftedu.com. The group has received cease-and-desist letters from its corporate targets. See @TMark, available at <http://www.rtmk.com> [Accessed October 28, 2012].

³⁹ *Barbie Liberation*, available at <http://www.sniggle.net/barbie.php> [Accessed November 14, 2012].

⁴⁰ Dario Gamboni, *The Destruction of Art: Iconoclasm and Vandalism since the French Revolution* (New Haven: Yale University Press, 1997).

⁴¹ For excellent discussions of these tactics, see Caroline Auty, “Political Hacktivism: Tool of the Underdog or Scourge of Cyberspace?” (2004) 56 *Aslib Proceedings* 212.

the uncomfortable reality that to trademark “Occupy” would create a contradiction in terms—a property right with the ability to cease others from defining, for themselves, what Occupy means for them.

It is precisely this type of resistance that characterises the difference between Occupy and yesterday’s anti-branding movements. Although the movement is joined by a stalwart commitment to the disenfranchised 99 per cent, it is also united by an opposition to entrenched ideas—forcing a reimagination of politics, organisation, culture and property. Like semiotic democracy, the phenomenon of semiotic disobedience aims to create a dialogue where one is absent and tries to reclaim the inducement of passivity among modern consumers.⁴² Further, both semiotic democracy and semiotic disobedience seek to reverse the privileged position of the speaker or author and make the audience an active participant instead of a generally passive spectator.⁴³

However, although semiotic disobedience arguably shares many of the same goals of semiotic democracy, there are important differences between the two concepts. Unlike semiotic democracy’s willingness to place consumers and corporations on an equal playing field, some forms of semiotic disobedience are largely substitutive: it attempts to occupy and “recode” corporate space for the purpose of restoring a sort of critical balance between consumer and corporation. There is a deep and growing skepticism to traditional concepts of ownership, demonstrated, in part, by the resistance to the reach of intellectual property over aspects of culture. Unlike semiotic democracy, which seeks access to symbols, semiotic disobedience seems to take issue with the very idea of ownership of symbols entirely. In this way, the tactics utilized by semiotic disobedience activists offer an interesting convergence of property and speech by targeting—and challenging—the “sovereignty” of advertising. As these activists are well aware, trespass, vandalism, defacement, cyber-squatting and property occupation or alteration enjoy little protection under the law; the end sought is not protection, but protest.

And that is the story of disobedience: the making of meaning in the shadows of democracy, sometimes outside the protections of the law. Since the social norms of semiotic disobedience often favor the occupation of another’s property, rather than its independent reproduction, the types of semiotic disobedience mentioned here tend at times (though not always) to fall outside of legal protection.

While semiotic democracy focused on expanding the marketplace of ideas, semiotic disobedience focused on actually “correcting” the marketplace by occupying some ideas in favor of others. Moreover, unlike the goal of semiotic democracy, which focuses on legalising a self-created parody alongside an original work through fair use, the theory behind semiotic disobedience focuses on the occupation of owned property itself. In doing so, Occupy’s semiotic disobedience forcibly reclaims privately owned intellectual property for a sort of alternative domain that aims to place a pro-consumer, anti-corporate view at the center of its discursive space.

Although Occupy’s semiotic disobedience fails to capture all of the elements of classical forms of civil disobedience,⁴⁴ it does replicate its performative, dissenting character. As some authors have observed, civil disobedience, at its most general level, is defined as “doing legally reprehensible things in public, at times in an exhibitionist manner, for the purposes of political or social protest”.⁴⁵ As defined by Carl Cohen:

“Civil disobedience is an act of protest, deliberately unlawful, conscientiously and publicly performed. It may have as its object the laws or policies of some governmental body, or those of some private

⁴² Alexander Barley, “Battle of the Image: Subvertising”, *New Statesman*, May 21, 2001, p.45.

⁴³ Baines, “A Pie in the Face” (2001) *Alternatives J.* 14.

⁴⁴ For example, whereas civil disobedience traditionally requires the actor to accept punishment for her actions, many participants in semiotic disobedience try to actively avoid detection and punishment. E.g. Hakim Bey, “The Temporary Autonomous Zone, Ontological Anarchy, Poetic Terrorism”, available at <http://hermetic.com/bey/taz1.html> [Accessed October 28, 2012].

⁴⁵ Jerome B. King, “Book Reviews” (1972) 86 *Harv. L. Rev.* 468, 469.

corporate body whose decisions have serious public consequences; but in either case the disobedient protest is almost invariably nonviolent in character.”⁴⁶

Here, Occupy Wall Street’s semiotic disobedience represents both an outgrowth of and a departure from traditional forms of civil disobedience. As Nathan Schneider wrote in *The Nation*, referring specifically to Occupy Wall Street:

“When the first arrest videos went viral, it was rarely noticed that protesters were arrested while committing conscious acts of civil disobedience: holding down an illicit tarp that was protecting equipment from the rain, continuing a speech about having courage after being ordered to stop, writing the word ‘love’ on the sidewalk in chalk ... Nor has it been much remembered what kind of backdrop these early moments stood against: the police commanders wandering through the plaza and waking people at dawn, the ever present worry of a forced dispersal, the sense of isolation when the TV trucks were gone.”⁴⁷

University of Chicago Law Professor Bernard Harcourt has called the Occupy movement an example of “political disobedience”, as distinguished from “civil disobedience”. He argued that whereas civil disobedience accepted the legitimacy of political institutions, but resisted the authority of certain laws, Occupy’s political disobedience “resists the very way in which we are governed: it resists the structure of partisan politics, the demand for policy reforms, the call for party identification, and the very ideologies that dominated the post-[Cold] War period”.⁴⁸ The point of the resistance is not to articulate clear policy demands or “embrace old ideologies”, Harcourt wrote. The central focus of Occupy was not to rehash questions of whether big government or no government was better—the point was to resist politics as much as to resist the preexisting political structures that forced such choices upon people. In this way, Harcourt wrote that the resistance bore similarities to Foucaultian “critique”, demonstrating a resistance to being governed “in this manner”, or “voluntary insubordination”.

There is another important difference between civil disobedience and semiotic disobedience as well. With the latter, the object of protest is not just the state or federal laws that surround the expanding sovereignty of intellectual property, but also the private and corporate forces that rely on their existence. For a semiotic democracy, the ideal involves a culture rich in reproductive images, creating more speech (and thus more property) in the marketplace of ideas. In contrast, Occupy’s semiotic disobedience challenged these categories by creating expressions that were tangible, rivalrous and substitutive; its occupation of actual space made it more costly for corporations to advertise and protect the identity behind their products and images, because of the skillful way the movement engendered a deep and widespread critique of the corporate world.

And, in doing so, semiotic disobedience creates a new, converging marketplace of speech that is largely designed to interrupt and interfere with the “codes” of the previous one. The result is a world in which the powerful purchase properties—billboards, domain names and the like—only to have their messages exposed, occupied and thus interrupted by their disenfranchised counterparts. The idea behind semiotic disobedience is not to permit a marketplace of speech where the answer to objectionable speech is more speech, but rather where the goal is to interrupt, disrupt and replace the speech of the corporate entity with that of the disenfranchised consumer.

As a result, the spirit of Occupy reflects some of the same classic goals and interests of traditional civil disobedience. What matters is not whether Occupy “succeeded” (in whatever sense of the word)—what matters is the way Occupy offered us a new way to think about the relationship between law, culture and

⁴⁶ Carl Cohen, *Civil Disobedience: Conscience, Tactics, and the Law* (New York: Columbia University Press, 1971), pp.39–40.

⁴⁷ Nathan Schneider, “From Occupy Wall Street to Occupy Everywhere”, *The Nation*, October 11, 2011.

⁴⁸ Bernard Harcourt, “Occupy Wall Street’s ‘Political Disobedience’”, *New York Times*, October 13, 2011.

intellectual property. The individuals I am speaking of do not expressly seek to reclaim the protection of the law; rather, their very objective is to demonstrate the expressive value of transgressing its limits.

Conclusion

As the US First Amendment jurisprudence has aptly demonstrated, speech does not always have to be protected in order to be powerful: indeed, some of the most meaningful language of our time has been that which falls outside of law's protective boundaries. Similarly, I argue that it is too reductionist and simplistic to dismiss these actions as adult pranks, devoid of legal and political meaning. Indeed, the stark number and prominence of contemporary projects—like Occupy Wall Street—that offer sophisticated critiques of the relationship between culture and corporate commodification makes it impossible to do so.

Viewed through this prism, property law is no different. It creates boundaries that enfranchise certain types of speech at the expense of others. And, in doing so, it enables certain types of legal and illegal dissent, conferring legitimacy on some types of speech, but often excluding other types of expression from protection. Rather than expanding the marketplace of protected speech, as the First Amendment attempts to do, intellectual property law has tended to narrow its boundaries, thereby expanding the boundaries of the prohibited marketplace of speech instead.

As I argue, semiotic disobedience suggests there is another story that needs to be told, one that emanates from the shadow of the limits of law's governance. Thus, just as civil disobedience challenges basic conceptions of political democracy by drawing attention to disenfranchised minorities, semiotic disobedience challenges notions of semiotic democracy by drawing attention to disenfranchised types of expression. These alternative political economies of expression operate largely outside of law's protective enclosures, even though they represent powerful examples of the expressive diversity that the First Amendment is supposed to protect.

Going GaGa: Intellectual Property and Pop Culture

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☞ Celebrities; Community trade marks; Comparative law; Confusion; Culture; Music industry; Parody; United States

Introduction

Her real name is Stefani Joanne Angelina Germanotta, but the world knows her as Lady Gaga. She has sold over 64 million singles and 20 million albums. At the age of 24, she was named one of the “100 Most Influential People in the World” alongside Barack Obama, Bill Clinton and Lee Kuan Yew.¹ Her moniker was inspired by the Queen hit song *Radio Ga Ga*.² She has also attracted over 13 million followers on Twitter, and she uses the term “Little Monsters” to refer to her fans or followers—a reference to her hugely successful album “The Fame Monster”, which won the Grammy Award for Best Pop Vocal Album. Lady Gaga’s outrageous fashion statements and controversial music videos have made her an icon of modernity, or even post-modernity, that has amassed followers worldwide.³

Contemporary culture in industrialised nations is characterised by a vibrant kaleidoscope of images and spectacles that permeate the fabric of everyday life, influencing consumption choices and political views, and providing meaningful resources out of which people may shape their own identities. It has been said that “intellectual property laws are one means by which attachments and entitlements to ‘intangibles’ such as expressive works and heritage goods are forged”.⁴ The conceptual framework of cultural studies can help one better understand why certain cultural artifacts are popular and their impact within the environment they inhabit. More importantly, that framework can provide insights into how intellectual property (IP) laws may respond in the context of this cultural milieu.

The enforcement of IP rights in the entertainment industry cannot be divorced from an understanding of the popular culture in which celebrities, songs, movies and books are intimately entwined with participatory fan communities and new norms of social media. I have previously explored themes of how the celebrity, as a widely recognised cultural sign, can impel the public who identify with such attributed ideological values to consume the celebrity itself as a commodity (e.g. by watching the movies of a particular actor) or products associated with the celebrity (e.g. by purchasing celebrity-endorsed products).⁵ On the other hand, the celebrity semiotic sign, as a result of its publicly identifiable encodings, also presents rich opportunities for alternative codings to challenge these “typical ways of behaving, feeling and thinking

¹ The 100 Most Influential People in the World, *Time*, May 10, 2010.

² E.g. Maureen Callahan and Sara Stewart, “Who’s that Lady?”, *New York Post*, January 21, 2010.

³ Lady Gaga’s achievement of global fame through the internet and social media has been likened to the similar “buzz explosion” that has made Susan Boyle and Justin Bieber household names. Maureen Callahan, *Poker Face: The Rise and Rise of Lady Gaga* (New York: Hyperion, 2011), p.82; Chris Rojek, *Fame Attack: The Inflation of Celebrity and its Consequences* (London: Reaktion Books, 2012), pp.128–133.

⁴ Rosemary J. Coombe, “Cultural Agencies: The Legal Construction of Community Subjects and Their Properties” in Mario Biagioli, Peter Jaszi and Martha Woodmansee (eds), *Making and Unmaking Intellectual Property: Creative Production in Legal and Cultural Perspective* (Chicago: University of Chicago Press, 2011), pp.79, 81.

⁵ E.g. David Tan, “The Fame Monster Reloaded: The Contemporary Celebrity, Cultural Studies and Passing Off” (2010) 32 *Sydney Law Review* 291; David Tan, “Affective Transfer and the Appropriation of Commercial Value: A Cultural Analysis of the Right of Publicity” (2010) 9 *Virginia Sports & Entertainment Law Journal* 272; David Tan, “Beyond Trademark Law: What the Right of Publicity Can Learn from Cultural Studies” (2008) 25 *Cardozo Arts & Entertainment Law Journal* 913.

in contemporary society⁶ representative of majoritarian ideals. Through an examination of a recent English decision where Lady Gaga sought to assert her IP rights to prevent the release of a pop song by an animated character called Lady Goo Goo, this article explores how some of these cultural insights may help shape IP doctrine in a more nuanced fashion that takes into account the semiotic significance of celebrity icons in contemporary society.

Cultural studies and intellectual property law

A number of scholars have propounded the value of engagement between cultural studies and law. Scholars like Austin Sarat and Jonathan Simon have been prominently involved in the “cultural analysis” of law, focusing on the cultural lives of law and how the law is “a part of the cultural processes that actively contribute in the composition of social relations”.⁷ Of legal works that use cultural studies as an interpretive background and consider IP issues, there has been an overwhelming criticism that the right of publicity, like other IP rights, goes too far in protecting the commercial value of the celebrity persona and that significant rejection of the legal recognition of publicity rights can be harmful to the cultural domain. Legal scholars like Keith Aoki,⁸ Rosemary Coombe⁹ and Michael Madow¹⁰ have drawn on cultural studies in their critique of IP laws that restrict the terms and conditions of cultural production. For much of this writing, a key point is that “the power to license is the power to suppress”.¹¹ Some legal scholars have questioned the more absolute aspects of these approaches. Justin Hughes has pointed out that

“the argument for more recoding freedom probably overstates the negative impact of existing intellectual property laws on the self-expression of non-owners ... [and] understates the positive utility non-owners derive from stability in the meaning of propertized intellectual property”.¹²

Hence IP rights—like recognising Lady Gaga’s right of publicity and trademark rights—allow a celebrity persona to acquire a distinctive cultural cachet with a stable set of meanings commonly attributable to that persona; this in turn allows for recoding—using the cultural object in a forum for third persons to achieve different effects than those generally achieved already by the object—to occur. Similarly, legal commentator Jason Bosland agrees that trademark rights are not “culturally oppressive and dialogically restrictive”¹³ and contends that “the *per se* ownership of intellectual property should not have the effect of restricting the production or use of cultural resources if intellectual property rights are tempered by appropriate limitations”.¹⁴

Writings in contemporary cultural studies are notable in their overwhelming acceptance that the celebrity is “characterized by an individual distinction, mass appeal, ubiquity and popular authorship”.¹⁵ If one undertakes a cultural analysis of a cultural artifact like the celebrity persona of Lady Gaga, especially its significance in a Web 2.0 environment,¹⁶ then one can benefit from greater insights to a more nuanced

⁶ Richard Dyer, *Heavenly Bodies: Film Stars and Society* (London: Routledge, 1986), pp.15–16.

⁷ Austin Sarat and Jonathan Simon, “Cultural Analysis, Cultural Studies, and the Situation of Legal Scholarship” in Austin Sarat and Jonathan Simon (eds), *Cultural Analysis, Cultural Studies, and the Law: Moving Beyond Legal Realism* (Durham: Duke University Press, 2003), p.1.

⁸ E.g. Keith Aoki, “Adrift in the Intertext: Authorship and Audience ‘Recoding’ Rights” (1993) 68 *Chicago-Kent Law Review* 805.

⁹ E.g. Rosemary J. Coombe, *The Cultural Life of Intellectual Properties: Authorship, Appropriation, and the Law* (Durham: Duke University Press, 1998); Rosemary J. Coombe, “Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue” (1991) 69 *Texas Law Review* 1853.

¹⁰ Michael Madow, “Private Ownership of Public Image: Popular Culture and Publicity Rights” (1993) 81 *California Law Review* 127.

¹¹ Madow, “Private Ownership of Public Image” (1993) 81 *California Law Review* 127, 145.

¹² Justin Hughes, “‘Recoding’ Intellectual Property and Overlooked Audience Interests” (1999) 77 *Texas Law Review* 923, 1010.

¹³ Jason Bosland, “The Culture of Trade Marks: An Alternative Cultural Theory Perspective” (2005) 10 *Media & Arts Law Review* 99, 100.

¹⁴ Bosland, “The Culture of Trade Marks” (2005) 10 *Media & Arts Law Review* 99, 102–103.

¹⁵ Tan, “Beyond Trademark Law” (2008) 25 *Cardozo Arts & Entertainment Law Journal* 913, 938.

¹⁶ “Web 2.0” is a term often used to describe online forms of participatory media in which former passive audiences now assume active agency in content creation and distribution. It is commonly associated with technologies and platforms that enable the proliferation of amateur user-generated content. See e.g. Greg Lastowka, “Minecraft as Web 2.0: Amateur Creativity and Digital Games” in Dan Hunter, Ramon Lobato, Megan Richardson and Julian Thomas (eds), *Amateur Media: Social, Cultural and Legal Perspectives* (London: Routledge, 2012), p.154.

articulation of the relevant defences to an IP right infringement claim. Broadly speaking, Stefani Germanotta has a suite of potential IP claims available to her—depending on the jurisdiction—when there is an unauthorised use of her Lady Gaga persona in a commercial context. The three main IP actions are the right of publicity (available in a majority of state jurisdictions in the United States),¹⁷ trademark (depending on where and in what class of goods or services she had registered “Lady Gaga” as a trademark) and passing off (generally available in common law Commonwealth jurisdictions). In a right of publicity action, I have argued that the First Amendment defence has the ability to incorporate relevant insights on the recoding potential of the celebrity sign, especially as used by subaltern groups or counterpublics as an integral part of political and social identity formation.¹⁸ Specifically, I had pointed out that contemporary cultural studies can inform

“the revision of existing judicial tests to better take into account the content, form and context of politically expressive uses of the celebrity identity when engaging in an evaluation of the conflict between [intellectual] property and speech rights”.¹⁹

For trademark infringement and passing off claims, an understanding that the economic value of the mediated persona of a well-known individual is sustained by a complex interplay of encoding by cultural producers and decoding by audiences can better assist an evaluation of whether there was a likelihood of confusion, and ultimately liability.

Lady Goo Goo: From an online video game to an animated pop singer

In *Ate My Heart Inc v Mind Candy Ltd*,²⁰ Lady Gaga succeeded in obtaining an interim injunction from an English High Court in 2011 to restrain the release of a pop song by an animated Moshi Monsters character called Lady Goo Goo. Lady Gaga, suing under her company, Ate My Heart Inc, alleged infringement of provisions as set out in arts 9(1)(b) and (c) of the Community Trade Mark Regulation (EC Regulation 207/2009) relating to trademark infringement and dilution. Lady Goo Goo was developed by the first defendant Mind Candy in September 2009, featuring a baby wearing a nappy, with

“large sunglasses with crystals on the right side, blond hair in some images worn in a style that is at least reminiscent of Lady Gaga on some of her album or other video poses, and a hair bow in some images, also reminiscent of Lady Gaga”.²¹

The second defendant, Moshi Music, is a subsidiary of Mind Candy, incorporated to exploit musical sound recordings and songs associated with the Moshi Monsters Game. Lady Gaga’s primary complaint is that the defendants intend to release, as a single, a pop song titled *The Moshi Dance* sung by the Lady Goo Goo character and is alleged to bear a striking resemblance to her hit song *Bad Romance*. *The Moshi Dance* has in fact already been released on YouTube and had garnered 3.9 million hits at the time the case was decided.

The Moshi Monsters Game is a social networking online game targeted at children between the ages of 6 and 12, where players can make friends with each other on “monster blogs”. The player registers and chooses a pet monster which is then guided around the game. The player nurtures his or her monster,

¹⁷ J. Thomas McCarthy, *The Rights of Publicity and Privacy*, 2nd edn (St. Paul: Thomson West: 2000), §6.3; *Restatement (Third) of Unfair Competition* (1995), §46. In Europe, it is recognised as a right of personality in a number of civil law jurisdictions like Germany and France. See e.g. Huw Beverley-Smith, Angsar Ohly and Agnès Lucas-Schloetter, *Privacy, Property and Personality: Civil Law Perspectives on Commercial Appropriation* (Cambridge: Cambridge University Press, 2005), pp.94–205.

¹⁸ David Tan, “Political Recoding of the Contemporary Celebrity and the First Amendment” (2011) 2 *Harvard Journal of Sports & Entertainment Law* 1.

¹⁹ Tan, “Political Recoding of the Contemporary Celebrity and the First Amendment” (2011) 2 *Harvard Journal of Sports & Entertainment Law* 1, 51.

²⁰ *Ate My Heart Inc v Mind Candy Ltd* [2011] EWHC 2741 (Ch).

²¹ *Ate My Heart* [2011] EWHC 2741 at [3].

solves puzzles, embarks upon missions and thereby earns money, which can be spent in a virtual shop on things to feed the monster and make it happy.²² By September 20, 2011, there were about 50 million users of the Moshi Monsters Game.²³

It was undisputed that the creation of Lady Goo Goo was inspired by Lady Gaga. At the same time, in September 2009, the defendants introduced a number of other parody characters into the Moshi Monsters Game that included Banana Montana (a spoof of Hannah Montana), Broccoli Spears (bearing a similarity to Britney Spears), Taylor Miffed (Taylor Swift), the Groanas Brothers (the Jonas Brothers), Hairosmith (Aerosmith) and Avril Le Scream (Avril Lavigne).²⁴ On September 15, 2011, Lady Gaga commenced proceedings to seek, inter alia, an injunction to restrain the defendants from promoting, advertising, selling, distributing or making available to the public in the course of trade the musical work and video titled *The Moshi Dance* or any other musical or video works purported to be performed by the character Lady Goo Goo. By the time of the hearing, the relief sought has been narrowed to an injunction “to restrain the defendants from releasing the Moshi Dance Song through iTunes or any other medium, and requiring the defendants to take the Moshi Dance Song off its YouTube pages”.²⁵ Lady Gaga, however, has no objections to the use of the Lady Goo Goo character in the online Moshi Monsters Game. At the preliminary hearing, Ate My Heart Inc was successful in preventing Lady Goo Goo from encroaching on the popular music market. Accordingly, her music should only be used in the context of the Moshi Monsters Game.

Goo Goo Ga Ga: Are we so easily confused?

Regarding art.9(1)(b) of the Community Trade Mark Regulation, the claimants’ main contention in *Ate My Heart* was that the commercial release of *The Moshi Dance* song would represent a move by the defendants into Lady Gaga’s core commercial field, and the consequent widespread media coverage of the song would bring the Lady Goo Goo character and the song “to the attention of an entirely new constituency of people who are not concerned with children’s online computer games”, thereby creating “confusion on the part of the public as to whether Lady Gaga is responsible for or has somehow endorsed or licensed the Song”.²⁶ Justice Vos appeared to have ignored the observations of an article that appeared in a magazine called *Music Talkers* on *The Moshi Dance* which commented:

“A far cry from Lady Gaga herself, Lady Goo Goo does not [bear] much resemblance in music style. It’s severely annoying to anyone above the age of 12 ... In the future we are going to see similar performances from 49 Pence, Dustin Beaver and Broccoli Spears alongside many other stars. It seems free virtual worlds are becoming more popular for just about everyone. Young or old, millions of people are actively taking part”²⁷

It was held that a “likelihood of association” was held to be sufficient to satisfy the likelihood of confusion standard.²⁸ His Honour reached this conclusion despite no actual evidence of confusion presented, but instead relied on two factors: that the title or name Lady Gaga bears in itself a reference to “goo goo ga ga”, a sound commonly made by babies; and the commercial song production of a track by Lady Goo Goo beyond the Moshi Monsters Game might make people think that the two were commercially connected because of the aural association.²⁹

²² *Ate My Heart* [2011] EWHC 2741 at [3].

²³ *Ate My Heart* [2011] EWHC 2741 at [29].

²⁴ *Ate My Heart* [2011] EWHC 2741 at [29].

²⁵ *Ate My Heart* [2011] EWHC 2741 at [32].

²⁶ *Ate My Heart* [2011] EWHC 2741 at [42].

²⁷ *Ate My Heart* [2011] EWHC 2741 at [25].

²⁸ *Ate My Heart* [2011] EWHC 2741 at [51].

²⁹ *Ate My Heart* [2011] EWHC 2741 at [56]–[57].

This decision is troubling in at least two respects. First, it confers on Lady Gaga a virtual monopoly over a common phrase in the English language, and it suggests that evocation may be tantamount to association, and therefore confusion. It is contrary to the judgment in *Hasbro Inc v 1234 Nahrungsmittel GmbH* that “mere association, in the strict sense that the later mark brings the earlier mark to mind, is not sufficient” and that “the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association”.³⁰ Secondly, it does not adequately address how an effective parody, albeit commercial in nature, may mitigate against a likelihood of confusion. Justice Vos’s explanation that “goo goo” and “ga ga” are frequently used together does not take into account that Lady Gaga’s moniker was in fact derived from Queen’s hit song *Radio Ga Ga*, rather than from noises babies made. Even if the registered trade mark was inspired by babytalk, it is arguable that the mark owner would be overreaching if other commercial entities were generally prohibited from using “goo goo” in association with a female animated character in class 9 (“sound and video recordings, audio-visual recordings featuring music and musical-based entertainment”) and class 41 (“entertainment ... services”) in which the words “Lady Gaga” were registered because such words would evoke the primary mark in a presumptively confusing manner.

The decision of the US Court of Appeals for the Fourth Circuit in *Louis Vuitton Malletier SA v Haute Diggity Dog LLC (Chewy Vuiton)* sheds some light on how a parody could be considered in the likelihood of confusion analysis, especially when a well-known brand has built up a worldwide following with established connotative values and has therefore become far more susceptible to countercultural recordings.³¹ The Fourth Circuit held that for trademark purposes, “[a] ‘parody’ is defined as a simple form of entertainment conveyed by juxtaposing the irreverent representation of the trademark with the idealized image created by the mark’s owner”.³² On the facts on the case, the court concluded that the Chewy Vuiton dog toys were successful parodies of the Louis Vuitton handbags. The court found that “the pet chew toy is obviously an irreverent, and indeed intentional, representation of an LVM handbag”, and it “undoubtedly and deliberately conjures up the famous LVM marks and trade dress, but at the same time, it communicates that it is not the LVM product”.³³ The court held that there was no likelihood of confusion. The Lady Goo Goo character has much in common with the Chewy Vuiton dog toy in that both poke fun at the original trademark, and achieve their parodic purpose only because they successfully evoke the original mark.

More pertinently, contemporary cultural practices would reveal that consumers—especially fans of iconic works—are far more sophisticated in terms of their ability to distinguish between the “original” (or canonical) and the “alternative” (non-canonical) products. In copyright law, canonicity can be viewed as the incontestable authorial mandate which “sets the original author’s creative teleology apart from all other creative teleologies ... [and] is an implicit stamp of legitimacy that gives the original author’s work primacy over every fan-based work that comes after it”.³⁴ It has been observed that fan obsession with canonicity occurs most prominently in the United States among fans of major science fiction works like *Star Wars* and *Star Trek*—and maybe more recently with *Harry Potter* and *Twilight*—whose fans “have created entire [online] databases to distinguish canon from non-canon”.³⁵ It appears that the importance that fans ascribe to the canon works preserves the author’s artistic and economic integrity. To the fans, hence arguably also to the buying public, the authentic official will always trump the fan-made unofficial.³⁶ While these observations pertain to fan communities of copyrighted works, similar considerations may

³⁰ *Hasbro Inc v 1234 Nahrungsmittel GmbH* [2011] EWHC 199 (Ch) quoted in *Ate My Heart* [2011] EWHC 2741 at [51].

³¹ *Louis Vuitton Malletier SA v Haute Diggity Dog LLC* 507 F.3d 252 (4th Cir. 2007).

³² *Chewy Vuiton* 507 F.3d 252, 260 (4th Cir. 2007).

³³ *Chewy Vuiton* 507 F.3d 252, 260 (4th Cir. 2007).

³⁴ Nathaniel T. Noda, “Copyright Retold: How Interpretive Rights Foster Creativity and Justify Fan-Based Activities” (2010) 57 *Journal of Copyright Society of USA* 987, 1001.

³⁵ Noda, “Copyright Retold” (2010) 57 *Journal of Copyright Society of USA* 987, 993.

³⁶ David Tan, “Harry Potter and the Transformation Wand: Fair Use, Canonicity and Fan Activity” in Hunter, Lobato, Richardson and Thomas (eds), *Amateur Media* (2012) p.95.

be extended to celebrity personae registered as trademarks when these celebrities—like Lady Gaga, Justin Bieber and Katy Perry command a significant following around the world.³⁷

Parody, fan participation and IP rights

Fan fiction—which may be in literary, video or musical form, or a hybrid of text-image-music—and has been broadly defined as “all derivative fiction and related works created by fans, whether authorized or unauthorized by the author of or current right-holder in the original work”.³⁸ The secondary works of fan fiction authors can cover several genres including fantasy, eroticism, comedy, drama, adventure and mystery. Furthermore, fan-based activities like fanfic (literary form) and fanvids (image and musical hybrid) are usually undertaken as a complement to, rather than in competition with, the authentic canonical work of the original author; this “symbiotic relationship” is likely to “augment, rather than subtract from, the [original] author’s aggregate economic and creative incentives”.³⁹ In their interpretive activities, fans may arguably, as fair use, comment or criticise the canonical universe of the original author, create parodies of the original works or express their own creative teleologies that draw on the canon’s primacy. Most of these activities are not only transformative, but the “complementary nature of fan-based works keeps them from directly competing with the works of the original author”⁴⁰ and “any success enjoyed by the fan-based work inevitably proselytises others to the [canonical] work”.⁴¹ As Sonia Katyal argues, “copyright law needs to equalize the authorial monopoly of the creator in favour of a more dialogic and dynamic relationship between producers and consumers in the process”.⁴² Although these observations were made in the context of copyright law and fair use/fair dealing, the underlying social need of contemporary audiences and consumers who want their own opportunity to participate in today’s “Rip. Mix. Burn.” culture⁴³ extends to other areas of IP law like publicity rights and trademarks.

In order to succeed in a claim under art.9(1)(c) of the Community Trade Mark Regulation, it needs to be shown that the claimant has an established reputation, that the alleged infringement creates a link in the mind of the public with the registered mark, and that the claimant has suffered or is likely to suffer actual damage. In *Ate My Heart*, Justice Vos referred to a number of factors as laid down in *Intel Corp v CPM United Kingdom Ltd* that are to be examined in relation to the question of the link and the question of the injury or damage,⁴⁴ as well as the European Court’s decision in *Interflora Inc v Marks & Spencer* where the court explained detriment.⁴⁵ The European Court of Justice has interpreted damage to include detriment to the distinctive character of the trade mark, detriment to the repute of that mark and unfair advantage taken of the distinctive character or the repute of the mark.⁴⁶ The first two kinds of detriment are similar to concepts of dilution by blurring and dilution by tarnishment in the U.S. Trademark Dilution Revision Act 2006.⁴⁷ If the third requirement of “damage” was broadly interpreted, this dilution/unfair

³⁷ Lady Gaga, Justin Bieber and Katy Perry have the highest number of followers on Twitter with 29 million, 27 million and 26 million respectively. See “The Twitaholic.com Top 100 Twitaholics Based on Followers”, available at <http://twitaholic.com/> [Accessed October 28, 2012].

³⁸ Aaron Schwabach, “The Harry Potter Lexicon and the World of Fandom: Fan Fiction, Outsider Works, and Copyright” (2009) 70 *University of Pittsburgh Law Review* 387, 388; Rachel L. Stroude, “Complimentary Creation: Protecting Fan Fiction as Fair Use” (2010) 14 *Marquette Intellectual Property Law Review* 191, 193-194.

³⁹ Noda, “Copyright Retold” (2010) 57 *Journal of Copyright Society of USA* 987, 994; Jean Burgess and Joshua Green, *YouTube: Online Video and Participatory Culture* (Cambridge: Polity Press, 2009) 12.

⁴⁰ Noda, “Copyright Retold” (2010) 57 *Journal of Copyright Society of USA* 987, 1013.

⁴¹ Noda, “Copyright Retold” (2010) 57 *Journal of Copyright Society of USA* 987, 1000.

⁴² Sonia K. Katyal, “Performance, Property, and the Slashing of Gender in Fan Fiction” (2006) 14 *Journal of Gender, Social Policy and the Law* 461, 468.

⁴³ Lawrence Lessig, “Innovating Copyright” (2002) 20 *Cardozo Arts & Entertainment Law Journal* 611, 617. Lessig argues that “[t]here is no good reason for copyright law to regulate this [amateur] creativity. There is plenty of reason—both costs and creative—for it to leave that bit free”. Lawrence Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy* (New York: Penguin Press, 2008), p.255.

⁴⁴ *Intel Corporation v CPM United Kingdom Ltd* [2009] R.P.C. 15 cited in *Ate My Heart* [2011] EWHC 2741 at [62].

⁴⁵ *Ate My Heart* [2011] EWHC 2741 at [63].

⁴⁶ *Interflora Inc v Marks & Spencer PLC* (C-323/09) September 22 2011, 2011 WL 4388782 at [73]–[74] (First Chamber). See also *L’Oreal SA v Bellure NV* (C-487/07) [2009] E.T.M.R. 55 at [38], [42].

⁴⁷ Trademark Dilution Revision Act 2006, Pub. L. 109-312, § 2, 120 Stat. 1730, 1730-1732 (2006).

advantage provision can have the effect of stifling creativity and competition as parodic signs may be readily found by courts to be riding on the “coat-tails of the mark ... in order to benefit from the power of attraction, the reputation and the prestige of that mark”.⁴⁸

In the United States, despite the availability of trademark dilution actions, free speech considerations often trump the proprietary interests of trademark owners,⁴⁹ as evident in Mattel’s repeated failure to protect the Barbie mark from unauthorised parodic or satirical uses⁵⁰ and cases like *Hormel Foods Corp v Jim Henson Productions Inc*⁵¹ and *Chewy Vuiton*.⁵² However, the ECJ appears willing to extend protection to the brand values which might be embodied in a trademark beyond its source designation function as demonstrated in the court’s decision in *Arsenal Football Club v Reed*.⁵³ In *L’Oreal*, the European Court of Justice (ECJ) noted that

“[a]s regards the concept of ‘taking unfair advantage of the distinctive character or the repute of the trade mark’, also referred to as ‘parasitism’ or ‘free-riding’, that concept relates not to the detriment caused to the mark but to the advantage taken by the third party as a result of the use of the identical or similar sign”.⁵⁴

With regard to the notion of parasitism, the ECJ exhibited a strong reliance on an unjust enrichment rationale.⁵⁵ Generally, the courts can benefit from more scholarly considerations of the phrase “without due cause” in art.9(1)(c). This is where US jurisprudence in the dilution cases may be of assistance.⁵⁶

In *Chewy Vuiton*, on the issue of dilution by blurring, it was held that

“by making the famous mark an object of the parody, a successful parody might actually enhance the famous mark’s distinctiveness by making it an icon. The brunt of the joke becomes yet more famous”.⁵⁷

It was a pertinent consideration for the Fourth Circuit that

“Haute Diggity Dog intentionally associated its marks, but only partially and certainly imperfectly, so as to convey the simultaneous message that it was not in fact a source of LVM products.”⁵⁸

The court further noted that “because the famous mark is particularly strong and distinctive, it becomes more likely that a parody will not impair the distinctiveness of the mark”.⁵⁹ Having ascertained that the Chewy Vuiton product was a successful parody, the court swiftly dismissed Louis Vuitton’s dilution by tarnishment claim for being mere “speculation”.

Similarly, despite the commercial nature of the parody song “Barbie Girl” by the Danish band Aqua, the Ninth Circuit found that although “MCA used Barbie’s name to sell copies of the song ... the song

⁴⁸ *L’Oreal* [2009] E.T.M.R. 55 at [49].

⁴⁹ Section 43(c)(3)(A)(ii) of the Lanham Act incorporates robust First Amendment protections that render non-actionable, inter alia, uses that parody, criticise or comment on the famous mark owner.

⁵⁰ E.g. *Mattel Inc v MCA Records Inc* 296 F.3d 894 (9th Cir. 2002); *Mattel Inc v Pitt* 229 F. Supp. 2d 315 (S.D.N.Y. 2002); *Mattel Inc v Walking Mountains Productions* 353 F.3d 792 (9th Cir. 2003).

⁵¹ *Hormel Foods Corp v Jim Henson Productions Inc* 73 F.3d 497 (2nd Cir. 1996).

⁵² *Chewy Vuiton* 507 F.3d 252, 260 (4th Cir. 2007).

⁵³ Jennifer Davis, “Between a Sign and a Brand: Mapping the Boundaries of a Registered Trade Mark in European Union Trade Mark Law” in Lionel Bently, Jennifer Davis and Jane C. Ginsburg (eds), *Trade Marks and Brands: An Interdisciplinary Critique* (Cambridge: Cambridge University Press, 2008), pp.65, 86–87. See *Arsenal Football Club PLC v Reed* (C-206/01) [2003] C.L.M.R. 12; Jennifer Davis, “To Protect or Serve? European Trade Mark Law and the Decline of Public Interest” [2003] E.I.P.R. 180.

⁵⁴ *L’Oreal* [2009] E.T.M.R. 55 at [41].

⁵⁵ *L’Oreal* [2009] E.T.M.R. 55 at [43].

⁵⁶ Under the Trademark Dilution Revision Act 2006, a plaintiff must show that the junior mark is likely to impair the distinctiveness of the famous mark, based on an analysis of all the statutory factors, including “degree of similarity”. E.g. *Levi Straus & Co v Abercrombie & Fitch Trading Co* 633 F.3d 1158 (9th Cir. 2011); *Starbucks Corp v Wolfe’s Borough Coffee Inc* 588 F.3d 97 (2nd Cir. 2009). However, cases have demonstrated that a junior mark that is a parody of the famous mark is generally unlikely to impair the distinctiveness of that mark.

⁵⁷ *Chewy Vuiton* 507 F.3d 252, 260 (4th Cir. 2007).

⁵⁸ *Chewy Vuiton* 507 F.3d 252, 260 (4th Cir. 2007).

⁵⁹ *Chewy Vuiton* 507 F.3d 252, 260 (4th Cir. 2007).

also lampoons the Barbie image and comments humorously on the cultural values Aqua claims she represents”.⁶⁰ Thus, MCA Records was shielded from the trademark dilution claim under the non-commercial use exemption of the Trademark Dilution Revision Act 2006.

The bar for tarnishment is a high one in US law. The courts there have found that a trademark may be tarnished when it is “linked to products of shoddy quality, or is portrayed in an unwholesome or unsavory context”, with the result that “the public will associate the lack of quality or lack of prestige in the defendant’s goods with the plaintiff’s unrelated goods”.⁶¹ In *V Secret Catalogue v Moseley*, the Sixth Circuit observed that there have been

“at least eight federal cases in six jurisdictions that conclude that a famous mark is tarnished when its mark is semantically associated with a new mark that is used to sell *sex-related products*”.⁶²

In the United States, there appears to be “a clearly emerging consensus in the case law” that

“a semantic ‘association’ is equivalent to a liability-creating mental ‘association’ of a junior mark ... with a famous mark ... that constitutes dilution by tarnishment when the junior mark is used to sell sexual toys, videos and similar soft-core pornographic products”.⁶³

However, outside of this sex-related context, parodies, even where a semantic association is present, are accorded a different treatment. The *Chewy Vuiton* case is paradigmatic. Similarly, in *Hormel Foods*, despite the obvious semantic association, the Second Circuit rejected the argument that the image of the Muppet character Spa’am, as a grotesque, untidy wild boar will “inspire negative and unsavory associations with SPAM® luncheon meat”.⁶⁴ The court held that the “sine qua non of tarnishment is a finding that plaintiff’s mark will suffer negative associations through defendant’s use” and the fact that the defendants’ merchandise “will not be in direct competition with that of Hormel ... is an important, even if not determinative, factor”.⁶⁵ More importantly, the court explained:

“Here, Henson does not seek to ridicule SPAM in order to sell more of its competitive products; rather, the parody is part of the product itself. Without Spa’am, the joke is lost.”

In a similar vein, it is arguable that without Lady Gaga and her distinctive *Bad Romance* song, the joke of Lady Goo Goo and *The Moshi Dance* song would be lost. The songs and videos produced by Lady Gaga cater to a different market and population demographic from that to which the “annoying”⁶⁶ Moshi Dance song and video appeals—namely 6–12 year olds. Mere increased exposure to a silly animated character targeted at children does not fall into the usual tarnishment context of sexual activity, obscenity or illegal activity.

On the “unfair advantage” limb of art.9(1)(c), the *L’Oreal* and *Interflora* cases referred to by Justice Vos do not deal with parodies. A parody by its very definition implicates the freedom of expression, a right guaranteed by art.10 of the European Convention of Human Rights (ECHR). Courts are obliged to give effect to art.10 in the enforcement of IP laws, and therefore should consider whether an expressive parody in the particular circumstances of each case where unfair advantage is alleged constitutes ‘due cause’ for the use of the “sign”. As Justice Vos concedes:

⁶⁰ *Mattel Inc v MCA Records Inc* 296 F.3d 894, 905 (9th Cir. 2002).

⁶¹ *Hormel Foods* 73 F.3d 497, 507 (2nd Cir. 1996).

⁶² *V Secret* 605 F.3d 382, 389 (6th Cir. 2010) (emphasis added).

⁶³ *V Secret* 605 F.3d 382, 389 (6th Cir. 2010).

⁶⁴ *Hormel Foods* 73 F.3d 497, 507 (2nd Cir. 1996).

⁶⁵ *Hormel Foods* 73 F.3d 497, 507 (2nd Cir. 1996).

⁶⁶ *Ate My Heart* [2011] EWHC 2741 at [53].

“all observers, whilst realising the link between Lady Gaga and Lady Goo Goo, might just think that it was an effort at comedy, particularly when associated with a number of different artists like Broccoli Spears and others of similar amusingly referential names.”⁶⁷

If such names and characters were indeed valuable parodic expressions, then in order to give effect to art.10 of the ECHR, the judicial conclusion that there was “coat-tailing or free-riding once one moves out of the Game and into free distribution of popular music under the name Lady Goo Goo”⁶⁸ must take into account whether this commercial activity was nonetheless justified as a protected expressive activity. In making such evaluations, the guidance provided by studies of fandom and fan participatory culture is likely to be valuable in understanding how the contemporary audience-consumer-creator interacts with cultural artifacts like the iconic celebrity persona and copyrighted works. As fan communities move online, the nature of the social and cultural relationship between the author (or owner of an IP right) must necessarily evolve to reflect this contemporary reality.

Concluding comments

Parodic and satirical references to a famous trademark involve a complex mixture of confusion and dilution issues. As the Second Circuit cautioned, “we must be careful not to ... prohibit all uses of a distinctive mark that the owner prefers not be made”.⁶⁹ Celebrities, because of their symbolic significance, are “an important element of the shared communicative resources of our cultural domain”.⁷⁰ Courts have recognised the value of parody of celebrities “both as social criticism and a means of self-expression ... in the marketplace of ideas”.⁷¹ One of the few generalisations about the US cases is that the defendant’s use of parody or satire is not in itself a defence against trademark infringement or dilution. However, even when some commercial motive is present, the defendant is not liable merely because its satire or parody leads the public to think of the claimant’s famous mark. In the United States,

“courts go to great lengths in weighing the interests of the public, the mark holder, and the parodist in determining whether to grant an injunction against a parody in the absence of confusion.”⁷²

As the Tenth Circuit observed, “where a party chooses a mark as a parody of an existing mark, the intent is not necessarily to confuse the public but rather to amuse”.⁷³ It should also be noted that not all parodies are unequivocally protected. The Second Circuit has warned that

“[w]e have accorded considerable leeway to parodists whose expressive works aim their parodic commentary at a trademark or a trademarked product, ... but have not hesitated to prevent a manufacturer from using an alleged parody of a competitor’s mark to sell a competing product.”⁷⁴

The notion of transformative play is at the heart of most fan communities where the authorial hegemony is challenged through irreverent recordings. However, while these interpretive semiotic disruptions and alternatively constructed differences may be construed by IP rights owners as an antagonistic assault, they rarely destabilise the dominant codings of the cultural artifact as intended by the IP right owner or compromise the economic franchise of that owner. In fact, the background stability of the original cultural

⁶⁷ *Ate My Heart* [2011] EWHC 2741 at [77].

⁶⁸ *Ate My Heart* [2011] EWHC 2741 at [78].

⁶⁹ *Hormel Foods* 73 F.3d 497, 507 (2nd Cir. 1996).

⁷⁰ *Cardtoons LC v Major League Baseball Players Association* 95 F.3d 959, 972 (10th Cir. 1996).

⁷¹ *Cardtoons LC* 95 F.3d 959, 972 (10th Cir. 1996).

⁷² Justin J. Gunnell, “Evaluation of the Dilution-Parody Paradox in the Wake of the Trademark Dilution Revision Act of 2006” (2008) 26 *Cardozo Arts & Entertainment Law Journal* 441, 462.

⁷³ *Jordache Enterprises Inc v Hogg Wyld Ltd* 828 F.2d 1482, 1486 (10th Cir. 1987).

⁷⁴ *Harley Davidson Inc v Grottanelli* 164 F.3d 806, 812 (2nd Cir. 1999).

artifact or the canon is quintessential to the activities of fan communities.⁷⁵ In *Ate My Heart*, those familiar with babyspeak will undoubtedly think of “ga ga” when they hear “goo goo”. The semantic association between Lady Goo Goo and Lady Gaga is present, but it might be a stretch to argue that Lady Goo Goo’s inane songs and videos aimed at children compete with the more sophisticated musical products of Lady Gaga. The scenario in *Ate My Heart* is unlike that in *Interflora* where the use of internet keywords of signs corresponding to trade marks with a reputation which belong to other persons could be construed as a use whereby the advertiser rides on the coat-tails of a trade mark with a reputation in order to benefit from its power of attraction, its reputation and its prestige.⁷⁶ A trademark parody reminds us that we should be free to laugh at the images and associations linked with the mark. Denying individuals the opportunity to poke fun at symbols and names, which have become woven into the fabric of our daily life, would not only diminish the richness of our cultural experiences but also constitute a serious curtailment of a protected form of expression. In this 21st century, IP rights owners and courts will have to be more attuned to the social rules of “play” with “communities of prosumers [as opposed to consumers], multipliers, loyals, influencers [and] fans” and be careful not to snuff out creativity in “affinity spaces”.⁷⁷ Parodies are often harmless. They neither compete directly with nor impair the distinctiveness of the primary trade mark. Moreover, consumers are unlikely to be confused as to their source. Perhaps the only harm the primary marks suffer is others having a laugh at their expense.

⁷⁵ For example, Hughes, “‘Recoding’ Intellectual Property and Overlooked Audience Interests” (1999) 77 *Texas Law Review* 923, 957; Henry Jenkins, “Afterword: The Future of Fandom” in Jonathan Gray, Cornel Sandvoss and C. Lee Harrington (eds), *Fandom: Identities and Communities in a Mediated World* (New York: New York University Press, 2001) p.362.

⁷⁶ *Interflora* 2011 WL 4388782 at [89].

⁷⁷ Jenkins, “Afterword” in Gray, Sandvoss and Harrington (eds), *Fandom* (2001), p.360.

Options for the Future Protection of GRTKTCEs: The Traditional Knowledge Licenses and Labels Initiative

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☞ Indigenous peoples; Labelling; Licensing; Traditional knowledge; WIPO

Introduction

Since 2001, WIPO has convened the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC).¹ What began as a committee to address an unresolved problem regarding the issue of “disclosure” within the patent system, and, consequently, the unresolved position of indigenous peoples’ knowledge and interests within the world intellectual property regime, has grown into something much larger.² After 10 years of contested and at times frustrating negotiations about process and definitions, the meetings have moved to text-based negotiations on three new international legal instruments. Generously labelled *sui generis* because of their aim to move beyond the confines of IP categories and classifications, these negotiations feature participation that is bound by the logic, the rules of process and procedure governing WIPO.³ That is, these *sui generis* treaties are being negotiated primarily among WIPO Member States whose delegates are experts in intellectual property law and trade.

In a post-TRIPS world, negotiations over potentially three new international legal instruments have raised the stakes considerably. These negotiations address new intellectual property rights for previously excluded interests—one for each of the three new invented categories: genetic resources (GR), traditional knowledge (TK) and traditional cultural expressions (TCEs). Member States that had a marginal interest in this issue from the beginning (including those that have a tenuous hold on the title “Member State” like the Holy See) and those that insist that they have no indigenous or traditional peoples residing within them (such as Barbados, Vietnam and Bangladesh) are now not only paying attention but in regular attendance, contributing to the text-based negotiations.⁴ The tensions that run throughout the room find different alliances, depending upon which of the three draft instruments are being negotiated.

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¹ Established in the WIPO General Assembly in August 2000. “Matters Concerning Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore” August 25, 2000, WIPO Doc. WO/GA/26/6.

² Personal communication with Wend Wendland, Head, Traditional Knowledge Division, WIPO. See also Marc Perlman, “From ‘Folklore’ to ‘Knowledge’ in Global Governance: On the Metamorphoses of the Unauthored” in Mario Biagioli, Peter Jaszi and Martha Woodmansee (eds), *The Making and Unmaking of Intellectual Property: Creative Production in Legal and Cultural Perspective* (Chicago: University of Chicago Press, 2011).

³ Convention Establishing the World Intellectual Property Organization 1967.

⁴ WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, “Second Provisional List of Participants”, July 11, 2012, WIPO/GRTKF/IC/22/INF/1 PROV.2.

The most contentious and incomplete of these instruments is the one relating to genetic resources.⁵ The reasons for this are not surprising: the anticipated and increasing value of genetic and biological resources lead many powerful interest groups, including especially the pharmaceutical industry, to lobby Member States to maintain core TRIPS-based provisions.⁶ The other key contest within the draft genetic resources instrument involves determining who it is that actually “owns” the knowledge, how that knowledge is or is not transformed, and, inevitably the ownership of the genetic and biological resources on any given territory. This is where a large variety of issues play out: unresolved sovereignty issues, future economic benefits and thus ideas of access and benefit sharing, the connection between knowledge of certain uses and properties of genetic resources and the land that the genetic/biological resources derive from, issues about the disclosure of origin as well as the contestation around free, prior and informed consent.⁷

The treaty with the most partisan support and with the text largely coherent is the one on TCEs. This is seen as the easiest of the trilogy to resolve, because the economic implications are seemingly not as heightened and because the issue is more copyright related than patent oriented, a factor that greatly affects who the interested parties are, as well as their effective lobbying power. Nevertheless, this treaty has its own resistances, which can come from public domain advocates eager to make sure nothing already understood to be in the public domain is brought back under a copyright-style protection. Cultural industries that have historically benefited from the free access and circulation of TCEs (especially those already documented and available in archives and libraries), such as the music and film industries, are also key stakeholders that expect their Member States to act on their behalf.⁸ Within the TCE treaty text, this means deleting provisions for any retroactive protections, making sure the scope of protection for TCE treaty subject matter is limited and providing space for generous exceptions.⁹ Each meeting brings all these and many other issues into the room.

About to enter its 13th year, these IGC meetings could themselves constitute a rich site of ethnographic study, both in terms of shedding light on the network of relationships required for advancing new intellectual property policy, and for understanding the intricate dynamics of intellectual property politics and governance. In the absence of such analysis, what is clear is that through these protracted negotiations two important things have happened: (1) brand new categories for describing indigenous and traditional knowledge systems have been invented (and then naturalised as they have increased in circulation); and (2) an intellectual property legal logic has been reinforced. That indigenous peoples themselves never discuss their knowledge systems through those categories that are now used in this international context should give us a moment to think in whose interests these treaties have been established. Reflecting bureaucratic ease, they were developed as a means of mapping indigenous knowledge systems more easily onto the dominant IP categories of copyright (TCEs) and patents (genetic resources), thus reaffirming the logic and dominance of intellectual property law. In this sense, indigenous epistemological systems have been transformed through division and simplification in order to render them more recognisable and subject to specific “Western” legal frameworks of identification and determination.

⁵ WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, “Options for Future Work on Intellectual Property and Genetic Resources”, October 10, 2011, WIPO/GRTKF/IC/20/5.

⁶ For the documented role of the pharmaceutical industry in directing and influencing international intellectual property negotiations, see Peter Drahos and John Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy?* (New York: Earthscan Press, 2002); Susan Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights* (Cambridge: Cambridge University Press, 2003); Amy Kapczynski, “Harmonization and Its Discontents: A Case Study of TRIPS Implementation in India’s Pharmaceutical Sector”, (2009) 97 Cal. L. Rev. 1571.

⁷ Within the IGC since 2011, there has emerged a consistent discussion about the role and status of the UN Convention on Biological Diversity’s Nagoya Protocol on Access and Benefit Sharing 2011 in setting the minimum standards that should also be incorporated into these instruments.

⁸ E.g. “Comments of the Library Copyright Alliance on the February 18 2011, Draft Articles on the Protection of Traditional Cultural Expressions”, available at http://www.librarycopyrightalliance.org/bm~doc/lca_tcecomments21march11-2.pdf [Accessed October 28, 2012]; “Statement from Library Copyright Alliance: WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore—Intersessional Working Group, Geneva, 19–23 July 2010”, available at http://www.librarycopyrightalliance.org/bm~doc/lca_wipo_comments_072210.pdf [Accessed October 28, 2012].

⁹ WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, “Like-Minded Countries Contribution to the Draft Articles on the Protection of Traditional Cultural Expressions”, April 27, 2012, WIPO/GRTKF/IC/22/5.

The next two years promise to bring the final stages in the epic that has been the production of these legal instruments. Yet the dissonance between what is discussed in the IGC and the urgency and specificity of concerns that indigenous peoples' experience in relation to knowledge protection remains. Over the 13 years of WIPO diplomacy, indigenous and traditional peoples' needs in respect to protecting their valuable knowledge resources have only escalated. What was already a problem that was overlooked within mainstream IP discourse has worsened as more and more communities find themselves subject to a system that is not only inadequate for their needs, but also facilitates the dispossession of valuable knowledge resources.¹⁰ While increasing attention is directed to WIPO and the discussions taking place there, indigenous communities continue to find themselves in compromised situations in relation to the protection, transformation and access to their knowledge resources. If even one-quarter of the resources that have been poured into the IGC deliberations had been spent on providing access to educational and informational resources on intellectual property, indigenous and traditional communities would be in a different position in regards to making decisions about how to protect and maintain their knowledge systems.¹¹ The capacity for indigenous communities to make informed decisions about intellectual property law is a critical need that remains unaddressed. These decisions include, for example, when it is useful and when it is not, how to assert legal ownership and control over specific knowledge resources used by third parties, how to recognise and do something about exploitative research practices, how to develop decision-making processes in relation to documentation and digitisation projects.

This article seeks to step back from discussions at the international level. Instead its aim is to discuss a new initiative that is designed outside the WIPO discussions to address two key problems indigenous peoples have experienced in relation to the management of their cultural resources. First, how to protect individual, community and familial rights to knowledge according to community-based rules and regulations whilst simultaneously enabling the sharing of that knowledge with others beyond the community? Secondly, how to create a new informational and educational paradigm for documented cultural materials that indigenous peoples can no longer control—for example, the extensive materials produced through the colonial encounter that resides in the public domain? Addressing these two issues constitutes the foundational aims and ambitions of the Traditional Knowledge Licenses and Labels initiative.¹²

Importantly, this is just one initiative that needs to occur and is at an early stage of development. It is also not being designed to provide blanket licenses for all indigenous or traditional knowledge, but rather licenses for very specific contexts and situations, especially where current license options like Creative Commons fall short. There is a diverse range of innovative strategies that need to be developed to adequately protect indigenous and traditional knowledge in ways that accord with the expectations and needs of the owners and custodians of these materials. Moreover, it is not just protection that is required, but mechanisms that facilitate and support the communities from which this knowledge derives and is transformed. It is the hope that the TK Licenses and Labels initiative will get at these two significant problems and thus also contribute to a shift in attitudes, understanding and behaviour about what indigenous peoples consider to be fair and equitable use of their knowledge resources.

¹⁰ Jane Anderson, "Anxieties of Authorship in the Colonial Archive" in Cynthia Chris and David Gerstner (eds), *Media Authorship* (New York: Routledge, 2012).

¹¹ The capacity building initiatives developed by the WIPO Secretariat have been important, but they have had their limits in directly reaching local indigenous and traditional communities and providing much needed advice.

¹² The TK Licenses and Labels were conceived in collaboration with the author and Professor Kim Christen, Director of Mukurtu, available at <http://www.mukurtu.org> [Accessed October 28, 2012]. Initial funding has been provided by the Canadian SSHRC funded project 'Intellectual Property in Cultural Heritage: Law, Ethics and Policy' and the Traditional Knowledge Division, World Intellectual Property Organization.

The TK Licenses and Labels

Licenses are now a common feature of the intellectual property landscape. They have the potential to offer a range of additional economic incentives to the licensor—for example, through patent licenses.¹³ They also offer the possibility to create completely alternative conditions for the use of works and technological innovations, as evidenced in the Free Software License.¹⁴ In the field of copyright, arguably the most widely used and circulated licensing framework is Creative Commons. Creative Commons offers copyright licenses that allow creators to “forge a balance inside the traditional all rights setting that copyright creates”.¹⁵ In this sense, working with traditional copyright, Creative Commons offers very specific options for how work can be copied, shared, edited, mixed and redistributed.

The proliferation of licenses has led to a range of unresolved questions about the relationship between contracts and intellectual property.¹⁶ But what has become clear is that licenses do offer new possibilities for creating differentiated sets of rights for the specificity of cultural works. This runs against the traditional assumption that each category of works (literary, dramatic, musical works, for instance) maintains sameness within that category and therefore needs to be treated in the same way. Licenses, like those of Creative Commons, work to create greater specificity because they seek to clarify more clearly the expectations of the creator in regard to how their work is to be shared and used. Thus, this kind of licensing provides important options for innovation, both in terms of making clear the expectations of the “creators” and forging new cultural norms for how works themselves are used and circulated. It is for these two reasons that licenses offer a new range of possibilities for specific kinds of indigenous knowledge resources.

Background

The primary point of departure for the TK Licenses and Labels initiative is not intellectual property law alone but also the 2007 UN Declaration on the Rights of Indigenous Peoples.¹⁷ The three articles that are particularly important for this initiative are arts 3, 13(1) and 31(1).¹⁸ As the central international document setting forth the primary rights for indigenous peoples, the Declaration establishes the expectations and standards for the treatment and development of any initiatives that will impact or affect indigenous lives. The Declaration thus forms an integral part of the international legal context in which this strategy has been initiated. The vision of the TK Licenses and Labels initiative is two-fold. First, it ensures that indigenous, traditional and local peoples be recognised and acknowledged as the proper custodians and authorities for making decisions about how their cultures can be shared with others. Secondly, the initiative

¹³ Royalties from patent licensing are substantial in the United States. According to Rivette and Klein, “royalties from patent licensing increased from US \$15 billion in 1990 to more than US \$110 billion in 1999”. Kevin Rivette and David Kline, “Discovering New Value in Intellectual Property” (2000) 78 Harv. Bus. Rev. 55.

¹⁴ The Free Software Movement is an example of a different way of using licensing and contracts to alter the intellectual property paradigm. According to Richard Stallman, founder of the GNU General Public License, the “central idea of copyleft is that we [the coders] give everyone permission to run the program, copy the program, modify the program, and distribute modified versions—but not permission to add restrictions of their own.” Richard Stallman, *Free Software Free Society: Selected Essays of Richard M. Stallman* (Boston: Free Software Foundation, 2002), p.20.

¹⁵ Creative Commons, available at <http://creativecommons.org/licenses/> [Accessed October 28, 2012].

¹⁶ There are differences across jurisdictions in how to deal with this. In the United States, *ProCD Inc v Zeidenberg* 86 F.3d 1447 (7th Cir. 1996), produced a range of commentary. Other commentaries on the relationship between copyright and contract include: Jane C. Ginsberg, “Copyright, Common Law and Sui Generis Protection of Databases in the United States and Abroad” (1997) 66 U. Cin. L. Rev 151; Maureen A. O’Rourke, “Drawing the Boundary between Copyright and Contract: Copyright Preemption of Software License Terms” (1995) 45 Duke L.J. 479; James Griffin, “The Interface between Copyright and Contract: Some Options for Reform” (2011) 2 Eur. J.L. & Tech. 1; Australian Copyright Law Reform Commission, *Copyright and Contract* (Canberra: Attorney General’s Department, 2002).

¹⁷ United Nations Declaration on the Rights of Indigenous Peoples 2007.

¹⁸ Article 3 states: “Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.” Article 13(1) provides: “Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.” And art.31(1) states: “Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.”

helps users of TK and TCEs develop and increase capacities for cultural awareness, cultural sensitivity and respect for different rules regarding the access and use of specific kinds of knowledge.

As a compliment to this international legal framework, the TK Licenses and Labels initiative developed as a need-based response to very specific concerns that indigenous and local communities have been experiencing in relation to their expression of culture in an increasingly digital environment. While Creative Commons offers options for indigenous communities to manage their cultural materials, there are certain limitations in the utility of these for all circumstances, especially in regard to dealing with the collective rather than individual ownership of materials, culturally specific rules for access and use of materials and concerns about how these materials will be used and in what kinds of contexts. These issues run alongside one of the greatest needs in the area of indigenous knowledge protection: how to recognise and embolden already existing local knowledge management strategies? One answer is to look to private law more generally. As Kathy Bowrey has advocated:

“We need a fuller exploration of smaller domains—an investigation of the practical uses of private law at the community level for the protection of custom. This avenue is suggested for pragmatic as well as jurisprudential reasons.”¹⁹

To this end licensing offers new possibilities especially in providing space for acknowledging that indigenous people are not a homogenous group, but rather have the right to designate and maintain their own names for the community. Licenses also provide options to recognize that the significance, integrity and value of knowledge and works created and developed from such knowledge systems are often directly tied to context and locality. What has been missing in traditional copyright and in licensing frameworks that have developed from this legal position is attention to the differentiated needs and concerns of indigenous peoples regarding ownership, access and control of cultural materials and the very specific conditions of circulation that these are governed under. Within indigenous communities, not all knowledge is considered “common” or public. There are a range of complicated governance structures that seek to manage knowledge circulation and use.

The first problem

As noted above, one of the specific issues that the TK Licenses and Labels initiative seeks to address is the development of a framework that can protect individual, community and familial rights to knowledge according to community-based rules and regulations whilst simultaneously seeking to share that knowledge with others. A key dimension to this problem is the management of already existing and circulating digital and analogue materials such as photographs, sound recordings, films and manuscripts that embody and/or represent traditional indigenous knowledge, cultures and practices. There is an urgent need to develop new options for addressing issues of ownership, access and control of TCEs documented and recorded by non-indigenous peoples and researchers and now residing in numerous cultural institutions worldwide.²⁰ Importantly, a new framework needs to look simultaneously backwards and forwards; it therefore must also address the increased need for new forms of management of materials made by indigenous peoples and communities for community-based archival projects, for cultural heritage preservation purposes and for projects where indigenous communities maintain a leading role in determining what cultural traditions and practices can be shared with multiple audiences outside the community.

¹⁹ Kathy Bowrey, “Alternative Intellectual Property: Indigenous Protocols, Copyleft and the Juridifications of Customary Practices” (2006) 6 *Macquarie L.J.* 65.

²⁰ Kimberley Christen, “Opening Archives: Respectful Repatriation” (2011) 74 *American Archivist* 185; Jim Enote, “Creating Collaborative Collections”, available at http://sarweb.org/?iarc_lecture_jim_enote-p:past_events [Accessed October 13, 2012].

In the colonial collecting endeavour, indigenous peoples' lives and cultural practices were documented and recorded at unprecedented levels.²¹ As technological capacity increased so did the capacity for documentation.²² As the "subjects" of these copyright works, indigenous peoples and communities, unlike copyright authors and owners, currently have no legal rights to determine how and when these materials should be accessed or by whom.²³ As indigenous peoples and communities have increasingly found these (often disparate) collections and demanded legitimate access, cultural institutions all over the world are now facing the task of how to adequately deal with these collections—both in terms of recognising the conditions that led to their creation and establishing new options for renegotiating their access and control. This continues to be a significant concern across many communities worldwide and has resulted in the development of a set of international guidelines and best practices to help museums, libraries and archives respond to indigenous concerns.²⁴ The increase in the use of digital technology has facilitated the beginning of return and repatriation of projects. But this return, often in digital form, only deals with the problem of access to the community; it has not yet been able to adequately deal with the problem of who legally owns these materials, or how to manage access by third parties who are also eager to have access to these materials for various commercial, non-commercial and educational reasons.

At the same time as this renegotiation within cultural institutions is occurring, indigenous activists, scholars and researchers, in collaboration with other scholars and technology experts, have been creating community-based documentation and recording projects.²⁵ These projects deliberately position indigenous communities themselves as the owners and custodians of the materials that are being created and thus the central decision makers for controlling and disseminating cultural materials and knowledge. The site-specific digital archives that are also necessarily being developed to store and manage these materials are working to embody culturally specific forms of classification and organisation. Increasingly, important questions about how to provide regulated and culturally specific access to these materials for persons from outside the community are being raised. This is because there are numerous instances where either traditional copyright or Creative Commons does not provide specificity in relation to conveying the expectations of the community in regard to either access of the materials or the responsibility that the user has to respect community rules and regulations for the (re) circulation and use of these materials.

To the extent legally possible, the aim of the TK Licenses is to incorporate key elements of these community-based rules and regulations in the provisions set within the license for use and circulation. For example, central to community-based rules for materials that can be shared outside the community is the necessity for those materials to always be acknowledged as deriving from a specific community and context. The significance of naming and how the community, family or tribal name should appear in relation to the work is imperative for indigenous peoples: the connection between place and people gives a work its life. Thus within the TK License suite is the option for establishing specific naming and culturally appropriate forms of attribution. While this is similar to one of the most popular CC licenses, it establishes more detailed naming and attribution instructions to accord with the expectations of use associated with

²¹ For further exploration of this, see David Chambers and Richard Gillespie, 'Locality in the History of Science: Colonial Science, Technoscience, and Indigenous Knowledge' (2000) *Osiris*, 2nd Series; Vine Doloria Jr, *Custer Died for Your Sins: An Indian Manifesto* (New York: Macmillan Press, 1969); Walter Dignolo, *The Darker Side of the Renaissance: Literacy, Territoriality and Colonization* (Michigan: University of Michigan Press, 1995); Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (New York: Palgrave Macmillan, 1999); Laurelyn Whitt, *Science, Colonialism and Indigenous Peoples: The Cultural Politics of Law and Knowledge* (Cambridge: Cambridge University Press, 2009).

²² One example is Margaret Mead's collection of materials from her ethnographic work in Indonesia during 1936–1938, where she collected 36,000 photos and 35,000 feet of film. In 1936, photographic and recording technology was really in emergence, yet this is a substantial amount of material to collect. This is just one researcher's collection produced in a two-year period in the 1930s. One only needs to imagine the documentation and recording possibilities that increased with the technology. Much of this material is now found in cultural institutions around the world.

²³ Jane Anderson, "Anxieties of Authorship in the Colonial Archive" in Chris and Gerstner (eds), *Media Authorship* (2012).

²⁴ Molly Torsen and Jane Anderson, *Safeguarding Traditional Cultures: Legal Options and Practical Issues for Museums, Libraries and Archives* (Geneva: World Intellectual Property Organization, 2011).

²⁵ Two examples of these projects include: Mukurtu, a digital storage and management system developed by Kim Christen, available at <http://www.mukurtu.org> [Accessed October 28, 2012]; and the Inuvialuit Pitqusiit Inuuniarutait: Inuvialuit Living History, developed through the Inuvialuit Cultural Resource Centre, Inuvik, Canada, available at <http://www.inuvialuitlivinghistory.ca> [Accessed October 28, 2012].

those materials. Importantly, the TK Label option alongside the License extends this by providing an opportunity for community naming and attribution to occur, even if the community is not recognised as the copyright owner.²⁶

For many indigenous communities, cultural materials that contain cultural information or representations of cultural practices (in the form of photographs, sound recordings, films, videos and manuscripts) need to be managed according to alternative sets of rules to those provided by copyright and Creative Commons license models. These alternate rules derive from the specificity of the contexts from which such materials derive and reflect cultural conditions of circulation and use particular to the materialized knowledge. For instance, some expressions have rules regulating access according to gender, initiation and/or the secret nature of the materials.

From the outset, the TK Licenses and Labels initiative focus on a very specific type of indigenous knowledge problematic—namely, the historical recording and documentation of indigenous and local peoples’ knowledge; its historical and contemporary storage in archives, museums and libraries across the world; the unequal terrain of the legal entitlements that make those with the equipment, the privilege and the institutionalised inquiry as the “authors” of much of these materials; and the continued effects of documenting and recording indigenous cultures and cultural expressions in the contemporary present—where many of the historical problems repeat and transform themselves alongside the changing technology.

While thankfully not all indigenous, local and traditional peoples and their knowledge have been recorded and placed either out of reach of the original custodians, or have entered into the brave new world of endless digital circulation to be used by anyone at anytime, there is a significant proportion of indigenous and local knowledge that is found under these conditions. That is, it is either still within the copyright periods of protection or it has expired resulting in enormous collections of indigenous materials being found in the public domain. These materials are the specific focus of the TK Licenses and Labels initiative.

The second problem

The second problem that the TK Licenses and Labels initiative seeks to address flows out of the first: how to create a new informational and educational paradigm for documented cultural materials that indigenous peoples can no longer control—for example, the extensive materials produced through the colonial encounter that reside in the public domain?

In terms of the legal status of the photographs, sound recordings, films and manuscripts that are the primary focus of the TK Licenses and Labels initiative, it is possible to say that these fall into the following four main categories. First, the vast majority of these recorded works fall into the public domain. The second category of materials concerns works authored by non-indigenous peoples. The third category of materials covers orphan works, where the author is unknown or un-contactable. Indigenous authored materials, the fourth category, counts for much less in the proportion of materials.²⁷

One substantial problem for indigenous communities accessing and seeking to control their historical cultural materials is that a significant majority of these materials reside in the public domain. That is, despite the return of the materials, they can also be used, circulated and accessed by anyone at anytime in the institutions from which they are returned. There are no controls that indigenous peoples can assert over these materials, even if, according to the community from which they are derived, they should never have been recorded, were recorded without permission, should only be viewed or heard by women or men

²⁶ More on this feature of the TK Labels can be found below.

²⁷ However, this categorisation of material is subject to change as the dominance of non-indigenous peoples making recordings about indigenous peoples is slowly changing. In the future, we can expect a shift in the legal status of materials to move more towards indigenous authored materials.

or were recorded without any explanation about where they might end up (or what now might be called free, prior and informed consent).

The TK Labels, designed as a compliment to the TK Licenses, aim at addressing these kinds of materials especially, since a significant amount of indigenous cultural materials is categorised as existing in the public domain. The TK Labels take seriously the premise of establishing a new paradigm for the fair and equitable use of indigenous materials. They are designed to be educational and informative and to illustrate culturally specific conditions of access and use for certain kinds of cultural expressions. This is especially for materials that are often circulated without reflection and consideration that there might be alternative rules derived from the community whose knowledge it is, but that have not historically been taken into account or treated with legitimacy. The TK Labels provide additional and often missing information about these materials and help users make an informed decision about the best and most appropriate way of using these materials, especially helping to avoid derogatory treatment.

For instance, if a non-indigenous musician comes across a public domain sound recording at the Smithsonian Institution that has the Community-use Men-Restricted Label explaining that the content has been designated as containing men's secret ceremonial materials, that musician is given information that will help her make an ethically and culturally appropriate decision about the best way of using those materials. With the TK Label, she is given more information about the cultural conditions governing the use of the materials and is therefore much more likely to respect the conditions of access and use requested by her as a user. The label thus helps prevent misuse and derogatory treatment of the TCEs.

A TK Label can be generated and independently added to a work by indigenous individuals, family, clans and communities. There will also be an option for institutions and researchers working closely with communities to develop an appropriate label. This recognises that much of the public domain materials actually continue to reside in cultural institutions. When an institution or researcher is working to develop a label, they are asked to work in collaboration and dialogue with communities themselves to develop the most appropriate label for the works. Since the labels seek to provide a space where missing information, including the cultural conditions for use and access, can be added, and since indigenous communities are traditionally the ones that have this missing information, the labels are designed in such a way that discourages them from being added to the materials by only institutions or researchers. Since so many institutions are beginning to work more closely with communities, these labels reflect the collaborative environments that are developing between institutions and communities as part of the repatriation and digital return agendas. Fair and equitable TK Labels, almost out of definition and necessity, require mutual dialogue and conversation in order to develop the most appropriate labelling options.²⁸

Dealing with the past, the present and the future status of recorded indigenous cultural materials presents a substantial challenge. To properly deal with the older, public domain materials alongside the new rights that are being asserted by indigenous and local peoples as the rightful owners, custodians, holders and authors of their knowledge, a multifaceted approach that embraces legal and educational strategies needs to be developed. This approach culminates in the combination of licenses with an informational and educational network of labels.

²⁸ The labels centre fairness and equity in access and use at their centre. This is a deliberate critique and augmentation of the concept of "fair", especially how it is deployed within the copyright discourse. What is fair and equitable for indigenous materials derives from indigenous expectations and rules and is focused on how the context from which the materials derive affects their use. This runs against an image of these materials as de-contextualized knowledge objects. For indigenous owners and custodians, regardless of where these materials now are, they can still be bound by the contextual and localized conditions governing their accessibility and use. This was not diminished when the recordings were made, taken out of the community and catalogued in an institution in another country. It was just that this was assumed to be irrelevant. Indigenous peoples insist, especially with public domain works that circulate 'freely', that access and use should still be bound by cultural conditions, and that these should and can be negotiated, rather than assumed that they do not exist or are no longer relevant.

Delivery

At the time of writing, the TK Licenses and Labels initiative is being developed to be delivered as a stand-alone digital platform. It will include a license and label generator, as well as offering various educative and instructional tools for both indigenous and non-indigenous users of these licenses and labels. For instance, it will provide online tutorials to provide accurate and accessible assistance to indigenous and local peoples in their decisions to use either a license or a label. It will also provide accessible information about relevant intellectual property laws to help facilitate informed decision-making for indigenous users of the site. This is vitally important, as educational resources that adequately address and translate the primary scope and purpose of intellectual property law for indigenous peoples and communities is extremely limited. The lack of such resources not only precludes full indigenous participation in meaningful discussions about the future of intellectual property policy in this area at national and international levels, but it also limits the development of informed decision-making frameworks at a local level to deal with the extent of intellectual property issues that arise in any given context.

The delivery of these TK Licenses and Labels must also necessarily include relevant educational materials for non-indigenous people about the initiative, especially in regard to changing social practices and creating new conditions for the respectful treatment and use of indigenous knowledge as well as representations and expressions that draw from this knowledge. It will also contain educational and informational detail for cultural institutions seeking to work with indigenous communities to utilize the TK Labels and thus promoting a new paradigm of fair and equitable treatment of indigenous peoples and their cultures.

Currently in its early development, the TK Licenses and Labels initiative has options if materials are owned/shared between multiple communities. These licensing and labelling options recognise that there are some materials where multiple communities have responsibilities of custodianship and/or ownership. Moreover they recognise that there are circumstances when no singular community has explicit control over the materials. Rather it indicates that the rights and responsibilities for use are spread across multiple communities through already existing community protocols and ongoing cultural relationships.

Testing

Before public release, this initiative will be offered to indigenous and local communities internationally for testing. Communities working with and in the stages of developing their own digital archives with combinations of historical materials from institutions and newly recorded and developed materials will be especially encouraged to test the TK Licenses and Labels. The testing is considered integral to the success of this initiative, as it needs to work first and foremost for indigenous needs, and secondly for those institutions grappling with the digitisation and return of indigenous cultural materials. Important information about what works, what does not and what needs to be further refined will be gathered through the testing phase. This phase will also include a specific component for cultural institutions. The testing will allow for modification and resolution of concerns before it is publicly launched.

Conclusion

Over the 13 years of WIPO's work on the development of new legal instruments, indigenous and traditional peoples' needs in respect to protecting their valuable knowledge resources have only escalated. While the pace of developments at WIPO has increased, and progress has been made to text-based negotiations on three new legal instruments, indigenous communities continue to find themselves in compromised situations in relation to the protection, transformation and access to their valuable knowledge resources.

The TK Licenses and Labels initiative involves the development of an accessible digital platform that will contain a specific set of standardised licenses and labels that can be applied to already existing and future generated content that contains community-recognised traditional and indigenous knowledge. The platform is designed to offer indigenous peoples and communities, as well as those working in collaboration with these communities on the development of digital archives, an opportunity to apply legal licenses and educative labels to cultural content in digital and analogue form.

Importantly the TK Licenses are not seeking to change already-existing national or international copyright law. They are offered as a set of additional agreements that indigenous copyright owners can use to convey culturally specific concerns about the materials that they already legally own and control. These licenses concern general attribution of the source community alongside that of the copyright owner, direct negotiation over the integrity of the work when used in a commercial context and the negotiation over reciprocal benefits from use within an educational context. The TK Licenses can only be used and applied by (or in agreement with) the original holder of the copyright.

The TK Labels seek to inform a misinformed public about what constitutes fair and equitable use and access to indigenous and traditional knowledge for indigenous and local communities. At this stage, the labels are not legally binding and therefore have no basis in formal law. They serve an educative function and are designed to begin the creation of new social norms about the use of cultural knowledge and TCEs. The labels incorporate customary expectations regarding access and use of specifically designated materials.

In combination, the licenses and labels encourage the creation of a dialogue between indigenous peoples and external users of cultural knowledge and TCEs. They place an onus on the licensor to provide accurate information for correct attribution and acknowledgement details and to maintain current contact information for someone wishing to license the materials. These conditions will need to be fulfilled before the license itself can be generated and attached to the copyrighted materials. This will be built into the processes of “creating a license” on the site.

The TK Licenses and Labels initiative is just one of many that need to occur. Currently at an early stage of development, it offers an opportunity to deal with two significant problems facing indigenous communities: first, how to protect community-based rights to knowledge according to community-based rules and regulations whilst simultaneously seeking to share that knowledge with others; and secondly, how to create a new informational and educational paradigm for documented cultural materials that indigenous peoples can no longer control—for example, the extensive materials produced through the colonial encounter that resides in the public domain. For the first time, indigenous peoples and communities will have access to a resource tool that offers specifically tailored license options for TCEs that recognise unique needs in relation to access and control and that incorporates already existing and context-driven customary rules and obligations for sharing the knowledge that the expressions embody.

Geographies of Knowledge: Cultural Diffusion and the Regulation of Heritage and Traditional Knowledge/Cultural Expressions in Southeast Asia

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☞ Cross-border disputes; Cultural property; Intellectual property; Migration; South East Asia; Traditional knowledge

Introduction

Although always concerned with cultural products in the form of literature, visual arts, inventions and symbols for marketing purposes, intellectual property initially did not problematise the concept of culture. It was regarded as more or less universal and not as regionally or locally specific. The early international agreements were concluded largely by European nations that indeed had similar values and practices when it came to rewarding creative endeavours in the fields of arts, science and engineering. Tunisia, then a French protectorate, was the only non-European country among the initial signatory states of the Berne Convention. The only non-European country among the initial signatories of the Paris Convention was Brazil. Of course, there were differences between the United Kingdom and Continental European nations about the importance of moral rights vis-à-vis economic rights, but these were differences about the scope of copyright protection, not about the subject matter of protection as such. Few independent countries from outside Europe joined the international IP system prior to World War II. The really significant expansion of the system occurred with the decolonisation process after the end of the war and again in a most recent wave following the conclusion of the WTO TRIPS Agreement. However, as more and more newly independent countries began to join the international IP system after the end of World War II, it soon became clear that they brought with them different forms of knowledge and of artistic expressions that European derived intellectual property systems found difficult to accommodate.

The clearest expression of this different environment has been with regard to the debate about the use of intellectual property principles to protect what has become known as traditional knowledge and traditional cultural expressions. This article will give a brief overview of this debate and show its inter-dependence with broader notions of cultural heritage protection, as developed in various UNESCO conventions. The mixture of cultural and intellectual property is often a powerful, yet dubious basis for claims. The article will then move on to examine a specific problem for legal regulation of this subject matter, namely the diffusion of cultural material through migration movements and the expansion of nation states. It will show how the national borders and geographical maps of current nation states that define the limits of

* The research for this article was conducted in the context of the “IP in Asia” project of the ARC Centre of Excellence for Creative Industries and Innovation (CCI). The views expressed herein are those of the author and not necessarily those of the ARC or the CCI.

national law and regulation are different from cultural realms. These differences will be explained using examples from Southeast Asia. Historians have used historical maps and sources to show that the emphasis on the precise delineation of borders arrived with Western style geography and cartography and with colonial powers eager to exploit natural resources and to know exactly on which side of the border such resources were situated. The resulting fixation of relatively fluid borders often cut through the realms of cultural minorities that had traditionally paid little attention to national boundaries. The fact that their cultures continued to be practised on both sides of a border was of little significance for tangible expressions of culture that were either here or there. However, with increasing emphasis on intangible cultural material in national laws inspired by UNESCO conventions for heritage protection and in WIPO discussions about traditional knowledge and traditional cultural expressions, conflicting claims are now becoming more frequent.

Culture/tradition and intellectual property

“Folklore”, as “traditional cultural expressions” were then called, turned up on the agenda of Berne Convention revision meetings and other WIPO and UNESCO meetings during the 1960s and 1970s.¹ At the time, the topic was approached with strong reliance on established principles of copyright law. A newly introduced art.15.4 of the Berne Convention concerned “unpublished works where the identity of the author is unknown, but where there is every ground to presume that he is a national of a country of the Union”. The article was introduced as a response to calls for protection of folklore by countries such as India.² It allowed for the creation of a “competent authority” to represent the author and “to protect and enforce his rights”. The difference to the current commercialisation of often very individual expressions of folklore is striking. Not only does the provision appear in the context of anonymous works, but it is confined to “unpublished works”. For the administration of the rights, it simply attempts to create a copyright-style collecting society. Although many developing countries at the time adopted a similar formula in their copyright acts, it is perhaps telling that India was the only country to designate the “competent authority” in communication with WIPO.³

The subsequent folklore provisions of the Tunis Model Law on Copyright for developing countries, drafted in 1976 by a group of Tunisian Governmental Experts with assistance from WIPO and UNESCO again saw relevant rights exercised by a “competent authority” with regard to “works of national folklore”.⁴ The nationalist focus of the Tunis Model Law with regard to folklore was probably in accordance with the spirit of the time, when the governments of still relatively young countries were shaping a national identity for their often very diverse populations. The difficulties to put such policies into practice led to the joint drafting by UNESCO and WIPO Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions, adopted in 1982 and published in 1985.⁵ The Model Provisions shifted away from the focus on copyright to recommend sui generis protection and, as a consequence, also shifted the terminology from “works” to “expressions” of folklore. However, copyright inspired approaches remained, resulting in the development of copyright-style exceptions in photographs, film or television broadcasting—for example, for education, “incidental utilization”, or current events reporting purposes. Authorisation was only required for utilisations “with gainful intent and outside their traditional or customary context”. In comparison with the Tunis Model

¹ Christoph Beat Graber, “Institutionalization of Creativity in Traditional Societies and in International Trade Law” in Shubha Ghosh and Robin P. Malloy (eds), *Creativity, Law and Entrepreneurship* (Cheltenham: Edward Elgar, 2011), pp.240–242.

² WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, “Final Report on National Experiences with the Legal Protection of Expressions of Folklore”, March 25, 2002, WIPO/GRTKF/IC/3/10, 2002, p.9. See also WIPO, *Guide to the Berne Convention* (Geneva, 1978), pp.95–96.

³ WIPO, *Guide to the Berne Convention* (1978), p.9, fn.5.

⁴ Janice Weiner, “Protection of Folklore: A Political and Legal Challenge” (1987) 18 *International Review of Industrial Property and Copyright Law* 56.

⁵ UNESCO/WIPO Model Provisions for National Laws on the Protection of Folklore Against Illicit Exploitation and Other Prejudicial Actions 1985.

Law, the Model Provisions give communities a much greater role in dealing with national heritage and agencies. For authorisation and collection of fees, they leave a choice between a “competent authority” at national level and authorisation by the communities themselves.⁶

The current negotiations in the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) began in 2001, after provisions on traditional knowledge in the Convention on Biological Diversity had renewed the interest in intellectual property aspects. The IGC’s mandate was renewed in 2009 and again in 2011 for biannual periods with the obligation to undertake text-based negotiations. These negotiations have meanwhile produced draft texts for the three subject areas under negotiation of genetic resources, traditional knowledge and expressions of folklore (or traditional cultural expressions).⁷ Negotiations in these subject areas have progressed at varying pace. “The Protection of Traditional Cultural Expressions: Draft Articles” is now the most advanced of the three documents, while substantial differences and many alternatively worded options remain in the “Consolidated Document Relating to Intellectual Property and Genetic Resources”.

The focus of this article is, however, on the identification of the cultures and people(s) that, as beneficiaries, form the departure point for any form of protection. Several different views of culture are presented that are difficult to protect under a common umbrella and that make it difficult to find compromises. The first view sees culture as an essentially local phenomenon and as emerging from indigenous and local communities. Such communities see their interests at times represented by their governments, while at other times they criticise that they have only observer status in these international negotiations and have to seek support from national delegations for their proposals to be considered.⁸ Indigenous and local communities and the NGOs representing them at the IGC would like the discussions to remain focused on the local origins of traditional knowledge and cultural expressions, and they are wary of attempts by national governments to widen the definition of the protectable material to knowledge and expressions that have long entered mainstream culture and become widely spread at national level. Some national delegations, on the other hand, explain that an encompassing definition of traditional knowledge and expressions must include also knowledge and expressions that are traditional, but widely practised across a nation.⁹ Several national delegations have expressed broad support for the concerns of indigenous peoples, but at the same time pointed out that the concept of “indigenous peoples” did not apply within their own national context.¹⁰

Because of the implications of the discussions for the intellectual property systems, the more familiar division between industrialised countries rich in intellectual property and developing countries rich in genetic resources also continues to play a role. Developing countries are seeking strong and binding agreements that are relatively flexibly worded to achieve coherence with obligations under the Convention on Biological Diversity and the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization.¹¹ Industrialised nations on the other hand are concerned about the certainty of rights and they seek to keep the intellectual property system relatively free from outside considerations. They are reluctant to accept binding standards¹² and find it important that any type

⁶ For details see Christoph Antons, “Intellectual Property Rights in Indigenous Cultural Heritage: Basic Concepts and Continuing Controversies” in Christoph Beat Graber, Karolina Kupprecht and Jessica Lai (eds), *International Trade in Indigenous Cultural Heritage* (Cheltenham: Edward Elgar, 2012), pp.148–151.

⁷ WIPO, “Matters Concerning the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC)”, August 1, 2012, WIPO Doc. WO/GA/41/15, Annexes A, B and C.

⁸ See, for example, the statements of the representatives of Tupaj Amaru, WIPO Doc. WIPO/GRTKF/IC/21/7 PROV. 2, pp.24, 86, 93, 97; Tin Hinane, p.88; the Comisión Jurídica para el Autodesarrollo de los Pueblos Originarios Andinos (CAPAJ), p.95; and the Foundation for Aboriginal and Islander Research Action (FAIRA), p.101.

⁹ See, for example, the statements of the Delegations of China, WIPO/GRTKF/IC/21/7/PROV. 2, p.16; Morocco, pp.16, 22; and Barbados, p.61.

¹⁰ See, for example, the statements of the Delegations of Barbados, China and Morocco, WIPO/GRTKF/IC/21/7 PORV. 2, p.22; Trinidad and Tobago, pp.24, 69; and Barbados, p.68.

¹¹ See, for example the statements of the Delegation of Brazil on behalf of the Development Agenda Group (DAG), WIPO Doc. WO/GA/41/15, pp.4–5; and of the Delegation of India, p.7.

¹² See the statements of the Delegations of the European Union, WIPO Doc. WO/GA/41/15, p.5; and of the United States, p.7.

of obligation emerging from the negotiation is clearly defined.¹³ The organisations representing indigenous and local communities maintain their own positions in the middle of this wider debate. On the one hand, they are seeking strong rights and relatively loose definitions of the subject matter in accordance with the positions of most developing countries. On the other hand, they prefer more restrictive and narrow definitions of beneficiaries than the governments of many developing countries.¹⁴ They also advocate the inclusion of spiritual aspects of the production of the material¹⁵ to a degree that rarely finds support from developing countries.

Trans-boundary issues and cultural diffusion

It has become increasingly clear that any national laws protecting culturally derived material in the form of traditional knowledge, traditional cultural expressions and genetic resources associated with TK/TCE may trigger trans-boundary conflicts in regions where culture has been widely practised across national boundaries or where migration has contributed to the spread of cultures. Such disputes, often couched in the language of intellectual property, have recently occurred between several Southeast Asian countries about cultural expressions such as batik, songs and dances and about the use of plants in traditional medicine.¹⁶ Apart from the WIPO discussion about intellectual property rights in traditional material, these disputes also have to be seen in the context of the UNESCO listings under the 2003 UNESCO Convention for the Safeguarding of Intangible Cultural Heritage. Although the Convention does not concern intellectual property rights and in fact obliges countries to take measures for the conservation of intangible cultural heritage, listings by UNESCO have achieved powerful symbolic value. And although such listings do not prevent neighbouring countries from practising the tradition, it appears that the UNESCO listings are nevertheless seen as an important advantage in the cultural branding of tourism and local products.¹⁷ Inscriptions on the List of Intangible Cultural Heritage in Need of Urgent Safeguarding and on the Representative List of the Intangible Cultural Heritage of Humanity only started in 2008. Since then, many countries in Asia have been very active in inscribing elements on one of the lists. In fact, the most active country in heritage listing has been China. The international listing has been supported by national legal developments. In 2011, the Intangible Cultural Heritage Act of the People's Republic of China came into effect.¹⁸ It followed earlier legislation at provincial and county levels in provinces such as Yunnan, Guizhou, Fujian, Guangxi, Hunan, Hubei and Jiangsu.¹⁹ Media reports about conservation efforts in the provinces include the recording of the knowledge and culture of the *Hmong* in Guizhou province²⁰ as well as the necessity to stop the unsupervised activities of foreign researchers among the *Miao* in the Southwest region of the same province.²¹

¹³ For the example of traditional knowledge protection, see the statements of the Delegations of the European Union, WIPO Doc. WIPO/GRTKF/IC/21/7 PROV. 2, pp.13, 14, 21, 61; the United States, pp.17, 48; Japan, pp.19–20, 23; and the Republic of Korea, p.20.

¹⁴ See, for example, the statement of the representative of Tupaj Amaru, WIPO/GRTKF/IC/21/7 PROV. 2, p.66.

¹⁵ See, for example, the statements of FAIRA and CAPAJ, WIPO/GRTKF/IC/21/7 PROV. 2, pp.18–19.

¹⁶ Stephen Fitzpatrick, "Malaysia 'Steals' Bali Dance", *The Australian*, August 26, 2009; GRAIN and Kalpavriksh, "Traditional Knowledge of Biodiversity in Asia-Pacific: Problems of Piracy and Protection", available at <http://www.grain.org/article/entries/81-traditional-knowledge-of-biodiversity-in-asia-pacific-problems-of-piracy-and-protection> [Accessed November 7, 2012]; "Indonesians Tell Malaysians 'Hands off Our Batik'", *The Telegraph*, October 5, 2009; "Malaysia Urges Indonesia to Drop Plans to Sue over Folk Song", *Jakarta Post*, October 8, 2007; "Thai Gives Cambodia the Finger over Jeebs—Or Get Your Hands of Our Intangible Heritage!", available at <http://ipkitten.blogspot.com/2011/08/thai-gives-cambodia-finger-over-jeebs.html> [Accessed October 28, 2012].

¹⁷ On cultural branding by using geographical indications, see Rosemary Coombe, "Bordering Diversity and Desire: Using Intellectual Property to Mark Place-based Products", (2011) 43 *Environment and Planning A* 2027.

¹⁸ The text is available at http://www.wipo.int/wipolex/en/text.jsp?file_id=215504 [Accessed October 28, 2012].

¹⁹ Ministry of Culture, "Protection of Intangible Cultural Heritage in China", available at <http://chinagate.cn/english/reports/48277.htm> [Accessed October 28, 2012].

²⁰ Richard Stone, "Chinese Province Crafts Pioneering Law to Thwart Biopiracy", (2008) 320 *Science* 732.

²¹ Vinti Vaid, "New Intangible Cultural Heritage Laws to Protect and Preserve China's Vast and Diverse Culture", *Asia-Pacific Business and Technology Report*, July 1, 2011.

Miao is a Chinese term grouping together a number of minorities in this part of China, including the *Hmong*.²² The *Hmong*, however, are widely spread across the borders of several East and Southeast Asian countries. Originally coming largely from Guizhou, Yunnan and Guangxi, the *Hmong* migrated into Vietnam, Laos and Thailand over a period of approximately 300 years.²³ There are many similar groups often referred to by different names in China, Vietnam, Laos, Thailand and Myanmar.²⁴ With reference to the Akha in China and Thailand, the geographer Janet Sturgeon points out that

“[w]hile I make no claim that Akha in China are ‘the same’ as Akha in Thailand, these people are historically related and share genealogies reaching back fifty-five to sixty-five generations to the first Akha”.²⁵

They

“spoke a common dialect of Akha, recited almost identical genealogies, managed forests with many overlapping species, and lived along the Burma border—these peoples and their environments were clearly related”.²⁶

In addition, Akha shifted easily across the border into Burma for hunting, herding or wet-rice cultivation, sometimes contacting friends and family there to gain access to land.²⁷

Historians explain the relative permissiveness of Southeast Asian borders by pointing to the particular circumstances, in which the Southeast Asian kingdoms emerged. Southeast Asia was a geographically difficult terrain with dense forests and prior to the 18th century only sparsely populated. The feudal rulers of the region were in constant need of manpower for their armies and for the building of temples and monuments. As a result, slave raiding was common and victorious armies in warfare would capture as many enemies as possible to replenish the population at home.²⁸ With scarce manpower at their disposal, Southeast Asian rulers had to rely on the loyalty of tribute paying vassals. Historians have used the Sanskrit term *mandala* for this network of governance. O.W. Wolters has defined the *mandala* as

“a particular and often unstable political situation in a vaguely definable geographical area without fixed boundaries and where small centers tended to look in all directions for security. *Mandalas* would expand and contract in concertina-like fashion. Each one contained several tributary rulers, some of whom would repudiate their vassal status when the opportunity arose and try to build up their own network of vassals”.²⁹

Thongchai Winichakul has described the coming of a new geography and of modern cartographic techniques to Siam in the 19th century. He shows the initial lack of understanding between the Siamese court and their new British neighbours in Colonial Burma, who were interested in a precise delineation of a particular part of the border that was rich in tin and other minerals.³⁰ While local rulers saw the British and other

²² Erik Cohen, *The Commercialized Crafts of Thailand: Hill Tribes and Lowland Villages* (Honolulu: University of Hawai'i Press, 2000), p.130; Janet Sturgeon, *Border Landscapes: The Politics of Akha Land Use in China and Thailand* (Chiang Mai: Silkworm Books, 2005), p.45.

²³ Nguyen Van Thang, *Ambiguity of Identity: The Mieu in North Vietnam* (Chiang Mai: Silkworm Books, 2007), pp.15–19. Jan Ovesen, “All Lao? Minorities in the Lao People's Democratic Republic” in Christopher R. Duncan (ed.), *Civilizing the Margins: Southeast Asian Government Policies for the Development of Minorities* (Ithaca: Cornell University Press, 2004), pp.225–226, believes that migration out of China started as late as in the mid-19th century.

²⁴ David Bradley, “Language and Culture of Minority Groups” in Yves Goudineau (ed.), *Laos and Ethnic Minority Cultures: Promoting Heritage* (Paris: UNESCO Publishing, 2003), p.46.

²⁵ Sturgeon, *Border Landscapes* (2005), p.15.

²⁶ Sturgeon, *Border Landscapes* (2005), p.16.

²⁷ Sturgeon, *Border Landscapes* (2005), p.161.

²⁸ Anthony Reid, “Economic and Social Change, c. 1400–1800” in Nicholas Tarling (ed.), *The Cambridge History of Southeast Asia, Volume One: From Early Times to c. 1800* (Cambridge: Cambridge University Press, 1992), pp.460–463.

²⁹ O.W. Wolters, *History, Culture and Region in Southeast Asian Perspectives* (Ithaca: Southeast Asia Program Publications/Institute of Southeast Asian Studies, 1999), pp.27–28.

³⁰ Thong'chai Winichakul, *Siam Mapped: A History of the Geo-Body of a Nation* (Honolulu: University of Hawai'i Press, 1994), pp.62–80.

colonial powers simply as new elements in their existing tributary system of power relations, European concepts of power were based on territorial conquest and not on multi-layered hierarchical relationships.

The delineation of borders suited the interests of the new powers in the region in raw materials. However, to understand the spread of cultural expressions across the region and to better appreciate current claims to “ownership”, the history of boundaries in the region remains important. The relatively loose borders at the margins of Southeast Asian kingdoms were also buffer zones, “regions of refuge” as James Scott has called them, which the ruling administration found difficult to reach and where minority groups could escape from taxation, military service and forced labour.³¹ When territorial borders finally became more strictly enforced, they cut through the cultural realms of communities living along the borders.

Although most research on such Asian borderlands has focused on the uplands of Southeast Asia and on the territorial borders between South and Southeast Asian nations,³² there are similar examples from maritime Southeast Asia. The *Orang Laut* or *Orang Suku Laut*, are “Sea Nomads” in the Straits of Malacca and the Indonesian Riau archipelago of over 3,200 islands, who travel along the East coast of Sumatra, the coasts of the Malay Peninsula and as far as to the Isthmus of Kra and the West coast of Kalimantan.³³ Related groups can be found on the north-eastern coast of Borneo, the Sulu archipelago, in Sulawesi, around the Lesser Sunda Islands, Maluku and along the northern entrance of the straits bordering Malaysia, Thailand and Burma.³⁴ Feared as pirates, they played an important role in pre-colonial Malay kingdoms around the Straits of Malacca and were held in high esteem by rulers because of their knowledge of the sea and its resources, their capability to defend the kingdom, patrol and secure the sea lanes and to force passing vessels to frequent the port of the ruler and to pay their dues.³⁵ Today, their areas happen to overlap with the so-called “growth triangles” fostered in various forms by Indonesia, Malaysia, Thailand and the Philippines.³⁶ They also happen to stretch what has become known as the “Malay world”, a somewhat ambiguous term that goes back many centuries and refers to the region influenced by Malay culture and centred on Sumatra and Malacca. Geoffrey Benjamin, quoting Anthony Milner,³⁷ has defined it as “areas currently or formerly falling under *kerajaan Melayu*, the rule of a Malay king” and distinguishes it from a usage of the term as referring to either insular Southeast Asia as a whole or to the much larger world of Austronesian (Malayo-Polynesian) languages.³⁸

Apart from historically rather permissive borders and loosely defined empires, another contributing factor to cultural diffusion in Southeast Asia has been, as elsewhere in the world, large scale migration. The matrilineal *Minangkabau*, for example, spread from their heartland in the interior of West Sumatra, to other areas of Sumatra and across the Straits of Malacca to the Malay Peninsula.³⁹ Fostered in particular by the colonial powers, there was also the large scale migration of minorities from elsewhere in Asia, such as Chinese, Indians and Arabs. These communities became essential links for the interior and exterior trade or, where the population was sparse, worked in the mines and on the plantations of the colonies. Legally, they were sometimes treated differently from the local population,⁴⁰ but their better access to

³¹ James C. Scott, *The Art of Not Being Governed: An Anarchist History of Upland Southeast Asia* (New Haven: Yale University Press, 2009).

³² See for example Noburo Ishikawa, *Between Frontiers: Nation and Identity in a Southeast Asian Borderland* (Singapore: NUS Press, 2010); Scott, *The Art of Not Being Governed* (2009); Sturgeon, *Border Landscapes* (2005).

³³ Cynthia Chou and Vivienne Wee, “Tribality and Globalization: The Orang Suku Laut and the ‘Growth Triangle’ in a Contested Environment” in Geoffrey Benjamin and Cynthia Chou (eds), *Tribal Communities in the Malay World: Historical, Cultural and Social Perspectives* (Singapore/Leiden: Institute for Southeast Asian Studies/International Institute for Asian Studies, 2002), pp.334–335.

³⁴ Leonard Y. Andaya, *Leaves of the Same Tree: Trade and Ethnicity in the Straits of Melaka* (Singapore: NUS Press, 2010), pp.173–174.

³⁵ Barbara Watson Andaya and Leonard Y. Andaya, *A History of Malaysia*, 2nd edn (Basingstoke: Palgrave Macmillan, 2001), pp.26, 29–30, 48; Chou and Wee, “Tribality and Globalization” in Geoffrey Benjamin and Cynthia Chou (eds), *Tribal Communities in the Malay World* (2002), pp.328–329; Andaya, *Leaves of the Same Tree* (2010), pp.184–201.

³⁶ Chou and Wee, “Tribality and Globalization” in Benjamin and Chou (eds), *Tribal Communities in the Malay World* (2002).

³⁷ Anthony Milner, *Kerajaan: Malay Political Culture on the Eve of Colonial Rule* (Tucson: University of Arizona Press, 1982).

³⁸ Geoffrey Benjamin, “On Being Tribal in the Malay World” in Benjamin and Chou (eds), *Tribal Communities in the Malay World* (2002), p.7.

³⁹ Andaya, *Leaves of the Same Tree* (2010), pp.82–107.

⁴⁰ Christoph Antons, “Ethnicity, Law and Development in Southeast Asia” in Frans Hüsken and Dick van der Meij (eds), *Reading Asia: New Research in Asian Studies* (Richmond: Curzon, 2001), pp.3–28.

commercial law and trade sometimes also meant that they were able to play an important role in the early commercialisation of local traditional knowledge.⁴¹

Cultural and intellectual property in international and national discourses

In view of the large scale cultural diffusion described above, it seems that one should approach claims to exclusive “ownership” of cultural material with some caution. Further, given the possibility for intangible knowledge, skills and expressions to be held by various people in various places at the same time, it is understandable that scholars interested in the legal protection of cultural heritage have long advocated a move away from the language of property.⁴² Although the term “cultural property” was used in the 1954 Hague Convention for the Protection of Cultural Property and in the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, there was a shift away from this terminology in later conventions. In the 2003 UNESCO Convention for the Safeguarding of Intangible Cultural Heritage, the term “cultural property” is not used. As a consequence, the Convention is able to cover a wider range of material related to heritage (such as cultural spaces, languages, social practices, rituals and festive events) that would be a difficult fit for conventional categories of “property”. Perhaps mindful of the trans-boundary nature of much of the material, international co-operation and assistance is emphasised and parties undertake to cooperate at the bilateral, subregional, regional and international levels (art.19). There is also the possibility of a joint request to the Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage by two or more parties related to intangible cultural heritage present in their territories (art.23).

If one examines the current intangible heritage lists,⁴³ there are only relatively few elements inscribed by two or more parties jointly. Where countries with similar cultural material are competing for tourists and consumers of handicrafts, music and other cultural expressions, they may in fact rather seek an exclusive listing. While this does not prevent others from using the material, it may provide recognition of the authenticity and the length of the local tradition, and this may give the registering party a competitive edge in the fierce competition for attention in a crowded market.

There is potential for conflict with regard to more widely dispersed material, however, where national laws continue to use the language of cultural property and, especially, where national intellectual property laws incorporate elements of heritage protection. The National Cultural Heritage Act of 2009 of the Philippines, for example, uses the terms “cultural heritage” and “cultural property” side by side, whereby “cultural property” also extends to intangible cultural heritage.⁴⁴ It creates restrictive conditions in particular for “important cultural property” and “national cultural treasures”. Important cultural property shall be protected against exportation, modification or demolition, for example, if it concerns works of “national living treasures” (Manlilikha ng Bayan) of traditional Filipino folk art,⁴⁵ works by a national artist or works of national heroes. More generally, “no cultural property shall be sold, resold, or taken out of the country without first securing a clearance from the cultural agency concerned” (s.11).

Laos protects so-called “artistic works and folklore” under the Copyright part of its Intellectual Property Law of 2008. “Artistic work and folklore” is defined in s.3(32) as “a result of compilation of the creations traditionally created in community or group reflecting the ways of life of such communities”. Section 87

⁴¹ Christoph Antons and Rosy Antons-Sutanto, “Traditional Medicine and Intellectual Property Rights: A Case Study of the Indonesian Jamu Industry” in Christoph Antons (ed.), *Traditional Knowledge, Traditional Cultural Expressions and Intellectual Property Law in the Asia-Pacific Region* (Alphen aan den Rijn: Kluwer Law International), pp.372–373; Christoph Antons, “From Magic Charms to Symbols of Wealth: Well-Known Trade Marks in Indonesia” in Andrew T. Kenyon, Ng-Loy Wee Loon and Megan Richardson (eds), *The Law of Reputation and Brands in the Asia Pacific* (Cambridge: Cambridge University Press, 2012), pp.144–145.

⁴² Lyndel V. Prott and Patrick J. O’Keefe, “‘Cultural Heritage’ or ‘Cultural Property’?” (1992) 1 *International Journal of Cultural Property* 307.

⁴³ The Committee maintains two lists: the List of Intangible Cultural Heritage in Need of Urgent Safeguarding and the Representative List of the Intangible Cultural Heritage of Humanity.

⁴⁴ See the definition of terms in s.3.

⁴⁵ See also the Republic Act No.7355, the Manlilikha ng Bayan Act.

lists examples and provides that users of the material must state the source and preserve the original value of such works. Beyond this, the arrangements remain a little unclear. Section 83 specifies types of copyright owners and includes here the owner of artistic works and folklore of the community in the locality. Section 82 clarifies that such ownership can be exercised by authors, joint authors, persons or organisations hiring the author, assignees of rights, successors in rights and/or by the state. The Law on National Heritage of 2005 provides further information about cases, in which the state will step in and assert copyright ownership. The Law protects intangible cultural heritage as cultural heritage (art.9) and as historical heritage (art. 12). The state asserts copyright ownership to Lao national cultural and historical heritage⁴⁶ outside of Laos, in the illegitimate possession of other countries or in respect of which foreign countries have illegitimately asserted copyright (art.27). The state will also “consider” copyright ownership in “national heritage items at national level which have high value, are rare and are of unique national character” and propose them for “registration of ownership and copyright in the name of the nation with international organisations” (art.28).

A further example of a regulation of cultural expressions mixing copyright and heritage protection comes from Indonesia. Part Three of the Indonesian Copyright Act, originally introduced in 1982 and revised in 1987, 1997 and 2002, bears the heading “Copyright to Works of Unknown Authors”. The provisions in this part mix elements from art.15.4 of the Berne Convention with the “national folklore” approach of the Tunis Model Law. Article 11 deals with unpublished (as well as published) works of unknown authors, in which case the state shall be the holder of the copyright. There has been, however, no designation of a competent authority to represent the author’s interest as required by art.15.4 of the Berne Convention. The rather unusual art.10(1) declares the state to be the holder of copyright in prehistoric and historic relics and “other national cultural objects”. The Indonesian text uses the term of the Copyright Act for a copyright protected “work” (*karya*) in combination with “relics” (*peninggalan*), although this would normally be material for heritage rather than copyright protection. According to art.10(2), the state holds also the copyright to various expressions of folklore and “products of popular culture”. Foreigners will need a licence to use such material (art.10(3)). Article 10 requires further implementation via a Government Regulation (art.10(4)), which has never been issued. If adopted, a Draft Law on the Intellectual Property Use of Traditional Knowledge and Traditional Cultural Expressions would regulate such licensing as well as benefit sharing with local custodians in the future. The Copyright Act is also being revised and it remains to be seen whether it will continue to include expressions of folklore or leave the subject matter to the sui generis law.

Conclusion

Intellectual property law used to be concerned with incentives for the creation of cultural material rather than with its content. With cultural branding becoming more important for tourism and through the use of geographical indications, intellectual property now has to deal with locally specific expressions of culture. As the discussion about traditional knowledge in the IGC shows, the underlying cultures are no longer confined to Europe or to national cultures. The examples from Southeast Asia in this article show further how cultural material has been diffused across neighbouring countries through processes of migration and the drawing of borders during the colonial period that divided cultural communities. As a consequence, the UNESCO Convention for the Safeguarding of Intangible Cultural Heritage of 2003 urges international collaboration rather than competition in this field. At the national level, however, many countries employ strong cultural property concepts, sometimes in combination with intellectual property laws, to control the trade in and use of material derived from heritage. There are important lessons to be

⁴⁶That is heritage of “outstanding national value located in any area of the Lao PDR and which have become the heritage of the national community” (art.18).

learnt for the current debate about traditional knowledge from the discussion about cultural heritage and cultural property more broadly. In view of recent cross-border conflicts about intangible heritage, any instrument for the future regulation of traditional knowledge and traditional cultural expressions at international level should include mechanisms for trans-boundary cooperation and arbitration. At the IGC, trans-boundary issues are currently still overshadowed by the discussions about the definition of the subject matter and the beneficiaries and the scope of protection. Nevertheless, draft provisions aiming at trans-boundary cooperation have been included in all three draft texts. The effective regulation of such cooperation and of the arbitration of disputes will be important for the implementation of any type of traditional knowledge protection and deserve further attention.

Geographical Indications and Cultural Heritage

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☞ Culture; Geographical indications; International law; TRIPs

1. Introduction: The significance of a cultural heritage rationale

The emergence of claims that geographical indications (GIs) protection furthers cultural heritage goals is a relatively recent development. As we will see below, GIs such as Parmigiano Reggiano, Darjeeling and Bordeaux have historically been protected for reasons similar to those grounding trade mark protection. Granting exclusive rights over such signs prevents cluttered or misleading signalling in the marketplace, which benefits both consumers and legitimate producers. Individual or collective reputation—the valuable intangible associated with such signs—is the object of protection as well as the basis for inclusion within the intellectual property (IP) canon. With the informational efficiency foundation established, there is some uncertainty as to where the heritage argument fits in and whether it is necessary at all. At the same time, the heritage dimension of regional specialities is increasingly emphasised in policy documents and academic scholarship. This article therefore sets out to: (1) identify the conditions under which the heritage argument was made possible; and (2) evaluate the different forms this argument takes and the types of work expected of it. While cultural heritage is a contested analytic category, as a resource its social, political and economic resonances are undeniable. Its contemporary prominence within the GI discourse has been associated with the potential for GIs to act as a bulwark against the neoliberal excesses of globalisation, as well as the continuing significance of place-based communities.¹

In order to assess the relevance of the heritage argument, the article is structured along the following lines. Section 2 begins with a thumbnail sketch of international GI protection under the TRIPS Agreement. It also draws on examples to indicate the manner in which facets of cultural heritage are incorporated into GI registrations. Section 3 draws upon the history of GI protection to suggest that a shift in emphasis from physical geography (soil, climate etc) to the human or cultural contribution (collectively generated processes and experimentation) redefined the character of the link between product and place. This recognition of collective human inputs in turn created the space for accommodating cultural heritage arguments. This section goes on to review the increasing prominence of a cultural heritage rationale within international GI protection debates, including those taking place at the WTO. Subsequently, section 4 identifies the principal contexts in which the cultural heritage rationale is deployed and the different types of work it is expected to do. First, it has the potential to support an enhanced scope of protection for GIs. Certain GI rules deviate from the communicative logic of trade mark law by seeking to reify and reserve signs for GI producers, regardless of audience perception. The heritage argument, usually in combination with additional instrumental arguments, is offered as a normative foundation for this enhanced scope. Secondly, GIs are potential vectors for recognising and rewarding those who produce traditional cultural expressions (TCEs).² More specifically, GI protection for crafts and textile products is an ongoing experiment. Thirdly,

¹ These themes are explored in: R. Coombe, “Legal Claims to Culture in and against the Market: Neoliberalism and the Global Proliferation of Meaningful Difference” (2005) 1 *Law, Culture and the Humanities* 32; D. Rangnekar, “Remaking Place: The Social Construction of a Geographical Indication for Feni” (2011) 43 *Environment and Planning A* 2043.

² For background, see C. Beat Graber and M. Burri-Nenova (eds) *Intellectual Property and Traditional Cultural Expressions in a Digital Environment* (Cheltenham: Edward Elgar, 2008).

sustaining local or regional cultural heritage, via the market-friendly option of GI protection, offers a practical solution for those more generally concerned with the protection of cultural heritage. Here we see a tentative exploration of synergies with the broad definition of intangible cultural heritage adopted by the United Nations Educational, Scientific and Cultural Organisation (UNESCO), which can accommodate locally embedded agricultural or manufacturing practices. Having identified the different expectations being brought to bear on the heritage argument, section 5 concludes with some observations about the significance of this “cultural turn” within GI law.

2. The international protection of GIs

The presence of GI provisions in TRIPS attests to the continuing relevance of the local within a globalising world. Improved transportation, migration flows, better standards of living and cosmopolitan appetites have raised the profile of regionally specific foodstuffs, beverages and crafts. GIs are therefore simultaneously enabled by the consumer demand generated by global trade flows and potentially a means of resisting their homogenising effects.³ The international GI regime, contained in arts 22–24 of TRIPS, can be thematically summarised along the following lines:

- (1) the definition of a GI;
- (2) general protection for all GIs;
- (3) enhanced protection for wines and spirits; and
- (4) exceptions as well as future negotiations.

The object of GI protection is a sign—usually a word or symbol—which indicates the geographical origin of the referent product and information associated with that origin. According to WIPO, the “substance of the concept” of GIs is that they are

“used to demonstrate a link between the origin of the product to which it is applied and a given quality, reputation or other characteristic that the product derives from that origin”.⁴

This formal recognition of a link between product and place differentiates GIs from trade marks. Its significance is emphasised in art.22.1 of TRIPS:

“Geographical indications are, for the purposes of this Agreement, *indications which identify* a good as originating in the territory of a Member, or a region or locality in that territory, where a given *quality, reputation or other characteristic* of the good is *essentially attributable to its geographical origin.*” (emphasis added).

There are many layers to this definition,⁵ but for our purposes it is noteworthy that there are three discrete options for satisfying the link requirement—where the seemingly more objective quality or characteristics of the product are causally dependent upon geographical origin or where its more subjective (historic) reputation is. The flexibility of this definition suggests that physical geography factors no longer have dispositive importance, which has relevance for the following section.

Turning to the scope of protection, there are two levels available. Under art.22 the scope of protection for *all* GIs consists of the following three components:

- protection against uses of indications that mislead the public as to the origin of the goods (art.22.2(a)) or are false despite being literally accurate (such as perfume made in Paris, Texas) (art.22.4);

³ E. Barham, “Translating Terroir: The Global Challenge of French AOC Labeling” (2003) 19 *Journal of Rural Studies* 127, 129.

⁴ WIPO, “The Definition of Geographical Indications”, October 1, 2002, SCT/9/4, para.4.

⁵ The TRIPS definition is unpacked in greater detail in D. Gangjee, *Relocating the Law of Geographical Indications* (Cambridge: Cambridge University Press, 2012), Ch.5, s.4.

- protection against uses of indications where this amounts to an act of unfair competition within the meaning of art.10*bis* of the Paris Convention (art.22.2(b)); and
- refusal or invalidation of trade marks that contain or consist of indications, where they may mislead the public as to the origin of the goods (art.22.3).

This clutch of substantive rules seeks to preserve the integrity of consumer information by preventing misleading use, while also protecting producer goodwill. However, to prove misleading conduct, the rights holder has the burden of establishing the sign's reputation acquired through prior use in that jurisdiction, as well as public recognition of the associated product. By contrast, protection *for wines and spirits* is significantly stronger and is often referred to as "absolute" protection.⁶ There are three commitments involved here:

- Members shall provide the legal means for interested parties to prevent the use of GIs for wines and spirits on such products when they do not originate in the designated place, "even where the true origin of the goods is indicated or the [GI] is used in translation or accompanied by expressions such as 'kind', 'type', 'style', 'imitation' or the like" (art.23.1).
- Trade marks for wines and spirits which contain or consist of GIs shall be refused or invalidated, where the trade marked goods are not from the region which is indicated by the GI (art.23.2). There is no need to establish that use of the trade mark will be misleading.
- Coexistence in the case of homonymous GIs for wines and spirits, provided misleading uses are controlled for by differentiating between them in a practical manner (art.23.3).

The existence of two disparate levels of protection within the same legal instrument is a puzzle. In the case of art.22 which applies to all products, parallels are drawn with the basis for trade mark regimes. Protecting the communicative integrity of trade marks serves a dual purpose. Granting exclusive rights to the sign prevents consumer deception or confusion as to origin. It simultaneously shields legitimate producers against this particular type of unfair competition. An instrumentalist account is the predominant theoretical justification for this exclusivity, in a marketplace characterised by information asymmetries.⁷ In the case of experience or credence goods such as wines or foodstuffs, asymmetric information exists between buyers and sellers. Without any way of determining quality in advance, adverse selection is a real concern for consumers. If left unchecked, low-quality products would drive high-quality products out of the market.⁸ This represents a common type of market failure, which conventionally requires some form of state intervention. In response, granting contingent proprietary rights over trade marks enhances efficiency. These signs reduce consumer search costs by making products easier to identify in the marketplace—prospective purchasers can trust the sign—while encouraging producers to invest in maintaining or improving levels of quality. Rights to prevent misleading uses ensure that it is trade mark proprietors and not their rivals, who reap the reputational rewards of that investment. In order to preserve the communicative integrity of such signs, unauthorised use by third parties should therefore be prohibited. The relevant GI literature suggests a similar economic rationale,⁹ but with an added dimension. These geographical signs exhibit features of club goods, whereby the right to exclude is enjoyed by all members

⁶E.g. M. Geuze, "Protection of Geographical Indications under the TRIPs Agreement and Related Work of the World Trade Organisation", October 1997, WIPO/GEO/EGR/97/2, para.9; T.-L. Tran Wasescha, "Recent Developments in the Council for TRIPs (WTO)" September 1999, WIPO/GEO/CPT/99/2, para.12; WIPO Secretariat, "Protection of Geographical Indications: General Introduction, International Protection and Recent Developments", June 2001, WIPO/GEO/CIS/01/1, para.19.

⁷W.M. Landes and R.A. Posner, "Trade Mark Law: An Economic Perspective" (1987) 30 *Journal of Law and Economics* 265; N. Economides, "The Economics of Trade Marks" (1988) *Trademark Reporter* 523.

⁸G.A. Akerlof, "The Market for 'Lemons': Quality Uncertainty and the Market Mechanism" (1970) 84 *Quarterly Journal of Economics* 488.

⁹OECD, "Appellations of Origin and Geographical Indications in OECD Member Countries: Economic and Legal Implications", December 2000, COM/AGR/APM/TD/WP(2000)15/FINAL, pp.7–8, 31–34; C. Bramley and J.F. Kirsten, "Exploring the Economic Rationale for Protecting Geographical Indicators in Agriculture" (2007) 46 *Agrekon* 69; D. Rangnekar, "The Socio-Economics of Geographical Indications: A Review of the Empirical Evidence from Europe", (2004) UNCTA/ICTSD Issue Paper No. 4, pp.13–16; F. Thiedig and B. Sylvander, "Welcome to the Club? An Economical Approach to Geographical Indications in the European Union" (2000) 49 *Agrarwirtschaft* 428.

of the club.¹⁰ Where a collective reputation is at stake, institutional mechanisms are required to address collective action problems. It becomes necessary to establish and police common standards of production, ensuring that competing members will co-operate to the extent necessary to maintain quality. Otherwise in light of their apparent functional similarity, instrumentalist theory justifies exclusive rights in a congruent manner for both trade marks and GIs. By contrast, there is no similar consensual basis for art.23 levels of protection, nor is there an established explanation for why wines and spirits alone should be privileged in this way.¹¹

Another aspect worth noting is that while TRIPS outlines certain minimum standards of protection in arts 22–24, it does not prescribe an accompanying form of protection (art.1(1)). The terminological, conceptual and institutional diversity associated with GI protection¹² has either impeded meaningful international consensus or encouraged pluralistic experimentation, depending on one’s point of view. However in recent years this profusion of forms has been whittled down to two leading contenders that are both registration based.¹³ The first of these is the group mark—collective or certification marks within national or regional trademark registration systems. The alternative is *sui generis* GI protection, which differs in that it implicates a collective interest as opposed to a private commercial interest, systematically emphasises a product’s link to a demarcated geographical area and greater “quasi-public” or state involvement in the recognition process. These features facilitate a range of distinct policy agendas, including the recognition and support of cultural heritage. Therefore heritage related arguments are more closely associated with *sui generis* GI regimes.

As far as symbolic representation goes, it is widely accepted that local products can be emblematic of regions of origin.¹⁴ Nevertheless it is also worth considering other practice-based aspects of cultural heritage which are recorded within registration based systems. One view suggests that culture enters at an early stage, when producer groups begin to collectively engage with the process of drafting a product specification. The collective dimension of the origin-linked product strengthens social linkages between local actors during this process, while the promotion of an origin-linked product increases self-esteem among local actors as their identity and related way of life is recognised and valorised.¹⁵ While this process can develop or sustain networks of collaboration and build social capital within a region, the drafting process could also lead to divergences and dissent.¹⁶ In terms of the content of the specification, a GI scheme can

“also help protecting important elements of local cultural heritage, for instance traditional production methods and recipes, endangered animal breeds, or indigenous vegetables”.¹⁷

Various cultural norms are associated not only with production practices but also with the oral traditions surrounding a local product. These norms can function to signal demarcations between social groups or help integrate the product with social occasions.¹⁸ Regional specialities and well known products can also

¹⁰ Club goods are impure public goods characterized by partial excludability, no or partial rivalry of benefits, and congestion phenomena. J. M. Buchanan, “An Economic Theory of Clubs” [1965] *Economica* 1.

¹¹ Justifications for this level of “absolute” protection have been offered in the context of a debate as to whether art.23 should be extended to cover all products, but they remain controversial. See WTO, “Issues Related to the Extension of the Protection of Geographical Indications Provided for in Article 23 of the TRIPS Agreement to Products Other Than Wines and Spirits”, May 18, 2005, TN/C/W/25.

¹² As mapped out in WIPO Secretariat, “Document SCT/6/3 Rev. on Geographical Indications: Historical Background, Nature of Rights, Existing Systems for Protection and Obtaining Protection in Other Countries”, April 2, 2002, SCT/8/4.

¹³ For further details, see Gangjee, *Relocating the Law of Geographical Indications* (2012), pp.199–202.

¹⁴ F. Addor and A. Grazioli, “Geographical Indications beyond Wines and Spirits: A Roadmap for a Better Protection for Geographical Indications in the WTO/TRIPS Agreement” (2002) 5 *Journal of World Intellectual Property* 865, 865.

¹⁵ FAO and Siner-GI, *Linking People, Places and Products: A Guide for Promoting Quality Linked to Geographical Origin and Sustainable Geographical Indications*, 2nd edn (Rome: FAO, 2009–2010), p.23.

¹⁶ London Economics, *Evaluation of the CAP Policy on Protected Designations of Origin (PDO) and Protected Geographical Indications (PGI): Final Report* (London: 2008), p.245.

¹⁷ London Economics, *Evaluation of the CAP Policy on Protected Designations of Origin (PDO) and Protected Geographical Indications (PGI)* (2008), pp.245–246.

¹⁸ D. Rangnekar, *Geographical Indications and Localisation: A Case Study of Feni* (ESRC Report 2009), Ch.3.

act as the focal points for fairs, festivals and other cultural events which are used to promote a region's distinct identity.¹⁹ These initiatives can subsequently feed into more general tourism promotion strategies which showcase local heritage.²⁰ By formally recognising certain agricultural practices, such as free range animals requiring open spaces or terraced cultivation, GIs specifications could also help sustain traditional landscapes, which in some cases are regarded as libraries of local history as well as living laboratories for experimentation.²¹ Therefore heritage dimensions can be acknowledged at several stages within the GI protection process.

3. Making space for a cultural heritage rationale

As we have seen above, GIs are perceived to be a protected category of signs resting upon informational efficiency foundations. With an explanatory account already in place, how was the space created for an additional or complementary cultural heritage argument? The answer offered here draws on the history of GI protection, as it relates to the distinguishing feature for this category of signs. Products must establish an appropriate link to the region of origin before qualifying for GI protection and the characterisation of this link has changed over time. The initial approach relied upon a notion of *terroir* heavily influenced by a deterministic understanding of the importance of physical geography inputs.²² This view also has also found traction with courts on occasion:

“The region in which the Champagne vineyards are found is about one hundred miles east of Paris around Reims and Épernay, where there is a chalky, flinty soil and the climate is subject to extreme variations of heat and cold. It appears that these factors give to the wine its particular qualities.”²³

According to this view, since such regional products were uniquely anchored to specific places due to physical or geological influences, this strengthened objections to unauthorised use by producers from outside the region. However, a close study of attempts to regulate the French wine industry over the 19th and 20th centuries reveals that the influence of human skills and production techniques were gradually acknowledged.²⁴ Guaranteeing mere physical origin was not sufficient to guarantee product quality (e.g. making wine from inferior quality grapes within the formal Champagne appellation delimitation); selecting the criteria for delimiting origin regions was controversial, which suggested that such products did not spring forth unmediated from neatly defined parcels of place; and methods of production changed over time, in response to collective experimentation and changing ecological or socio-cultural conditions. A relational understanding of the interactions between producers, consumers, product and place also gave these products historic depth and enhanced the symbolic value of certain GIs, which emerged as national champions. Amongst the most illuminating studies are those of Champagne and Camembert,²⁵ both as “invented traditions”²⁶ and potent cultural symbols. Subsequently the Lisbon Agreement²⁷ took this recognition to the international level, by formally acknowledging both natural and human factors in its definition of an Appellation of Origin in art.2. International registrations cover not only the usual suspects

¹⁹ Rangnekar, *Geographical Indications and Localisation* (2009), pp.246–251.

²⁰ J. Suh and A. MacPherson, “The Impact of Geographical Indication on the Revitalisation of a Regional Economy: A Case Study of ‘Boeong’ Green Tea” (2007) 39 *Area* 518.

²¹ R.L. Barsh, “How Do You Patent a Landscape? The Perils of Dichotomizing Cultural and Intellectual Property” (1999) 8 *International Journal of Cultural Property* 14; I.B. Thompson, “The Role of Artisan Technology and Indigenous Knowledge Transfer in the Survival of a Classic Cultural Landscape: The Marais Salants of Guérande, Loire-Atlantique, France” (1999) 25 *Journal of Historical Geography* 216.

²² For the transition from privileging natural factors, such as soil and climate, to recognising human influences in the context of the influential French wine industry, see Gangjee, *Relocating the Law of Geographical Indications* (2012), Ch.3.

²³ *J Bollinger v Costa Brava Wine Co Ltd* [1961] 1 All E.R. 561, 563 (Ch), per Danckwerts J.

²⁴ See Gangjee, *Relocating the Law of Geographical Indications* (2012), Ch.3.

²⁵ P. Boisard, *Camembert: A National Myth* (Berkeley: University of California Press, 2003); K.M. Guy, *When Champagne Became French: Wine and the Making of a National Identity* (Baltimore: Johns Hopkins University Press, 2003).

²⁶ The standard reference point is E. Hobsbawm and T. Ranger (eds), *The Invention of Tradition* (Cambridge: Cambridge University Press, 1983),

p.1.

²⁷ Lisbon Agreement for the Protection of Appellations of Origin and their International Registration 1958.

such as “Champagne” for wine, “Cuba” for leaf or manufactured tobacco and “Tequila” for spirit drinks²⁸ but also “Olinalá” for wooden handcrafted objects, “Jablonec” (or “Gablonz”) for utility and decorative glassware, and “Kraslické Krajky” for embroidery and lace goods.²⁹ As we have seen in the previous section, the TRIPS definition in art.22.1 recognises reputation-based connections to regions, which further dilutes the influence of physical geography whilst potentially acknowledging historic associations between product and place.

This reconstitution of the link to place has paved the way for regional specialities to be rendered as symbols of regional or national heritage in policy debates. For instance, the European Commission advocates the position that “GIs are key to EU and developing countries cultural heritage, traditional methods of production and natural resources”.³⁰ The conclusion of an in-depth European study into the multifunctional dimensions of regional products asserts that GIs have a “high heritage dimension”.³¹ Developing countries are also interested in this potential. For countries such as India, crafts and textiles are important and make up the majority of national registrations at present.³² Within legal scholarship, the potential of the heritage dimension is being celebrated as well as critiqued. GIs are valued as a market-friendly mechanism for regional producers to benefit from global trade flows, whilst simultaneously nurturing regional cultural heritage.³³ Others are more suspicious of the deployment of cultural heritage rhetoric, given its potential to secure trade restrictive or protectionist advantages³⁴ and these arguments are considered in greater detail in section 4.

The cultural heritage rationale has found traction within WTO negotiations as well, where participants refer to it alongside the consolidated intergenerational *savoir faire* or traditional knowledge invested in such regional products. These references surface as early as 1989, during the negotiations leading up to TRIPS:

“[The European Community] hoped that countries which stood to benefit from being able to exploit more fully a comparative advantage in agriculture... would recognise the legitimacy of the Community’s desire to benefit fully from its own comparative advantage, which lay particularly in the accumulation of know-how, experience and in its specific conditions of soil and climate. The essence of what the Community was seeking was adequate protection against unfair use by third parties of the results of the work, investment and goodwill generated by its peoples.”³⁵

The demand for such recognition has been amplified over the past two decades. The WTO review of national GI legislation emphasises “human creativity and human factors” as one of the major criteria which determine eligibility for protection. Members

²⁸ Respectively Registration Nos 231, 477 and 669 in the Lisbon Express Registry database, available at <http://www.wipo.int/ipdl/en/search/lisbon/search-struct.jsp> [Accessed October 28, 2012].

²⁹ Respectively Registration Nos 732, 66 and 22. Others examples are Hungarian crafts such as lace from *Kiskunhalas* and the porcelain of *Herend* (Nos 495 and 737).

³⁰ European Commission, “Why Do Geographical Indications Matter to Us?”, available at http://ec.europa.eu/trade/issues/sectoral/intell_property/argu_en.htm [Accessed October 28, 2012].

³¹ D. Barjolle and E. Thévenod-Mottet, *DOLPHINS Final Report: Work Programme 6: Policies Evaluation* (2003), p.10.

³² These constitute 142 of the 230 applications listed in the (2011) 37 *Indian Geographical Indications Journal*. See also D. Giovannucci, T. Josling, W. Kerr, B. O’Connor and M. Yeung, *Guide to Geographical Indications: Linking Products and Their Origins* (Geneva: International Trade Centre, 2009), p.76.

³³ A. Jokuti, “Where Is the What If the What Is in Why? A Rough Guide to the Maze of Geographical Indications” [2009] E.I.P.R. 118, 120; A. Kamperman Sanders, “Incentives for Protection of Cultural Expression: Art, Trade and Geographical Indications” (2010) 13 *Journal of World Intellectual Property* 81; A. Taubman, “Thinking Locally, Acting Globally: How Trade Negotiations over Geographical Indications Improve ‘Fair Trade’ Rules” [2008] I.P.Q. 231.

³⁴ T. Broude, “Taking ‘Trade and Culture’ Seriously: Geographical Indications and Cultural Protection in WTO Law” (2005) 26 *University of Pennsylvania Journal of International Economic Law* 623; T. Voon, “Geographical Indications, Culture and the WTO” in B. Ubertazzi and E. M. Espada (eds), *Le indicazioni di qualità degli alimenti: Diritto internazionale ed europeo* (Milan: Giuffrè Editore, 2009), p.300.

³⁵ GATT, “Minutes of Negotiating Group of 12–14 July 1989”, September 12, 1989, MTN.GNG/NG11/14, para.53.

“have highlighted the relevance of human factors to matters such as quality, traditional methods of production, vinicultural practices and methods of production, preparation and cultivation”.³⁶

Switzerland notes that as opposed to private trade marks rights, GIs “form part of the national, cantonal or communal heritage”.³⁷ Referring to sui generis GI legislation, India’s position was that a GI “is considered under the act to be the property or heritage of all the persons engaged in the activity of creating [such] products”.³⁸ The Representative from Thailand supported extending GI protection since “GIs were often related to culture and ancestors’ traditional knowledge”.³⁹ Some maintain that calls for extending art.23 protection to all products

“emerged as a reaction to concerns of an ever greater number of countries to promote their goods which are fruits of their culture and know-how and their unique blend of soil, water and climate”.⁴⁰

However such cultural claims have also been challenged in the context of generic use, where a term indicates a type of product as opposed to any specific provenance (e.g. cheddar cheese). Since some WTO Members had sizeable immigrant populations

“who had brought with them their cultural traditions, including names and terms, it would be culturally insensitive ... to try to claim back terms that had been used for decades without being contested ... Immigrants’ customs were acquired rights which Members could not wipe out in the course of negotiations”.⁴¹

While the existing exception for generic use in art.24.6 addresses this concern, the question of who gets to shape the criteria for cultural authenticity is an important one that we return to below. While this section has demonstrated that the cultural heritage argument cannot be ignored in international deliberations on GI protection, it is analytically helpful to clarify the different senses in which it is used.

4. Mapping contexts of use

While the cultural heritage argument has clearly been associated with GI protection and incorporated into international policy debates, it is used in different senses. In the first context of use, the cultural heritage argument operates as a potential justification, accounting for the expansive scope of GI protection usually associated with sui generis regimes. Within such regimes certain rules deviate from the dominant paradigm of communicative logic,⁴² which otherwise epistemically validates much of trade mark law. One type of rule goes significantly further than preventing misrepresentation and would prohibit qualified uses (“Darjeeling style tea”; “Gorgonzola cheese, made in the USA”), translations (“Parmesan” in place of Parmigiano Reggiano) and any unauthorised use by those from outside the region which evokes the protected GI. Examples include art.23.1 of TRIPS, art.3 of the Lisbon Agreement and art.13 of EC Regulation 510/2006.⁴³ Even an expansive conceptualisation of unfair competition protection, incorporating misappropriation and dilution prevention, does not account for this scope of enhanced GI protection. These

³⁶ WTO, “Review under Article 24.2 of the Application of the Provisions of the Section of the TRIPS Agreement on Geographical Indications”, November 24, 2003, IP/C/W/253/Rev.1, para.44.

³⁷ WTO, “Review under Article 24.2—Switzerland’s Response to the Checklist”, February 16, 1999, IP/C/W/117/Add.13, p.10, fn.11.

³⁸ See the response to Q.13 in TRIPs Council, “Review of Legislation—India”, October 8, 2003, IP/Q/IND/1.

³⁹ TRIPs Council, IP/C/M/38, para.180.

⁴⁰ “Agreement on TRIPS — Extension of the Additional Protection for Geographical Indications to Other Products: Communication from the Czech Republic”, WT/GC/W/206, para.1.

⁴¹ “Agreement on TRIPS—Extension of the Additional Protection for Geographical Indications to Other Products”, WT/GC/W/206, para.14.

⁴² In the sense that protection is contingent upon the defendant’s conduct, in the form of a communicative act such as the misleading or confusing use of a sign. Central to the enquiry is the relevant consuming public’s perception of the defendant’s use of the sign. See L. Bently, “From Communication to Thing: Historical Aspects of the Conceptualisation of Trade Marks as Property” in G. Dinwoodie and M. Janis (eds), *Trade Mark Law and Theory: A Handbook of Contemporary Research* (Cheltenham: Edward Elgar, 2008), pp.3, 5.

⁴³ Council Regulation 510/2006 of March 20, 2006 on the Protection of Geographical Indications and Designations of Origin for Agricultural Products and Foodstuffs [2006] OJ L93 12.

types of infringement tests depart from the contingencies of consumer understanding and reify signs as the objects of “absolute” proprietary interests.⁴⁴ Another type of rule stipulates that once a GI is legally recognised, the sign is deemed to be incapable of generic use. It is insulated against this fate by legal fiat. Examples include art.6 of the Lisbon Agreement and art.13(2) of EC Regulation 510/2006. In a related development, the European Union announced that it wishes to reclaim terms which are presently considered generic in third countries, as part of its WTO negotiating strategy.⁴⁵ Both the enhanced scope of protection and insulation against generic use (or reclamation attempts) cannot be explained according to the logic of the informational efficiency paradigm outlined in section 2. Due to this epistemic gap, commentators such as Broude⁴⁶ and Chesmond⁴⁷ have identified cultural heritage as a prospective candidate providing the basis for such special treatment, although Broude expresses doubts about its ability to deliver on this. We return to the critique later in this section.

The second and third contexts in which cultural heritage is associated with GI protection has more to do with GIs being a vector to deliver on extrinsically determined goals. The second of these is concerned with whether GIs can pragmatically protect cultural artefacts belonging to the category of TCEs. WIPO has identified the key features of TCEs in a set of Draft Articles as follows:

“Traditional cultural expressions are any form of expressions, tangible or intangible, or a combination thereof, which are indicative of traditional culture and knowledge and have been passed on from generation to generation...”⁴⁸

TCEs which are classed as intangible include stories, legends, symbols, dances, songs and rituals, while tangible ones encompass material expressions of art, handicrafts and architecture. With the specific categories of crafts and textiles in mind,⁴⁹ there are three inter-related reasons to consider the GI approach for recognising and protecting TCEs. First, contemporary IP regimes such as copyright or design have tended to classify such traditional products as unacceptable subject matter, based on “old” knowledge or creativity and therefore already in the public domain.⁵⁰ Given the general unavailability of content protection (e.g. the design of a wooden toy or a pattern for woven textiles), GIs can effectively signal the cultural heritage dimensions of such local products, since this form of connection to place concurrently satisfies the TRIPS definition in art.22.1.⁵¹ Secondly, GI regimes emphasise collective investment in processes, intergenerational knowledge transmission and historic associations with regions. The recognition of these features is also considered important in the context of TCE protection, making GIs a better fit with the needs of local communities.⁵² Thirdly, by emphasising the brand dimension and avoiding some of the difficult issues associated with protecting underlying techniques or creative content, GIs have emerged as one of the

⁴⁴ See Gangjee, *Relocating the Law of Geographical Indications* (2012), pp.166–177.

⁴⁵ The European Union was seeking to re-establish internationally protected GI status for these terms and the list included Roquefort cheese, Parma ham, Rioja wine and Feta cheese. European Commission, “WTO Talks: EU Steps up Bid for Better Protection for Regional Quality Products”, August 28, 2003, IP/03/1178. For representative critiques, see M. Handler “The EU’s Geographical Indications Agenda and its Potential Impact on Australia” (2004) 15 *Australian Intellectual Property Journal* 173.

⁴⁶ Broude, “Taking ‘Trade and Culture’ Seriously” (2005) 26 *University of Pennsylvania Journal of International Economic Law* 623, 647–650.

⁴⁷ R. Chesmond, “Protection or Privatisation of Culture? The Cultural Dimension of the International Intellectual Property Debate on Geographical Indications of Origin” (2007) 29 *E.I.P.R.* 379, 381.

⁴⁸ See draft art.2 (Option 2) in WIPO Secretariat, “The Protection of Traditional Cultural Expressions: Draft Articles”, April 27, 2012, WIPO/GRTKF/IC/22/4, Annex, p.4.

⁴⁹ These are the categories specifically mentioned in GI legislation as well registered in practice. See for example s.1(c) of WIPO Model Law for Developing Countries on Appellations of Origin and Indications of Source (Geneva 1975); art.212 of Decision 486 of the Cartagena Agreement by the Andean Community, September 14, 2000; International Trade Centre/WIPO, *Marketing Crafts and Visual Arts: The Role of Intellectual Property—A Practical Guide* (Geneva: 2003), pp.85–87.

⁵⁰ WIPO, “Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions”, May 2, 2003, WIPO/GRTKF/IC/5/3, p.4.

⁵¹ WIPO, “Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions”, 2003, WIPO/GRTKF/IC/5/3, pp.52–54.

⁵² D. Zografos, “Can Geographical Indications Be a Viable Alternative for the Protection of Traditional Cultural Expressions?” in F. Macmillan and K. Bowrey (eds), *New Directions in Copyright Law* (Cheltenham: Edward Elgar, 2006), Vol. 3, pp.37, 39.

“more free trade-oriented methods of stimulating and protecting localized art and cultural expression by means of the intellectual property system ... [where GIs help] to create a differentiated market for cultural expressions with localized characteristics”.⁵³

Even this synopsis suggests that GI protection will be appropriate only for certain TCEs. GIs are thus only one of the options on the table in TCE discussions. They are essentially a guest at someone else’s party.

Similarly, in the third context of use where GIs are associated with cultural heritage, scholars such as Yu and Kono have recognised their potential for furthering the broader goals of cultural heritage recognition.⁵⁴ Cultural heritage is valued for its ability to advance cultural diversity⁵⁵ as well as being a prerequisite for notions of development based on the freedom to participate in the cultural life of a community,⁵⁶ or development enabled by ensuring sustainable livelihoods.⁵⁷ Article 2(1) of the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage⁵⁸ adopts a broad definition, emphasising intergenerationally transmitted practices, representations, expressions, knowledge and skills that communities themselves recognise as part of their cultural heritage. This intangible heritage is constantly recreated in response to the community’s

“environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity.”

Several aspects of the definition correspond to the collective processes by which GIs are created, as well reasons why they are valued by local or national communities. The Convention itself emerged as a counterpoint to a prevailing Western (some would argue Western European) notion of the “shared heritage of humanity” with an emphasis on the universal value of heritage, as well as the dominance of Western monuments on the World Heritage List. By contrast, this instrument is designed to recognise living heritage and create the space for non-Western manifestations and practices.⁵⁹ It values dynamic and evolving processes, rather than adopting a static or preservationist perspective. As we have seen above, the practices recognised in GI product specifications may have a cultural dimension, sustaining certain skills or professions, acting as the focus for festivals and fairs celebrating regional identities or helping sustain traditional landscapes. Finally, GIs are signs operating very much within a market context. As Radin and Sunder observe

“Controlling culture—the arena through which we represent ourselves—is essential for attaining power. For better or worse, markets are a primary means of distributing and debating cultural representations. Thus, cultural control requires some market control.”⁶⁰

GI protection is one way of achieving such representational control in the marketplace, making a living heritage viable in the process.

Each of these three strands rests on certain idealised notions about culture as well as GIs, and these claims are open to challenges. However, the critical literature on the intersection between GIs and cultural

⁵³ A. Kamperman Sanders, “Incentives for Protection of Cultural Expression: Art, Trade and Geographical Indications” (2010) 13 *Journal of World Intellectual Property* 81, 82.

⁵⁴ Peter K. Yu, “Cultural Relics, Intellectual Property, and Intangible Heritage” (2008) 81 *Temple Law Review* 433, 486; T. Kono, “Geographical Indication and Intangible Cultural Heritage” in B. Ubertazzi and E. M. Espada (eds), *Le Indicazioni di Qualità degli Alimenti* (Milan: Giuffrè Editore, 2009), p.289.

⁵⁵ J. Blake “On Defining the Cultural Heritage” (2000) 49 *International and Comparative Law Quarterly* 61.

⁵⁶ M. Sunder, “Intellectual Property and Development as Freedom” in N. W. Netanel, *The Development Agenda: Global Intellectual Property and Developing Countries* (Oxford: Oxford University Press, 2009), p.453.

⁵⁷ N. Aylwin and R. Coombe “Marks Indicating Conditions of Origin in Rights-Based Sustainable Development” in P. Zumbansen and R. Buchanan (eds), *Human Rights, Development and Restorative Justice: An Osgoode Reader* (Oxford: Hart Publishing, 2012); Toshiyuki Kono (ed.), *Intangible Cultural Heritage and Intellectual Property: Communities, Cultural Diversity and Sustainable Development* (Antwerp: Intersentia, 2009).

⁵⁸ UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage 2003.

⁵⁹ See generally L. Smith and N. Akagawa (eds), *Intangible Heritage (Key Issues in Cultural Heritage)* (London: Routledge, 2008).

⁶⁰ M.J. Radin and M. Sunder, “Introduction: The Subject and Object of Commodification” in M. Ertman and J. Williams (eds) *Rethinking Commodification* (New York: NYU Press, 2005), p.8.

heritage approaches it from a very specific “trade and culture” perspective. Voon concludes that the culture argument adds little to the basis for GI protection and “the cultural justification for GI protection is largely subsumed within the broader purposes of preventing unfair competition and consumer confusion”.⁶¹ She underlines the danger that the cultural heritage argument will collapse into a protectionist one, legitimating the protection of local industry. While this concern is not unreasonable, it is also an overgeneralisation. First, this conclusion underplays the relevance of the heritage rationale for extending art.23 levels of protection to all suitably qualified products. Regardless of whether one agrees with it, it has independent epistemic significance. Secondly, characterising sui generis GI protection as predominantly protectionist is also ahistorical, since it marginalises the regulatory dimensions of the product specification, where not just the symbolic value of the sign (does it signal a heritage dimension?) but the identification of specific practices relevant to local communities (how is community identity sustained via production techniques at the local level?) is important. Implicit in Voon’s argument is the assumption that GI products should be treated like any other commodities in a trade context, whereas the recognition of provenance, process and labour, in an attempt to defetishize the commodity, is precisely what sets this category apart.⁶² Parmesan mass produced by Kraft should not be equated with Parmigiano Reggiano. Here, *two registers of difference* are relevant: how these signs are perceived by consumers (the domain of trade mark law) and the conditions of origin for these products (prioritised by sui generis GI systems). Since Voon endorses Broude’s conclusions, his critique is also worth addressing.

In an insightful and well developed argument, Broude essentially dismisses the usefulness of the cultural heritage preservation rationale in furthering GI protection goals.⁶³ He begins by acknowledging the cultural dimensions to GIs where these signs and the products they represent may be implicated in cultures of production, consumption or identity, but then he argues that “local traditions and cultures of production that benefit from GI protection ... change when markets cause them to, and remain constant when markets cause them to”.⁶⁴ GIs are therefore ineffective

“as legal agents, [which can] prevent the market influences on local culture that lead to degrees of cultural transformation and international cultural homogenization”.

However by suggesting that GIs cannot stem the tides of change, Broude is setting up a straw man and ascribing a preservationist notion of cultural heritage to proponents of GI protection. The history of institutional developments in this area suggests that sui generis appellation regimes were designed to recognise widely adopted “best practices” suited to local ecological conditions and with an eye to maintaining product quality.⁶⁵ Since places are porous, what constitutes “best practices” has inevitably changed over time. Active participation within national and international markets has sustained many regional specialties for centuries and these products have often been modified based on fluctuating tastes and preferences.⁶⁶ For that reason, attempting to draw binary distinctions between tradition and innovation is unhelpful. Here there are lessons to be learned from the manner in which ‘tradition’ has been reconceived as non-static in traditional knowledge protection debates.⁶⁷ Furthermore, Broude draws inductively on

⁶¹ Voon, “Geographical Indications, Culture and the WTO” in Ubertazzi and Espada (eds), *Le indicazioni di qualità degli alimenti* (2009), pp.300, 311.

⁶² Gangjee, *Relocating the Law of Geographical Indications* (2012), pp.90–92.

⁶³ Broude, “Taking ‘Trade and Culture’ Seriously” (2005) 26 *University of Pennsylvania Journal of International Economic Law* 623.

⁶⁴ Broude, “Taking ‘Trade and Culture’ Seriously” (2005) 26 *University of Pennsylvania Journal of International Economic Law* 623, 663.

⁶⁵ This argument is substantiated by tracing the transition from the more rudimentary French *Appellation d’Origine* regime to the *Appellation d’Origine Controlée*, its subsequent impact on the Lisbon Agreement and finally its impact upon the TRIPS GI provisions in Gangjee, *Relocating the Law of Geographical Indications* (2012), Chs 2–4.

⁶⁶ For the influential role of consumers, see D. Hancock, “Commerce and Conversation in the Eighteenth-Century Atlantic: The Invention of Madeira Wine” (1998) 29 *Journal of Interdisciplinary History* 197; Rangnekar *Geographical Indications and Localisation* (2009), pp.27–28.

⁶⁷ See Draft art.1 in WIPO, “The Protection of Traditional Knowledge: Draft Articles”, January 18, 2012, WIPO/GTRKF/IC/21/4; WIPO, “Elements of a Sui Generis System for the Protection of Traditional Knowledge”, September 30, 2002, WIPO/GTRKF/IC/4/8, para.27. (‘TK is “traditional” because it is created in a manner that reflects the traditions of the communities. “Traditional”, therefore, does not necessarily relate to the nature of the knowledge but to the way in which the knowledge is created, preserved and disseminated’).

individual case studies where socio-economic transformations have modified either production or consumption practices, but he does not link this to structural or systemic features of GI regimes which suggest that change is incompatible with GI protection. Finally, both Voon and Broude focus on the New World versus Old World axis and largely ignore the interests of developing countries in non-European contexts. Therefore while there is considerable merit in specific criticisms of theirs, the overarching arguments are ultimately unconvincing. This is not to suggest that a cultural heritage rationale is unproblematic, as the following two illustrations suggest. The version of a traditional cultural practice which is eventually included in a product specification (or edited out) depends on local power relations and hierarchies. The internal suppression of dissent and pluralism is a genuine concern.⁶⁸ Perhaps more significantly, since not all GI producers will be able to identify a cultural heritage dimension for their products, the question remains as to whether this should become a formal pre-requisite for those seeking enhanced protection in the name of cultural heritage. Put bluntly, should we replace the category of wines and spirits in art.23 of TRIPS with any product which can demonstrate this heritage dimension? And what threshold requirement would be required? Despite these and other unresolved issues, it is still too early to rule out the cultural heritage rationale since it does have potential epistemic significance for the enhanced scope of GI protection.

5. Conclusion

While the cultural heritage argument is one that has potential, it also has familiar pitfalls—the infiltration of static or preservationist notions of culture; the invention of romanticised and insulated origin stories for products; an awkward interface with technological change; and the impact of local power relations as well as supply chain inequalities during the process of defining traditional practices or production boundaries. Yet the acknowledgment of the intergenerational investment in such regional products and the potential for their “decommodification” may make grappling with such issues worthwhile. This article has therefore retraced the emergence of suitable conditions within GI doctrine that made a heritage argument plausible (commencing with the move to include human factors alongside natural ones) and unpacked the different senses in which the heritage argument is deployed in the context of GI protection (as a rationale for enhanced protection under a distinct regime; to further TCE protection goals and to further the recognition of the intangible cultural heritage). Beyond this, an exploration of cultural heritage arguments alongside ones related to traditional knowledge will help to erode the binary oppositions between art or culture and science or technology that pervades much of IP law. It also helps to underline the unique status of GIs as one of the few examples of a group or collective IP right, which is better suited to certain types of claims. Finally, it signals that, in the case of GIs, the shift from the authorship ascribed to nature to human or cultural influences may now be irrevocable, and this has important consequences for justifying the existence of a distinct *sui generis* regime of GI protection. But that is a story for another day.

⁶⁸ M. Sunder, “Intellectual Property and Identity Politics: Playing with Fire” (2000) 4 *Journal of Gender, Race and Justice* 69; A. Tregear, F. Arfinib, G. Bellettic and A. Marescottic, “Regional Foods and Rural Development: The Role of Product Qualification” (2007) 23 *Journal of Rural Studies* 12.

Chinese Culture and Intellectual Property: Let's Realise We Have Been Misguided

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☞ China; Culture; Intellectual property; Legal history

Intellectual property had had vivid life forms in China's own past, but a single scream does not take the audience into an epiphany. Almost every conversation about China's intellectual property issues covers, implies or reinforces an unverified but self-satisfactory belief that Chinese culture does not appreciate creativity and rewarding knowledge creators. This impression, as we all know, originated from Harvard law professor William Alford whose work has influenced, or misled, "a whole generation" in the understanding of China's history of intellectual property.¹

This article does not intend to repeat the scenes of China's intellectual property practice in history. Much has been done by the present author's earlier work through interdisciplinary and micro-historical approaches.² For most Western readers of intellectual property, China is not their field and China's culture and history can be difficult to contemplate. I thus feel necessary to provide a more macro-analytical, rather than micro-historical, perspective that can be better understood by the Western audience. The focus of this article is how to understand China's intellectual property history from methodological, cultural, institutional and economic perspectives.

Methodological

A fundamental hurdle to proper understanding of Chinese culture and history is perception. In the field of law, for example, conventional views portraying a Confucian-Legalist coalition in despising the position of law, thanks to contributions of landmark scholars like John Fairbank, have deeply influenced many generations' understanding of Chinese law and order in both the West and China.³ Self-effacement, submission, *patria potestas* and law for punishment, among many other jargons, are typological perceptions

¹ William P. Alford, *To Steal a Book Is an Elegant Offense: Intellectual Property Law in Chinese Civilization* (Stanford: Stanford University Press, 1995); Peter K. Yu, "Intellectual Property and Asian Values" (2012) 16 Marq. Intell. Prop. L. Rev. 341, stating that Professor Alford's provocative book has inspired a whole generation of intellectual property scholars studying developments in East Asia.

² Ken Shao, "Alien to Copyright?: A Reconsideration of the Chinese Historical Episodes of Copyright" [2005] I.P.Q. 400; K. Shao, "Look at My Sign!—Trademarks in China from Antiquity to the Early Modern Times" (2005) 8 J. Pat. & Trademark Off. Soc'y 654; Ken Shao, "Monopoly or Reward?—The Origin of Copyright and Authorship in England, France and China and a New Criticism of Intellectual Property" (2011) 41 Hong Kong L.J. 731; Ken Shao, "The Global Debates on Intellectual Property: What If China Is Not a Born Pirate?" [2010] I.P.Q. 341; Ken Shao, "The Promotion of Learning in Chinese History: To Discover the Lost Soul of Modern Copyright" (2010) 24 Colum. J. Asian L. 63.

³ For a typical narrative, see John K. Fairbank, *East Asia: The Great Tradition* (Boston: Houghton Mifflin, 1960), p.84.

that have no firm roots in micro-historicity.⁴ There have been many new findings in the last few decades, but psychological hormones continue to force us to embrace stereotypes.⁵

The same happens to our perception of China's history of intellectual property. Despite new evidence, many love the old versions. When Alford took a romantic perspective of authorship to claim that Europe in the 17th and 18th centuries began to view intellectual property as a property interest that "could be defended against the state",⁶ he automatically misguided readers to disqualifying China. Apparently, for most Westerners, the notion of using *rights* to confront the state is purely a European invention. If we follow this Weberian or Ungerian reasoning process, all new findings become unimportant. People will ask: how possibly can we define intellectual property rights in non-European cultures?⁷

Hence, listing several copyright cases of 11th-century China is not a study of Chinese intellectual property history. It cannot attract wary Western scholars. There is a real necessity, at micro-historical and interdisciplinary levels, to examine the cultural, economic, technological and institutional backgrounds under which China's intellectual property practice took place. For instance, without examining China's tradition in appreciating knowledge, creativity and authorship, it is impossible to understand why and how the Chinese initiated, justified and implemented their practice of copyright.

Western intellectual property scholars and practitioners are not experts of Chinese history and culture. Nor should we expect them to be. How appropriate, for example, is it to demand an American copyright professor to spend time on digging out the specific understanding of creativity and personalities reflected in *Wenxin diaolong*, a sixth-century landmark monograph in Chinese literary tradition?⁸ Most American students in China Studies will never know this book. They should probably know Su Dongpo (1037–1101), one of the most popular poets in Chinese history, just as we all know there is a Great Wall somewhere in Beijing. Micro-level details of Chinese history and culture, such as those analysed in my work, can be a feast for the eyes but daunting to digest.

Inevitably, intellectual property researchers have had to rely on long-standing arguments (or perceptions) of China, most of which are abstract, grand and beautifully woven. When they read such paragraphs as "the power of past and its consequences for possession of the fruits of intellectual endeavour" is overwhelming in Chinese history,⁹ they fall for them, especially if they at the same time bring up memories of a sweet-and-sour dish served in an oily and unimaginative China Town restaurant, panic DVD hawkers running into a Beijing alley, or breaking BBC news about social stability issues in Guangdong's urbanisation. The "China images" we possess intensify our perception that China's modernisation is driven not by its own culture but by globalisation.¹⁰ How possible, people ask themselves, that a rampant pirate like China has had its own history of intellectual property?

⁴ For instance, according to the leading Sinologist Thomas Metzger, submission is de facto against Confucianism. Thomas A. Metzger, *Escape from Predicament: Neo-Confucianism and China's Evolving Political Culture* (New York: Columbia University Press, 1977), p.46. As another leading Sinologist Mark Elvin has articulated, the sense of "self" firmly existed in Chinese elite tradition. Mark Elvin, "Between the Earth and Heaven: Conceptions of the Self in China" in Michael Carrithers, Steven Collins, and Steven Lucks (eds), *The Category of the Person* (Cambridge: Cambridge University Press, 1985), p.170.

⁵ As warned by an American expert of Chinese legal history twenty years ago. Karen Turner, Gao Hongjun and He Weifang (ed.), *American Scholars on Chinese Legal Tradition* (Beijing: Zhongguo zhengfa daxue, 1994), p.20.

⁶ Alford, *To Steal a Book Is an Elegant Offense* (1995), pp.18–19.

⁷ This logic is typically reflected in Max Weber's "either-or" mindset. Lin Duan, *Confucian Ethics and Legal Culture: Exploration from Sociology* (Beijing: Zhongguo zhengfa daxue, 2002), p.88. Roberto Unger proudly labels Europe as the *only* source of modern concepts of rule of law. This was criticized by William P. Alford, "The Inscrutable Occidental? Implications of Roberto Unger's Uses and Abuses of the Chinese Past" (1986) 64 *Tex. L. Rev.* 915, 937.

⁸ *Wenxin diaolong* argued that a good writer must be able to dislodge words from their hackneyed referents and create them anew by interweaving them into beautiful, unrivalled patterns. Cai Zongqi (ed.), *A Chinese Literary Mind: Culture, Creativity, and Rhetoric in Wenxin diaolong* (Stanford: Stanford University Press, 2001), pp.9–11.

⁹ Alford, *To Steal a Book Is an Elegant Offense* (1995), pp.19–29.

¹⁰ This is what I call an "image theory", which is a methodology I created for studying China. A similar methodology was developed in psychology but for analysing the role of images in decision making. See L.R. Beach, "Broadening the Definition of Decision Making: The Role of Prechoice Screening of Options" (1993) 120 *Psychological Bulletin* 338.

Unfortunately, any attempt to understand, interpret or narrate China's civilisation of its past through observing its present will fail, especially if our knowledge of China remains strikingly, yet understandably, scarce.¹¹ As a distinguished Sinologist Timothy Brook precisely stated:

“China *was* another place and time, a world and an era in which our assumptions, whether Chinese or Western, do not obviously apply.”¹²

This reminds me of Jean Nicolet, a French *coureur des bois* who set out from Québec in the summer of 1634 to Lake Michigan, over which, he was sure, lay China.¹³ Our fragmentary and limited understanding of China in general and China's intellectual property history in particular are just like this. Linking China's compliance issues under the Berne Convention to Confucianism and claiming China did not have copyright law before 1990 are just two typical examples that are “lost in translation”.¹⁴

There are other methodological problems. Discussions of many aspects of intellectual property in non-Western countries can easily be disturbed by the orthodox terminology of intellectual property of the *modern* (or early modern) West. But a narrow focus on fossilised definition of intellectual property suffers an archaeological difficulty: which period of the Western history are we talking about? Intellectual property in Western Europe used to be defined as a privilege and is now called a private right by the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs). The early model of English patent law subjected imported technology to patent protection, and this behaviour is now called piracy. China did not put limits on the term of intellectual property rights, whilst it had no counterpart of a European-style guild monopoly.¹⁵ When I examined China's history of technology innovation and transfer, I cannot find what we call patent. Should we simply rule this out in the study of China's intellectual property history?

The only definition of intellectual property suitable for the study of pre-modern intellectual property history is similar to the economic theory of intellectual property: knowledge by its nature is intangible and thus non-rivalrous, resulting in certain (and changing) needs of using exclusivity (or other forms) to claim economic and moral rewards.¹⁶ These forms of rewards or rights do not have to be normalised by such written laws as we now have, but need at least to be recognised by regulations, decrees, case law or customs. Such a flexible Interpretivist approach is necessary and well-justified.¹⁷ What we can see from China's history, through an interdisciplinary and micro-historical lens, is the inevitable birth of intellectual property in response to the commercialisation of non-rivalrous knowledge.

Cultural

Tellers of Chinese piracy stories dominate the discourse on China's intellectual property issues.¹⁸ Many of them enjoy adding cultural condiments to their talks. Often they would start from a quick sketch of the Confucian philosophy of *li*, which is widely translated into propriety, the five relationships, hierarchy, *guanxi* (personalised networks) and so on.¹⁹ Then they may move to note the inherent incompatibilities

¹¹ This scanty, or as I call it—the scanty of “true China knowledge”—is a universal problem in China-West political and economic discourses. The complexity of Chinese outbound investment into Australia's resource industries is a typical example.

¹² Timothy Brook, *The Confusions of Pleasure: Commerce and Culture in Ming China* (Berkeley: University of California Press, 1998), p.11.

¹³ Brook, *The Confusions of Pleasure* (1998), pp.xv-xvi.

¹⁴ For a typical example of “lost in translation”, see Susan Tiefenbrun, “A Hermeneutic Methodology and How Pirates Read and Misread the Berne Convention” (1999) 17 *Wis. Int'l L.J.* 22.

¹⁵ For a unique comparative study, see Shao, “Monopoly or Reward?—The Origin of Copyright and Authorship in England, France and China and a New Criticism of Intellectual Property” (2011) 41 *Hong Kong L.J.* 731.

¹⁶ For a detailed analysis of the economic theory of intellectual property, see Adam D. Moore, “Intellectual Property, Innovation, and Social Progress: The Case against Incentive based Arguments” (2003) 26 *Hamline L. Rev.* 601, 611–613.

¹⁷ Interpretive sociology is used in many legal areas. In the history of contract law, for instance, Alfred Simpson looked for links, not disconnections, between the past and the present. Alfred William Brian Simpson, *A History of the Common Law of Contract* (Oxford: Clarendon Press, 1975), pp.5–6.

¹⁸ For a recent discussion on China's innovation economy from a holistic perspective, see Ken Shao, “Patent Law, National Strategies and Policy Incentives: China's Road to a Leading Innovator” (2011) 14 *Int'l Trade & Bus. L. Rev.* 85.

¹⁹ For a typical example, see Glenn R. Butterson, “Pirates, Dragons and U.S. Intellectual Property Rights in China: Problems and Prospects of Chinese Enforcement” (1996) 38 *Ariz. L. Rev.* 1107.

between the “Chinese esthetic preference for imitation” and the concept of intellectual property, to which I would add, the *modern West’s* concept of intellectual property.²⁰ These are completely cultural chimeras made up of grotesque parts. But once again, we shall never blame these writers who are surrounded by so much flawed information.

Is there such a thing as the Chinese esthetic preference for imitation? Is the “power of past” described by Alford an obstacle to creativity? Plausible talks about *li* or *guanxi* never lead us to an answer. We should have not even started from these irrelevant and largely misconstrued concepts.

Many leading Chinese philosophers unanimously agree that a fundamental and possibly distinctive characteristic of Chinese anthropocosmic ontology is viewing the universe as an endless, positive and creative process.²¹ Confucian transcendental metaphysics requires human beings to seek guidance from the universe.²² It however does not mean obedience. Human beings must not be satisfied with being simply the creatures of the universe, but should rather actively participate in that creative process.²³ The meanings of human life can only be actualised by continuous creativity.²⁴ Otherwise, as Wang Fuzhi (1619–1692), one of the landmark Chinese philosophers, put it, what are the differences between animals, which do not create, and human beings?²⁵

This fundamental nature of Confucian ontology is something that a Weberian mindset can never come across. The Western impression of the so-called Chinese culture, including the blended impression of relationships, hierarchies or obedience, all come from window shopping of the Chinese tradition at its *low end*, not its *high end*.²⁶ Joseph Needham has suggested that it is ridiculous to probe Chinese science and technology by relying on de Groot, a folklore expert of Amoy, as we cannot expect the British folklore expert Cecil Sharp to be the sources of British intellectuals’ cosmological views.²⁷ But we do this to China. We tend to look at panic DVD hawkers darting into a Beijing alley and then conclude that the Chinese do not understand creativity. Unfortunately, China, after suffering many cultural catastrophes, has *few* high-end windows left for foreign (and domestic) observation.

The past did play a key role in Chinese rhetoric, but the legitimacy of the past is not simply a revivalist process or a fixed code.²⁸ As Tu Wei-ming and Wm. Theodore de Bary have suggested, individuals can draw inspiration from the past and discover *new* meanings by their own experience and consciousness through continuous reconstitution.²⁹ This is exactly what had guided Chinese elite scholars, inventors, officials, poets and artists for centuries. Expressions of the understanding, imperative and methods of creativity are voluminous in China’s high-end texts.³⁰ Information like this normally does not exist in the studies of Chinese legal history. It sits in other disciplines, making it less accessible by legal scholars who have little training in Chinese culture.

Overall, renowned Chinese intellectuals in history were keen to achieve unparalleled creativity. Readers should not immediately associate this argument with “collaborative authorship”.³¹ Raymond Williams, an

²⁰ For a typical example, see Tiefenbrun, “A Hermeneutic Methodology and How Pirates Read and Misread the Berne Convention” (1999) 17 *Wis. Int’l L.J.* 22.

²¹ Liang Shuming, “On Life and Upward Creativity” in Zheng Dahua and Ren Jing (eds), *Selected Essays of Liang Shu-ming’s Study of Confucianism* (Beijing: Zhongguo guangbo dianshi, 1995), p.150.

²² Fang Dongmei, “Universe and Individual in Chinese Metaphysics” in Liu Xiaofeng (ed.), *The Characteristics of Chinese Culture* (Beijing: Sanlian shudian, 1990), p.1.

²³ Cheng Zhongying, “An Analysis of the Scope of Creativity—On the Similarities and Differences between Whitehead and the Song and Ming Confucianism” in *The Modernization and Globalization of Chinese Culture* (Beijing: Zhongguo heping, 1988), p.154.

²⁴ Xiong Shili, *A New Theory of Consciousness-Only* (Beijing: Zhonghua shuju, 1985), p.149.

²⁵ Wang Fuzhi, *Shi guang zhuan*, Vol.4.

²⁶ This crucial dichotomy was proposed by a landmark Neo-Confucian philosopher Xu Fuguan. Xu Fuguan, “On Tradition” in *Selected Essays of Xu Fu-guan* (Taipei: Taiwan xuesheng shuju, 1980), p.110.

²⁷ Joseph Needham, *History of Scientific Thoughts in Pre-modern China* (Nanchang: Jiangxi renmin, 1999), pp.358–359.

²⁸ H.G. Greel, *Confucius and the Chinese Way* (New York: Harper and Row, 1960), pp.172–174.

²⁹ Tu Wei-ming, “Understanding Tradition” in Yue Hua (ed.), *The Modernizations of Confucian Tradition* (Beijing: Zhongguo guangbo dianshi, 1992), pp.174–175; Wm. Theodore de Bary, *The Liberal Tradition in China* (New York: Columbia University Press, 1983), p.25.

³⁰ Shao, “Alien to Copyright?” [2005] *I.P.Q.* 400, 411.

³¹ This term comes from Lucy Montgomery and Brian Fitzgerald, “Copyright and the Creative Industries in China” (2006) 9 *Int’l J. Cultural Stud.* 409.

influential figure within the New Left, claimed that the notion of creativity did not exist in traditional European societies as the term “create” was mainly used in the “precise context of the original divine creation”.³² The phenomenon Williams has described, if he is correct, significantly differs from the Chinese anthropocosmic view of creativity, which engages an individual’s inner creative momentum. In turn, Chinese authorship is not necessarily a Foucaultian synonym of proprietorship.³³ Although authorship normally leads to ownership, in Chinese contexts it in the first place means originality—an author (or an inventor) as the creative, prior contributor.³⁴

The Chinese appreciation of creativity, together with some other pragmatist views towards inventions, had had fundamental impact on China’s achievements in literary creativity and technological advancement. Only by this can we understand why China had remained a leader in the world’s culture-knowledge economy with unrivalled export industries of silk and porcelain as two commonly known examples.³⁵ It was “designed in China” rather than “made in China” that made the Chinese economy competitive and prosperous in the global market.

The Chinese appreciation of creativity and authorship certainly catalysed intellectual property. Early copyright cases, for instance, were quick reactions to plagiarism and unauthorised printing. Renowned Chinese authors were often aggressive when defending their original works through judicial enforcements, warnings, advertisements or negotiations. An exemplary case was Zhu Xi (1130–1200), one of the three most successful Chinese philosophers after Confucius. He was very active in seeking copyright protection for his new books.³⁶ Caring so much about originality and authorship, Zhu was extremely against scribblers who deliberately allowed unauthorised free reprints of their third-raters.³⁷ Western intellectual property scholars do not have to know about Zhu Xi. Hardly have they. But shouldn’t we listen to what Chinese classic authors and philosophers thought of creativity? We do listen to Martin Luther and Charles Dickens when discussing Europe’s copyright history.³⁸

Institutional

A conventional impression of Chinese history is that an emperor, possibly decorated with lots of dragon patterns, could exercise absolute power over his subjects. It is important to note that laws, policies and government performance in China’s own tradition were governed by the way of the universe,³⁹ or what Turner and Alford called the Chinese natural law, a concept not heterogeneous to rule of law.⁴⁰ To achieve satisfactory governance, the government has mandatory duties to take care of its people and promote development. Its power needs to be limited and regulated by substantive and procedural law.⁴¹ In fact, the Confucian-bureaucratic system in imperial China was to a notable degree rational and intellectualistic.⁴²

³² Raymond Williams, *Keywords: A Vocabulary of Culture and Society* (London: Croom Helm, 1976), pp.82–83.

³³ Michael Foucault, “What Is an Author?” in Paul Rabinow (ed.), *The Foucault Reader* (New York: Pantheon Books, 1984), p.101.

³⁴ For a detailed analysis of the differences between viewing copyright and authorship as reward in Chinese history, see Shao, “Monopoly or Reward?—The Origin of Copyright and Authorship in England, France and China and a New Criticism of Intellectual Property” (2011) 41 Hong Kong L.J. 731.

³⁵ For an overview of China’s science and technology history, see Colin A. Ronan (ed.), *The Shorter Science and Civilisation in China: An Abridgement of Joseph Needham’s Original Text* (Cambridge: Cambridge University Press, 1995), Vol. 5.

³⁶ Shao, “Alien to Copyright?” [2005] I.P.Q. 400, 424.

³⁷ Zhu Xi, *Zhuzi wenji*, Vol.26 (“To Professor Yang”).

³⁸ Martin Luther lacked any concept of intellectual property. Martha Woodmansee, “The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the Author” (1984) 17 *Eighteenth-Century Studies* 425, 434. For Charles Dickens’s active role in defending his copyright in the United States, see James J. Barnes, *Authors, Publishers and Politicians: The Quest for an Anglo-American Copyright Agreement 1815–1854* (London: Routledge and Kegan Paul, 1974), p.70.

³⁹ Qian Mu, *Examining China’s History* (Taiwan: Dongda Tushu, 1989), p.107.

⁴⁰ Karen Turner, “Rule of Law Ideals in Early China?” (1992) 6 *J. Chinese L.* 1; William P. Alford, “The Inscrutable Occidental? Implications of Roberto Unger’s Uses and Abuses of the Chinese Past” (1986) 64 *Tex. L. Rev.* 915, 937.

⁴¹ For the practice of transparent and standard legal norms in ancient China, see Turner, “Rule of Law Ideals in Early China?” (1992) 6 *J. Chinese Law* 1, 10–11.

⁴² Yu Yingshi, “Anti-intellectualism in Chinese Traditional Politics” in *On the Chinese Intellectuals* (Zhengzhou: Henan renmin, 1997), p.88.

Conventional views believe that Chinese laws focused on punishment, not rights, and thus served as a tool for control, suppression and exploitation. This is largely influenced by the Maoist distortion of history and is also a result of narrow focuses on the easily accessible criminal law case archives of the late imperial China, which was ruled by Manchu from 1644 to 1912. The criminal law under Manchu was not extremely irrational, though it did differ from some of its far-advanced predecessors.⁴³ The abundance of these cases had for decades pushed researchers into the closets of studying bizarre crimes and ambiguous legal issues, which were not part of Chinese people's daily life that was much regulated by civil laws.⁴⁴ Even if we only focus on criminal law, pointing out the ridiculous aspects of late imperial criminal law practice can be meaningless because in the same period the English law was arguably more brutal: the stealing of sums exceeding twelve pence was punishable in England by death.⁴⁵

In Chinese history, civil law was an inevitable response to the expansion of many economic relationships such as property.⁴⁶ As we will see in the next section, this was precisely the case in intellectual property. There are hundreds of thousands of civil law case archives of Ming and Manchu dynasties that are buried in museums in regions around today's Shanghai, which are collectively called Jiangnan—the centre of China for the last millennium. Some of these cases were compiled into books, thanks to archaeologists' restorative efforts after the disastrous Cultural Revolution.⁴⁷ They provide some astonishing time windows to experience the maturely developed legal practice in imperial China.

Since then there have been other great discoveries. Contract law, for instance, was well practiced in early China and was firmly rooted in a fundamental Confucian principle—reciprocal relationship.⁴⁸ Philip Huang examined some hundreds of late 19th-century Chinese civil cases discovered in several very remote counties. He concluded that courts in those remote regions routinely protected claims of common litigants to property, contract, inheritance, old-age support and the like.⁴⁹ Huang's findings are identical to what were practiced by courts in the most advanced Chinese region of Jiangnan, indicating a degree of consistency in legal practice despite huge economic and cultural disparities among Chinese regions.

Political control was identified by Alford as a major obstacle to the development of rights and intellectual property in Chinese history.⁵⁰ Again, political control was not part of Chinese people's daily life. Nor did it play any significant role in judicial judgment in intellectual property cases we have so far found. It was investment, creativity or trademark distinctiveness that was used as justifications in those judgments. Seeking judicial protection for intellectual property was a private theme, not different from property, contract or inheritance. Trademark, for instance, was widely regarded as a form of private property.⁵¹ As compared with its European counterpart, political involvement in China such as censorship was often mild, rational, corrective and non-monopolistic.⁵² They did exist, so did intellectual property.⁵³

Economic

With methodological, cultural and institutional aspects being covered, the economic factors, which were entirely disregarded in Alford's argument, are now much easier to understand. Economic progresses such

⁴³ For criminal justice in Manchu China, see Derk Bodde and Clarence Morris, *Law in Imperial China* (Cambridge, Mass.: Harvard University Press, 1973).

⁴⁴ Mark A. Allee, *Law and Local Society in Late Imperial China: Northern Taiwan in the Nineteenth Century* (Stanford: Stanford University Press, 1994), pp.3–4, 7.

⁴⁵ Victor Purcell, *The Boxer Uprising: A Background Study* (Cambridge: Cambridge University Press, 1963), p.64.

⁴⁶ Zhang Jinfan, "On Civil Law Procedures in Ancient China" (1996) 3 L. & Soc. Dev. 54.

⁴⁷ Shanghai Museum (ed.), *Selected Collection of the Epigraphs in Shanghai* (Shanghai: Shanghai renmin, 1980); Suzhou History Museum et al. (ed.), *Collection of Suzhou's Industrial and Commercial Epigraphs in the Ming and Qing Dynasty* (Nanjing: Jiangsu renmin, 1981).

⁴⁸ For an excellent study, see Hugh T. Scogin, "Between Heaven and Man: Contract and the State in Han Dynasty China" (1990) 62 S. Cal. L. Rev. 1325.

⁴⁹ Philip C.C. Huang, *Civil Justice in China: Representation and Practice in the Qing* (Stanford: Stanford University Press, 1996), pp.224, 235–236.

⁵⁰ Alford, *To Steal a Book Is an Elegant Offense*, pp.16–17.

⁵¹ Shao, "Look at My Sign!—Trademarks in China from Antiquity to the Early Modern Times" (2005) 8 J. Pat. & Trademark Off. Soc'y 654, 679.

⁵² For a detailed analysis, see Ken Shao, "The Promotion of Learning in Chinese History" (2010) 24 Colum. J. Asian L. 63.

⁵³ For a detailed analysis, see Shao, "Alien to Copyright?" [2005] I.P.Q. 400, 404–411.

as the development of a sizable market, quality goods, commercial publishing and technological advancements that resulted in those economic progresses all lead to inevitable impact on how non-rivalrous knowledge products are commercialised, distributed and regulated. This was precisely the case in Chinese history.

When the invention of printing technology stimulated commercial publishing industry in 11th-century China, profit was growing and soon sought by authors, publishers and pirates. The industrial scale was impressive and far larger than its 17th-century English counterparts.⁵⁴ Market size itself cannot regulate profit-driven, unauthorised texts. Copyright is therefore no more than a natural reaction, as taken by the philosopher Zhu Xi, to the expanding book market. Competition was quite fierce.⁵⁵ To attract readers, honest publishers had to work with popular writers, often with expensive bills, and put “new editions” as a major selling point. This furthered their sentiment against piracy. “We gentlemen,” as they stated, “who are capable of either writing or investing in publishing, only engage in elegant and creative activities and firmly reject plagiarism and piracies.”⁵⁶ Do we feel distant to this classic Chinese “high-end” way of thinking?

China in its own niches had long displayed some characteristics of modernity, such as free market.⁵⁷ China used to be a vast and united market with regionally specialised labours, nationwide distribution channels, creative and cutting-edge designs, quality goods and competitive technologies to meet and nourish changing market demand.⁵⁸ Supported by a large literate population, book market in China was clearly nationwide with established distribution channels and quality publishing centres flourishing in different regions.⁵⁹ The combined force of the large market necessitated a common style of copyright statement printed in many Chinese books: pirates are bluntly warned of prosecution even if they are thousands of miles away.⁶⁰

In a large market, geographical distances and huge product varieties often make it impossible for consumers to tell quality from appearance. Basic goods such as rice, pork and ploughs probably need no trademarks, but sophisticated goods do. Living in a country famous for “designed in China”, consumers increasingly had to rely on the distinctive function of trademarks on goods distributed from other regions.⁶¹ Famous Chinese trademarks, some of which remain prestigious today, were sought after because of their reliability. Trademark regulations were vital to economic order and especially to large-scale industries such as the Jiangnan silk industry, which fundamentally relied on trademarks. The complexity was clearly well understood by judicial judgments, which are not much different from our modern understandings.⁶²

Profit also influenced China’s technology market. The family-based secrecy model was a good way of making profit. Its level of openness might have been less when compared with that of patent, but family-based apprenticeship was essential to pre-industrial handicrafts, whose improvements were often intergenerational.⁶³ The nature of gradual, intergenerational technology changes might also have made imitation difficult and the secrecy model sustainable. If secrecy had to be released to outsiders, trademarks

⁵⁴ Shao, “Alien to Copyright?” [2005] I.P.Q. 400, 403–404.

⁵⁵ Chow Kai-wing, “Writing for Success: Printing, Examinations, and Intellectual Change in Late Ming China” (1996) 17 *Late Imperial China* 129, 130.

⁵⁶ Shao, “Alien to Copyright?” [2005] I.P.Q. 400, 423.

⁵⁷ Gilbert Rozman, *The Modernization of China* (New York: Free Press, 1982), pp.181–182.

⁵⁸ For the situation in medieval Song China, see Shiba Yoshinobu, *Commerce and Society in Sung China*, translated by Mark Elvin (Ann Arbor: University of Michigan Center for Chinese Studies, 1970), p.45.

⁵⁹ Shao, “The Promotion of Learning in Chinese History” (2010) 24 *Colum. J. Asian L.* 63, 80–81.

⁶⁰ For some of these records, see Zhou Lin and LiMing-shan, *Historical Materials for the Studies of China’s Copyright History* (Beijing: Zhongguo fangzheng, 1999), p.13.

⁶¹ Craig Clunas, *Superfluous Things: Materials Culture and Social Status in Early Modern China* (Cambridge: Polity Press 1991), pp.61–63; Brook, *The Confusions of Pleasure* (1998), pp.226–227.

⁶² Shao, “Look at My Sign!—Trademarks in China from Antiquity to the Early Modern Times” (2005) 8 *J. Pat. & Trademark Off. Soc’y* 654, 678–679.

⁶³ For a good example of how this worked, see Kenneth Pomeranz, *The Great Divergence: China, Europe, and the Making of the Modern World Economy* (Princeton: Princeton University Press, 2000), p.66.

were seen as a feasible alternative.⁶⁴ A notable characteristic of China's pre-industrial technology policies is that the family-based secrecy model coexisted with a much larger mechanism. The government, by the imperative of the universe, was active in promoting innovation and technology dissemination in such fields as medicine, agriculture and textile across China and often to Korea and Japan. The purpose was to improve people's living conditions. This mechanism was practically more effective than the pre-industrial European patent law and offset the potential risk of inaccessibility and disappearance of technologies kept in secrecy.⁶⁵

An economic perspective of intellectual property is probably more suitable for China than Europe in pre-industrial times. China did not have the necessary soil for institutionalised trade monopoly, which in Europe was a major player in often tongue-lashed copyright and trademark practices.⁶⁶ For instance, Chinese courts in the late imperial period were in general of the view that monopoly harms economy. As a judgment issued in 1834 reads: "[I]n every industry, the *first* thing to prohibit is monopoly ... [which] is extremely unjust and unfair."⁶⁷ Chinese guilds were normally established for the pursuit of diverse personal goals and the need for group support.⁶⁸ Existing evidence does not suggest any role of monopoly in copyright and trademark as well as in technology commercialisation in sizable industries. Intellectual property was treated as a normal private matter in China's culture-knowledge economy, in which market order and investment worked together with the appreciation of promotion of learning and respect to creative endeavours.

Conclusion

Misleading views on Chinese culture have a tremendously negative impact on our discourse in global intellectual property issues. Scholars criticizing the unbalanced global knowledge order traditionally have little access to positive inspirations that Chinese culture can really offer. On the other hand, intellectual property proponents are trapped by their gossips of Chinese culture, focusing little on developing mutually beneficial economic strategies in emerging economies.⁶⁹ A proper understanding of Chinese culture also helps to move away from the mindset of monopoly-born copyright and its long lasting effect.⁷⁰ Non-monopolistic practices of intellectual property, as China's history might have shown, are constructive to a more development-oriented approach that seeks balanced strengths among different players in global and local knowledge economy.⁷¹

For a century, economic rather than cultural factors have remained as a real maker of China-West disputes over intellectual property.⁷² These disputes, however, have been largely masked by an excessive quantity of cultural red herrings. It is time to realize that we have all been misled by the stereotypes of Chinese culture and intellectual property. Once the smog is gone, we will see many varied and refreshing sceneries.

⁶⁴ For an example, see Peng Zeyi, *Historical Materials of the Handicrafts Industry of Early Modern China* (Beijing: Sanlian shudian, 1957), p.67.

⁶⁵ Ken Shao, "Ingeniousness Excelling Nature: Inventors, Incentives and Technology Distribution Mechanism in Traditional China" (forthcoming).

⁶⁶ For a comparative analysis, see Shao, "The Promotion of Learning in Chinese History" (2010) 24 Colum. J. Asian L. 63, 65.

⁶⁷ Suzhou History Museum et al. (ed.), *Collection of Suzhou's Industrial and Commercial Epigraphs in the Ming and Qing Dynasty* (1981), p.81.

⁶⁸ Gary G. Hamilton, "Regional Associations and the Chinese Society: A Comparative Perspective" (1979) 21 Comp. Stud. Soc'y & Hist. 351.

⁶⁹ Both the proponents and opponents of intellectual property use Alford's version of Chinese intellectual property history to support their conflicting arguments. Shao, "The Global Debates on Intellectual Property" [2010] I.P.Q. 342, 343.

⁷⁰ China's history of appreciating originality and copyright suggests a more reward-oriented, rather than monopoly-oriented, version of copyright. Shao, "Monopoly or Reward?—The Origin of Copyright and Authorship in England, France and China and a New Criticism of Intellectual Property" (2011) 41 Hong Kong L.J. 731, 750.

⁷¹ For a detailed analysis, see Shao, "The Promotion of Learning in Chinese History" (2010) 24 Colum. J. Asian L. 63.

⁷² For a large amount of documentations on the copyright debates between China and other nations in the early 20th century, see Zhou and Li, *Historical Materials for the Studies of China's Copyright History* (1999), pp.133–259.

At the Frontiers of Law-Making: Copyright and the Protection of Culture in India

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© Copyright; Cultural property; India

Introduction

To say that copyright is cultural law should be stating the obvious. Yet copyright debates have moved so far away from the idea that copyright has a contribution to make to culture, that this proposition, old as the law itself, now has a startling quality. Copyright has become the law of technology, and of the entertainment industry. It has little to do with culture per se. Occasionally, copyright is discussed as the law that encourages the protection of “content creators”, prosaically known in the old days as authors and artists, but those occasions are relatively rare. Copyright also surfaces in discussions of Aboriginal cultures, and in this regard, it is often seen as a threat to traditional cultural expressions—a justified but potentially counterproductive way of characterising the relationship between copyright and traditional cultures. In fact, the surge of interest in Aboriginal culture over the past decade has been so intense that a focus on Aboriginal issues seems implicit whenever the expression “copyright and culture” is invoked. If anyone has taken up the mantle of looking, more generally, at copyright through a cultural lens, it would probably be the “free culture” movement. But Creative Commons advocates access to work without the need for royalties or other payments, and therefore offers no real answer to the larger question of how authors and artists are to continue to earn a living in the digital environment.¹

But copyright is cultural law. It is law that came into being in order to grant the creators of cultural works a basic right over their own creations. The study of copyright’s history shows that copyright originated for two purposes: to allow an author to retain the right to earn money from the sale of his or her own work, and to offer the work, and the author, a degree of protection from abuse.² The extension of copyright principles into new areas, such as functional works and technological works, and the expansion of rights of ownership through employment and other practices, is nearly always controversial. The law becomes distorted. Principles that were originally meant to protect individuals, livelihoods, works of art and intellect and the public interest come to serve other purposes. Bent to the point of breaking, perhaps

¹ My observations about the emphasis of Creative Commons on exemption from royalty payments provoked a tempest in a teapot of protest over the summer of 2012: see Jeremy Phillips, “Getting Paid is a Moral Right, Too! Why Creative Commons Gets it Wrong”, available at <http://the1709blog.blogspot.co.uk/2012/06/getting-paid-is-moral-right-too-why.html> [Accessed October 28, 2012]; Jeremy Phillips, ““Why Creative Commons Gets it Wrong”: A Rejoinder”, available at <http://the1709blog.blogspot.ca/2012/06/why-creative-commons-gets-it-wrong.html> [Accessed October 28, 2012]; and the comments from readers. Many objections to these posts point out that it is possible to sell a work alongside its free availability through Creative Commons, a model that is occasionally pursued but seems unlikely to replace traditional publishing.

² The Statute of Anne, (1710) 8 Anne c.19, the first modern copyright statute, is representative in this regard, stating: “Whereas Printers, Booksellers, and other Persons, have of late frequently taken the Liberty of Printing, Reprinting, and Publishing, or causing to be Printed, Reprinted, and Published Books, and other Writings, without the Consent of the Authors or Proprietors of such Books and Writings, to their very great Detriment, and too often to the Ruin of them and their Families: For Preventing therefore such Practices for the future, and for the Encouragement of Learned Men to Compose and Write useful Books . . .”. In *Moral Rights: Principles, Practice and New Technology*, I note: “The Statute clearly articulates three policy rationales: the importance of consent from the author or owner of a copyright before reprinting of the work can be lawful; the financial difficulty suffered by authors—and owners!—and their families, and the availability of legal action against unauthorized reprinting in order to correct it; and, finally, the provision of an incentive to ‘encourage’ the creation of ‘useful Books.’” Mira T. Sundara Rajan, *Moral Rights: Principles, Practice and New Technology* (Oxford: Oxford University Press, 2011), p.98.

copyright law as we know it has simply become obsolete. And as for the question of what will take its place, only Creative Commons, so far, has even attempted to provide an answer.

Is this the way it has to be? Hopefully not. Ideally, there is a world of ideas and concepts that will help us to maintain a rich cultural life by finding pathways for culture and society to relate to each other, whether it is through, or beyond, copyright law. But it seems clear that the discovery of new copyright concepts will depend on looking further afield.

This article offers the example of India, a country of rich culture and richer contradictions, which, over a half-century of experience with modern copyright law, has managed to attain some surprising achievements. India has consistently considered copyright as a means of implementing cultural policy, and, in doing so, it has explored specific ways of shaping copyright law to reflect cultural needs. These approaches to copyright are especially interesting in a country that is at once “underdeveloped”, in the sense that it is home to billions of the world’s poor, and a leader in high technology and, of course, entertainment, copyright’s key modern constituencies.

This article will briefly consider four case studies that illustrate India’s experiments with cultural policy through copyright law: copyright and the protection of cultural property in Amar Nath Sehgal’s case, the extension of the copyright term in Rabindranath Tagore’s poetry, the issue of maintaining the integrity of Mahatma Gandhi’s works and the public ownership of Subramania Bharati’s copyright. An interesting dynamic that runs through all four examples is the interplay of judicial decision-making and legislative policy development in a country where demands on the legal system make justice practically inaccessible to the majority of people.

Copyright and cultural property: Amar Nath Sehgal

Amar Nath Sehgal was a celebrated Indian sculptor who died in 2007.³ He had spent nearly three decades in the pursuit of an action against the Indian Government for the mistreatment of a mural that the Government had invited him to create for the decoration of a public building in Delhi. The Government had removed the mural in 1979, intending to place it in storage. During this process, the work was severely damaged. The Delhi High Court initially granted an injunction to the sculptor in 1992, finding that there was a sufficiently strong prima facie case to enjoin the Government from further mistreatment.⁴ This decision was subsequently upheld in the court’s final verdict of 2005.⁵

Sehgal’s claims were based on s.57 of the Indian Copyright Act, entitled “Author’s Special Rights”. Section 57 protected authors’ and artists’ moral rights of attribution and integrity as set out in art.6*bis* of the Berne Convention, though the Indian provisions were somewhat more expansive than the minimum international standards for protection outlined in Berne.⁶ The interim ruling of 1992 was straightforward enough, and, in a country where judicial delays can be exceptionally prolonged, held legal significance as a precedent.⁷ In its decision, the court simply assessed the damage to the sculpture as sufficiently serious to qualify, prima facie, as a violation of the artist’s moral right of integrity.⁸

³Vandana Kalra, “Renowned Painter, Sculptor Amarnath Sehgal Is No More”, *ExpressIndia*, December 29, 2007, available at <http://www.expressindia.com/latest-news/Renowned-painter-sculptor-Amarnath-Sehgal-is-no-more/255494/> [Accessed October 28, 2012].

⁴The injunction is discussed by the plaintiff’s counsel, Pravin Anand, in Pravin Anand, “The Concept of Moral Rights under Indian Copyright Law” (1993) 27 *Copyright World* 35, 36. The Delhi High Court took a similar approach in the recent case of Jatin Das, whose facts are almost identical to those of Sehgal: *Jatin Das v Union of India* CS (OS) No.936 of 2012 April 10, 2012.

⁵*Amar Nath Sehgal v Union of India* 2005 (30) PTC 253 (Delhi HC).

⁶Before 1994, there were key differences between the Indian provisions and the Berne Convention. Under art.6*bis* of Berne, an author must be able to show proof of damage to his “honour or reputation”, but the s.57 of the Indian Copyright Act has no such requirement. The Indian Act also did not specify a term of protection, while Berne suggests a minimum term of protection for moral rights “at least until the expiry of the economic rights”.

⁷This continues to be the case: see *Jatin Das* CS (OS) No.936 of 2012 April 10, 2012. In particular, Das applied the balance of convenience test, which weighs potential damage to the plaintiff against inconvenience to the defendant.

⁸In doing so, the court considered various details of the damage that occurred, including the fact that the sculpture had broken apart and some pieces had gone missing (including the place where the artist’s name had been indicated).

Following the ruling, the Indian Government legislated amendments to the moral rights provisions of the Indian Copyright Act, ostensibly to bring them more closely into line with the language of Berne. Importantly, the amendments included a new requirement that the plaintiff in a moral rights case would have to show proof of damage to his honour or reputation—a burden that Sehgal did not bear under the previous version of s.57.⁹

When the *Sehgal* case came before the Delhi High Court again, the court chose not to comment on the amendments. Instead, it took an entirely different approach to the complaint. It affirmed that Sehgal's work should be considered a "national treasure"¹⁰ of India and that, accordingly, special measures should be invoked for its protection. In particular, India was a signatory to international conventions on cultural property. The Indian provisions of moral rights should therefore be read in conjunction with India's international obligations, particularly those under the UNESCO and UNIDROIT Conventions on cultural property,¹¹ offering protection to works like Mr Sehgal's mural that would effectively transcend the mere words of s.57. Justice Pradeep Nandrajog comments:

"[The various declarations by the international community in the conventions noted above, lift the moral rights in works of Art if the[y] ... acquire the status of cultural heritage of a nation. India is a signatory to the conventions and it would be the obligation of the State to honour its declarations."¹²

This ruling offers a fascinating perspective on copyright and cultural policy. It bridges the fields of legal protection for intellectual property and cultural property, copyright law and international cultural heritage conventions, through the area of moral rights. Moral rights are a unique part of copyright law in a number of respects, being personally bound to the author, often inalienable even after the sale of a work of art (or other copyright work),¹³ and potentially offering protection without limitation in time for fundamental interests such as the attribution of authorship, the protection of the author's reputation and the preservation of the integrity of cultural works. *Sehgal* specifically deals with the protection of artworks, and its value as a precedent in relation to works of visual art and culture is indisputable. But the case could also be interpreted as having broad significance for cultural heritage in all its forms. The *Sehgal* Court uses a key phrase—"national treasure"—which opens up the possibility that principles analogous to the idea of interpreting moral rights in the light of overarching cultural principles—in this case, measures for the protection of cultural heritage described in the UNESCO and UNIDROIT Conventions and in the International Covenant on Economic, Social and Cultural Rights—could apply to other types of works. For example, linking moral rights with the International Covenant on Economic, Social and Cultural Rights considerably extends their scope beyond cultural property to culture at large¹⁴; and they could as well be linked to the Universal Declaration of Human Rights.¹⁵ In these combinations, moral rights could support the protection of national cultural treasures in the form of literature, music, folk culture or Aboriginal culture, an issue of special sensitivity in developing countries.

Finally, the apparent divergence between legislative movements and the approach of the Delhi High Court to moral rights is striking. This area of potential conflict represents the dynamics of Indian society at a fundamental level. Politics has its prestige, but politicians in India are generally viewed with a degree

⁹ The 1992 term extension did not apply retroactively (i.e. to works in which copyright had expired by December 31, 1991). Bharat B. Das, "Significance, History and Development of Copyright Law" (2005) 18 Cent. India L.Q. 332, 352.

¹⁰ *Sehgal* 2005 (30) PTC 253 at [37].

¹¹ The court cites the UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage 1972 and the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects 1995. Interestingly, in paragraphs 50–51, it also cites art.15 of the International Covenant on Economic, Social and Cultural Rights 1966.

¹² *Sehgal* 2005 (30) PTC 253 at [55].

¹³ In some jurisdictions, particularly those of common law origin, moral rights can be waived. Generally speaking, a waiver of moral rights must be explicit and made in writing. See Canadian Copyright Act s.14(2); Anand, "The Concept of Moral Rights under Indian Copyright Law" (1993) 27 *Copyright World* 35, supporting the availability of waiver under Indian law.

¹⁴ International Covenant on Economic, Social and Cultural Rights 1966, arts 15(1)(c) and (2).

¹⁵ Article 27(2) of the Universal Declaration of Human Rights, in particular, deals with rights of authorship.

of scepticism. Indians are exceptionally aware of the omnipresent reality of corruption. In contrast, Indian courts are widely seen as genuine repositories of justice. Judges have often been called upon to resolve difficult ethical problems that government cannot, or will not, confront. This attitude to judicial responsibility pervades Indian society and is apparent in issues far beyond the intellectual property arena. Judges have taken an interventionist stance to difficult questions surrounding religious equality and censorship.¹⁶

In the area of copyright law, Indian judges have often portrayed themselves as protectors of individual authors and artists against brute force and casual exploitation, whether it is at the hands of corporations or the government. In relation to moral rights, in particular, the role of caretakers of justice has been embraced by the Indian courts in a line of precedents stretching from 1987 to the present.¹⁷ Throughout this history, courts do not ever seem to have been questioned about their own competence to assess cultural matters—an implicit objection to entrusting cultural policy to the courts in Western countries.¹⁸

In India, government may be corrupt, but in Western countries, governments are subject to influence—particularly from corporate forces whose own interests are intimately connected with copyright policy. In this context, how can copyright reform, a legislative movement subject to lobbying, support cultural policy, whose goal must be to serve authors, artists and, of course, the public interest—the weaker parties in the cultural equation?

Mahatma Gandhi: A “National Treasure” of India?

In the *Sehgal* case, the Delhi High Court developed a principle for the protection of “cultural heritage of a nation” or “national treasure[s]” based on the moral rights of authors.¹⁹ The court specifically offered a novel approach to the judicial interpretation of moral rights as they are set out in s.57 of the Indian Copyright Act, essentially allowing the moral right of integrity to be invoked above and beyond the scope of the Act’s language in the light of international agreements on cultural heritage. The court imposes only one limitation on this approach to moral rights—that the work in question should have “attain[ed] the status of a modern national treasure”.²⁰ It does not set out the criteria that should be applied to this determination, and it is easy enough to envision future cases where this particular battle may be contested.

In *Sehgal*’s case, his status as an artist was apparently self-evident—supported, no doubt, by the fact that the work in question had been commissioned by the Indian Government, itself, to decorate what was, in effect, a national landmark, and was personally appreciated by then-Prime Minister Jawarhalal Nehru.²¹ In cases like this, the question is not whether the artist or his work will qualify for the special interpretive rules developed by the Court. Rather, the consequences of applying those rules become interesting. In other words, is the approach to moral rights in national treasures advocated by the Delhi High Court an effective tool of cultural policy in India?

Mahatma Gandhi’s legacy could serve as an interesting point of departure to test this principle. The man who must hold the right to be considered the greatest Indian of the 20th century—a century that produced an astonishing flowering of genius in the Indian sub-continent—was not an artist or author by

¹⁶ For example, in the *Sehgal* case itself, Justice Nandrajog makes reference to the use of international conventions to help to define the substance of Indian guarantees on gender equality: *Sehgal* 2005 (30) PTC 253 at [53].

¹⁷ For a summary of this case law, see Mira T. Sundara Rajan, “Moral Rights in Developing Countries: The Example of India—Part I” (2003) 8 J.I.P.R. 357; Mira T. Sundara Rajan, “Moral Rights in Developing Countries: The Example of India—Part II” (2003) 8 J.I.P.R. 449.

¹⁸ The reasons include subjectivity and lack of expertise. See the judgment of Justice Oliver Wendell Holmes in *Bleistein v Donaldson Lithographing Co* (1903) 188 U.S. 239, 251-252. In the seminal British case of *Hensher v Restawile*, [1976] A.C. 64, an enthusiastic group of judges each developed an individual definition of what is meant by “artistic”.

¹⁹ *Sehgal* 2005 (30) PTC 253 at [55]–[56].

²⁰ *Sehgal* 2005 (30) PTC 253 [56]: “Further, in relation to the work of an author, subject to the work attaining the status of a modern national treasure, the right would include an action to protect the integrity of the work in relation to the cultural heritage of the nation.”

²¹ A photo of Nehru visiting the mural was provided to me by Mr Sehgal, and published in my analysis of his case: Mira T. Sundara Rajan, “Moral Rights and the Protection of Cultural Heritage: Amar Nath Sehgal v Union of India” (2001) 10 Int’l J. Cultural Prop. 79. This note is cited by the court in [41] of the decision and broadly informs the ruling with its language and ideas.

profession. Rather, he produced a body of remarkable writings describing his involvement in the national movement, his perspective on the pivotal historical events of his time, and, of course, his extraordinary spiritual journey on the path to Freedom. Whether or not any particular work that he wrote could be called a cultural treasure, Gandhi himself should arguably be considered a national treasure of India. All of his work should be read and understood in this light.

It hardly seems surprising that Gandhi, himself, was not a strong proponent of copyright protection, at least as far as his own works were concerned. He is said to have remarked that he wanted his writing to be the property of the Indian people. In relation to his own edited works, he commented:

“Writings in the journals which I have the privilege of editing must be the common man’s property. Copyright is not a natural thing. It is a modern institution, perhaps desirable to a certain extent . . .”²²

Ownership of Gandhi’s works was ultimately acquired by the Navajivan Trust, a publishing house founded by Gandhi himself in 1929 in order to avoid official censorship and publish two journals promoting to the public his philosophy of “satyagraha”, the basis for non-violent resistance.²³ After Gandhi’s death in 1948, the Trust undertook the publication and dissemination of his works at minimal cost—the financial objective of the Trust being self-reliance rather than profit.²⁴ At the time of Gandhi’s death, copyright in India was still governed by British colonial legislation, which provided for a term of protection of 50 years after the death of the author.²⁵ In 1957, India adopted its first post-Independence copyright legislation. Like the earlier law, this post-colonial Act continued to provide copyright protection for the lifetime of the author and 50 years after his death.²⁶ In 1992, the Indian Copyright Act was amended to extend the term of protection from 50 to 60 years *post mortem auctoris*.²⁷ This term, retroactively applied to Gandhi’s works, meant that the copyright in his writings and, accordingly, the exclusive right of the Navajivan Trust to publish them, would expire at the end of 2008.²⁸

At least some observers believed that the Trust would request an extension of the copyright term to prolong copyright in Gandhi’s works. While such a strategy would have gone against much of what is known about Gandhi’s beliefs regarding property and copyright, the Trust was deeply concerned about the impact of widespread publishing on the integrity of Gandhi’s writings. Moreover, a precedent existed for the extension of copyright protection as a possible response to these kinds of concerns. In 1992, the copyright term was extended to prolong copyright in the works of Nobel prize-winning Bengali poet and

²² “No More Copyright on Gandhi’s Works—So Who Preserves Them?” *Thai Indian News*, January 29, 2009, available at http://www.thaindian.com/newsportal/world-news/no-more-copyright-on-gandhis-works-so-who-preserves-them_100148848.html [Accessed October 28, 2012].

²³ Navajivan Trust: *Continuing the Gandhian Tradition since 1929*, available at http://www.allaboutbookpublishing.com/index.php?option=com_content&view=article&id=465%3Anavajivan-trust-continuing-the-gandhian-tradition-since-1929&catid=53%3Apublishing&Itemid=155 [Accessed October 28, 2012].

²⁴ See “Navajivan Trust”, available at http://www.allaboutbookpublishing.com/index.php?option=com_content&view=article&id=465%3Anavajivan-trust-continuing-the-gandhian-tradition-since-1929&catid=53%3Apublishing&Itemid=155 [Accessed November 15, 2012]: “While asked how do they manage to subsidise the price of the book and do they get any grant from the Government, Jitendrabhai Desai, managing trustee of the Trust said that the Trust does not receive any grant from Government nor it accept donations. The settler of the Trust, Mahatma Gandhi has laid down in the Trust deed that all the activities of the institution will be conducted on the basis of self-reliance. It is only thoughtful planning and deployment of resource i.e. income from royalty of Gandhiji’s writings, income from rent of the property that we have developed and interest of the corpus of the Trust has made this possible.”

²⁵ India was governed by the Indian Copyright Act of 1914, Act III of 1914 passed by the Governor-General of India in Council, a suitably modified version of the grand British Copyright Act of 1911. Section 3 of the 1911 British Act already protected copyright for the lifetime of the author and 50 years after his or her death. The major differences between the Indian Act of 1914 and the British legislation of 1911 involved translation rights and, as noted in an online overview of Indian copyright law by Prashant, the introduction of criminal sanctions for infringement: see Prashant, “A (very) brief history of Copyright Development in India”, available at http://archive.icommmons.org/article_print/a-very-brief-history-of-copyright-development-in-india [Accessed October 28, 2009]. The issue of translation rights under the 1914 Act is dealt with in detail in Mira T. Sundara Rajan, “Moral Rights in the Public Domain: Copyright Matters in the Poetical Works of Indian National Poet C. Subramania Bharati” (2001) *Sing. J. Legal Stud.* 161.

²⁶ See British Copyright Act of 1911 s.3.

²⁷ See “Statement of Objects and Reasons to the Amendment Act 13 of 1992” reprinted in Professional’s, *The Copyright Act, 1957, Bare Act with Short Comments* (New Delhi: Professional Book Publishers, 2006), p.4.

²⁸ It should be clarified that the copyright term extension of 1991 could not apply to Gandhi’s works. Regarding the amendment, according to one Ministry source, “[h]e also pointed out that the amendment will apply only to authors whose copyrights expire on December 31, 1991”. “Govt Extends Tagore Copyright for 10 years”, *The Telegraph*, December 31, 1991.

national figure, Rabindranath Tagore, whose case is discussed below. In spite of these considerations, the Trustees ultimately decided that an extension of the copyright term would not be an appropriate response to their concerns, since it would go against “the spirit of Gandhian thought”.²⁹ Similar views were expressed by Ramachandra Rahi, the Secretary of the Gandhi Memorial Foundation, who pointed out that “[a]ll scholars have the right to interpret the original but no one has the right to tamper with the original text”, and expressed his concern that “[t]he original must be available for reference for all future generations”—concluding, nevertheless, “but I don’t think copyright is needed”.³⁰

What is curious about all of the discussions surrounding Gandhi’s writings is the explicit rejection of Indian copyright law as an instrument of cultural preservation. Copyright is seen, first and foremost, as a proprietary right, while its potential role in preserving Gandhi’s extraordinary legacy from harm and avoiding the possible misrepresentation and misappropriation of Gandhi’s thought, is essentially disregarded. An extension of the copyright term, in particular, was widely considered an inappropriate response to concerns about Gandhi’s work. Quite possibly, this attitude indicates a traditional unease about the connection between artistic, intellectual or spiritual work on the one hand and property, ownership and profit on the other. But it also suggests a certain lack of awareness among the parties concerned, who were clearly educated about the possibilities of the copyright term extension, but appear to have had little knowledge about moral rights. The possibility of perpetual protection for attribution and integrity in relation to cultural works of national importance seems to have passed unremarked—despite the long recognition of moral rights under the Indian Copyright Act of 1957 and strong interest in them among the Indian judiciary.

As emphasised by the *Sehgal* ruling, Indian copyright law has been shaped by considerations of cultural policy, and the instruments that it offers in the service of culture have been seized upon by the courts and expanded through their robust and creative approach to interpretation. Concerns about the preservation of Gandhi’s legacy could easily be addressed by the moral rights provisions in s.57 of the Indian Copyright Act. By applying the *Sehgal* principle of special attention to works of national importance, the invocation of moral rights in Gandhi’s protection would readily transcend the safeguards against excessive protection that are outlined in s.57—the requirement that the plaintiff demonstrate proof of damage to the author’s honour or reputation, and the restrictive application of moral rights only to “act[s] ... done before the expiration of the term of copyright”.³¹ Through moral rights, the Indian Copyright Act offers what may be the perfect solution to the dilemma confronting the Navajivan Trust and others interested in Gandhi’s writings—a way to protect their integrity without restricting the right to publish them, or, indeed, connecting them in any way with the repugnant notion of property. With due respect for Gandhi’s general perspective on copyright, Indian moral rights, particularly as developed by judicial interpretation, have something unique and, perhaps, entirely appropriate to offer to his legacy.

Tagore and term extension: A double-edged sword

When the issue of copyright in Gandhi’s works arose in 2008, attention turned naturally towards the possibility of extending the copyright term as a possible method of safeguarding them, for a very simple reason: it had been tried before. As noted above, the copyright in Rabindranath Tagore’s works was extended by a global amendment to the Indian Copyright Act, undertaken in 1992 at the behest of Visva Bharati, the famed University founded by Tagore at Shantiniketan, and the inheritor of copyright in his

²⁹ Jitendra Desai, Managing Trustee of the Trust, cited in “No More Copyright on Gandhi’s Works—So Who Preserves Them?” *Thai Indian News*, January 29, 2009.

³⁰ “No More Copyright on Gandhi’s Works—So Who Preserves Them?” *Thai Indian News*, January 29, 2009.

³¹ The oblique formula can probably be explained by the fact that, prior to 1994, moral rights were protected without limitation in time. It should be noted that a moral rights action can still be brought at any time; but the infringement, itself, should have occurred while the work was still under copyright term. See Indian Copyright Act 1957 s.57.

works. Since Visva Bharati was exclusively entitled to revenues from the publication, sale and use of Tagore's works, it would be the sole beneficiary of the term extension.³²

This aspect of Tagore's situation made the proposed term extension a highly controversial issue. Important cultural figures in Bengal, including the film directors Satyajit Ray and Mrinal Sen, objected to the prolongation of Visva Bharati's monopoly in Tagore's works. As eloquently noted in a *Telegraph* article on the issue:

“They have argued that no organisation should have a monopoly on Tagore's works and others should be given a chance to give fresh interpretations and publish [new] editions of Tagore.”³³

The controversy was intensified by allegations of corruption that have surfaced at Visva Bharati, where poor leadership appears to have become a serious problem. When the copyright in Tagore's works ultimately did expire, in 2001, the arrival of this date was “cheer[ed]”, with musicians, in particular, noting that Tagore's songs could now be performed freely without going through the “often long and tedious” process of obtaining approval from the University.³⁴ Somewhat ominously, Visva Bharati shielded itself with the language of preservation, arguing that the expiry of copyright control would lead to “rampant distortions” of Tagore's writings, while little mention appears to have been made of the importance of publishing revenues for the University.³⁵

In deciding to extend the term of protection, the Government's stated rationale was utterly distanced from this debate. The Statement of Objects and Reasons to the amendment act reads:

“Gurudev Rabindranath Tagore died in the year 1941 and copyright in his published works, which stood vested in Visva Bharati, was to expire on 31st December 1991. There had been numerous demands for according extended protection to his works in view of their national importance. While it was not considered feasible and appropriate to extend the term of copyright in respect of one author alone, the Government reviewed the whole question of what should be the appropriate term of copyright and decided to extend the term of copyright generally in all works protected by the Copyright Act ...”³⁶

These words are unambiguous. The Government's explicit goal was to further an objective of cultural policy—the preservation of Tagore's works, of historic literary, historical, social and cultural importance to India. The Government was firmly committed to the belief that extending the copyright term would support this goal. Once again, Indian legislators clearly envisioned copyright as an engine of cultural policy, and, in an interesting contrast to Western countries, they explicitly saw an extension of the copyright term as serving the good of cultural heritage. Given the various goings-on at Visva Bharati, was the Government's position ill-informed, or naive? Or had the Government simply weighed the perceived costs against benefits and reached its conclusion through a policy calculus behind the scenes?

Regardless, there was a superb and largely unremarked irony underlying the Government's actions. An examination of the Indian Government's past treatment of copyright matters shows that exactly the same concerns led to an exactly opposite approach to copyright some 40 years earlier, in the works of another important nationalist writer, Indian National Poet C. Subramania Bharati. In recognition of the importance of Bharati's works as national literature, his copyright was given to the public as a gift by the Government

³² But Tagore's case is not unique in world copyright history. In 19th-century Russia, the copyright term was also extended in response to a plea by Madame Pushkin for the continued protection of her husband's works. The extension was accomplished through special legislation in 1857. See L.P. Rastorgoueff, “The New Law of Copyright in Russia” (1912) 12 *J. Soc'y Comp. Legis.* 302, 307; Michael Newcity, *Copyright Law in the Soviet Union* (New York: Praeger Special Studies, 1978), pp.7–8. The issue is discussed in its broader context, in Mira T. Sundara Rajan, *Copyright and Creative Freedom: A Study of Post-Socialist Law Reform* (New York: Routledge, 2006), pp.77, 81.

³³ “Govt Extends Tagore Copyright for 10 years”, *The Telegraph*, December 31, 1991.

³⁴ “Indians Cheer as Copyright on Nobel Poet Tagore Expires”, *The Peninsula*, January 5, 2002.

³⁵ This is in direct contrast to the Navajivan Foundation, which discloses its expectations from publication revenues as “self-reliance”.

³⁶ “Statement of Objects and Reasons to the Amendment Act 13 of 1992” reprinted in Professional's, *The Copyright Act, 1957, Bare Act with Short Comments* (2006), p.4.

of Madras State, now Tamil Nadu, in 1949.³⁷ Tagore's works demanded the extension of the copyright term; but Bharati's works should be deprived of copyright altogether. How did this alternate approach to the protection of national literature fare?

*Public ownership of copyright: Mahakavi Bharati*³⁸

Subramania Bharati was the most important writer of the 20th century in the ancient South Indian language of Tamil, historically spoken throughout the southern part of the Indian sub-continent. Bharati made two important contributions to Tamil literature, creating a modern literary language out of this ancient, classical tongue,³⁹ and, in the process, igniting a Renaissance in Tamil literature. For his contribution, Bharati has been called the Shakespeare of the Tamils. Even this sublime comparison is, in a sense, inadequate. For Bharati was not only a great literary innovator—he was also an impassioned advocate of social reform whose revolutionary ideas on equality and freedom have yet to be fully realised.

Crucially, Bharati was one of the first generation of freedom fighters in the South of India. He attempted to work as a journalist, but the nationalist character of his writing ultimately led to the imposition of a ban on the publication of his work by the British colonial administration. Bharati fled to Pondicherry, a territory bordering the Madras province and governed by the French. He lived as one of the community of nationalist exiles in French India for 10 years. It was here that he wrote most of his works. Bharati finally decided to return to British India but died shortly thereafter, at the premature age of 39 in 1921.

Much of Bharati's work remained unpublished during his lifetime. After his death, this important task was undertaken by his wife, Chellamma, who had been intimately involved with his writing. It is difficult to convey the extent of the obstacles that Chellamma faced—a young widow at a time when widows were among the most disadvantaged members of Indian society, a traditional woman who had become Bharati's wife at the age of seven and had no access to formal education, and a person with no financial resources whose husband had been deprived of the right to work due to the country's political circumstances. She was, nevertheless, intellectually outstanding. She had memorised and internalised Bharati's poetry to such an extent that when she lay on her deathbed three decades later, she continued to recite lines from his poetry in her unconscious state.⁴⁰

Chellamma believed that it was her mission to publish Bharati's poems. In 1922, she brought out Vol. 1, *National Poems*. In the Preface to this volume, she addressed the people of Tamil Nadu in the following extraordinary terms: "I will undertake the responsibility of publishing all of Bharati's works in my lifetime, and afterwards, I have decided to bequeath them to the people of Tamil Nadu."

However, the challenges facing Chellamma proved to be overwhelming. Circumstances finally forced her to part with Bharati's copyright in 1931. The copyright was purchased from her for a nominal sum by Bharati's half-brother, and he continued with the publication project. Eventually, he sold the copyright to the Madras Government. In each of these transactions, Chellamma was paid small amounts of money, first by her brother-in-law and later by the Government as well—although she had already relinquished her rights. The Government, in turn, published new editions of Bharati's works. In 1954, it gave Bharati's copyright to the people of India as a gift.

The unusual nature of what happened in 1954 should be clarified. The situation of Bharati's copyright was somewhat different from nationalisation in the usual sense, where the state acquires the right to publish an author's works. Perhaps the most comprehensive wave of true nationalisations in history occurred in

³⁷ The former Madras state stretched over a large territory that included portions of modern-day Kerala, Andhra Pradesh, and Karnataka as well as Tamil Nadu.

³⁸ "Mahakavi", meaning "Supreme Poet", is the term uniquely used by Tamils to refer to Subramania Bharati.

³⁹ Tamil is characterised by a strong degree of diglossia, where the spoken language has evolved away from the language and literature over centuries, and indeed millennia. Bharati was able to maintain the structural integrity and beauty of the language while making the spoken language the basis of his expression, as his poems illustrated in countless ways.

⁴⁰ This extraordinary incident has been described by an eyewitness, the poet's granddaughter, Dr S. Vijaya Bharati. Private conversation, 2012.

Bolshevik Russia, when the Revolutionaries nationalised the works of classic Russian authors with a view to making them accessible to the public at large. The Madras Government's goal in nationalising Bharati's works must have been much the same—to make this important national literature widely available to the Indian public for the sake of education and nation-building. But the Madras Government went beyond nationalisation and made a truly grandiose gesture: not only the Government, but every citizen of India would acquire the right to publish Bharati's works.

Implicit in the Government's actions was also a desire to pay homage to Chellamma's extraordinary vision. She, herself, had intended to publish the works and then give them to the people of India upon her death, no doubt because she understood that this was Bharati's own goal—the widest possible dissemination of his works, his gift to his countrymen and women.

But it is unclear what Chellamma thought, or would have thought, about disseminating the act of publication per se. At the time of the nationalisation of the copyright, the Government stated that: "We provided for certain benefits to the family when we took up this business. There is no profit likely to be made by [the] Government on the publication [of Bharati's works]."⁴¹ This statement is mistaken on both grounds. In fact, the Government's action generated a publishing industry in Bharati's works in South India, and, in this sense, the objective of widespread dissemination was achieved.

But at what cost was this goal realised? The publication of Bharati's works has been of such poor quality, with errors so widespread in the text, the misattribution of the works of others to him such commonplace occurrences, and such large volumes of Bharati's work remaining unpublished in modern editions, that it would be fair to say that the integrity of his writings, nearly a century after his death, is now under sustained and serious threat. Moreover, to this day, no authoritative standard edition of Bharati's works has yet been published—a void that leading Bharati scholar S. Vijaya Bharati, who is also the poet's granddaughter, is currently attempting to fill.⁴²

The decision to make Bharati's copyright public was clearly intended to serve the public interest. It was an attempt to fulfil the noble aspiration of public education in the wake of British colonial rule, and to offer Bharati the widespread dissemination that his writings deserved. But the experiment failed miserably, in terms of the preservation of national literature. And, as Bharati and his times grow ever more remote, it is questionable whether the wrongs that have been done can ever be fully set right.

In Bharati's case, as in the examples discussed earlier, moral rights could play an important role in protecting the integrity of works in which copyright no longer subsists. The concepts of attribution and integrity comprehensively address the problems affecting Bharati publication, and it is noteworthy that in her new standard edition, Vijaya Bharati has now adopted these two legal concepts as the guiding principles for her literary work.⁴³

Nationalising, or "publicising", copyright is an innovative approach to cultural policy, and it has recently been employed by the Government of the Tamil Nadu state with a new twist. Copyright in the works of a number of writers has been purchased by the Government and placed into the public domain. Apparently, the goal is to protect writers from the avarice of publishers, who, in South India, are famed for their corrupt practices. Piracy is rampant, and, in many cases, writers are not only denied royalties, but they are actually expected to pay to have their work published.⁴⁴ But, once again, nationalising works is a crude approach to profound cultural problems. What is needed is broad reform of the publishing industry, methods of enforcing authors' rights and prerogatives, and education of publishers and the public about the need to

⁴¹ See "Bharati's Poems", *The Hindu*, March 11, 1954. In a discussion surrounding the release of a collection of Bharati's poems published by the Madras Government, Mr C. Rajagopalachari, Chief Minister, announced in the Madras Legislative Council on March 10: "We provided for certain benefits to the family when we took up this business. There is no profit likely to be made by [the] Government on the publication."

⁴² S. Vijaya Bharati (ed.), *C. Subramania Bharati's Works: Volume I*, standard ed. (Chennai: S. Vijaya Bharati Publications, 2007).

⁴³ Bharati (ed.), *C. Subramania Bharati's Works* (2007), p.xvi.

⁴⁴ This issue is discussed in Mira T. Sundara Rajan, "The Lessons of the Past: C Subramania Bharati and the Nationalization of Copyright" (2009) 6 *SCRIPTed—A Journal of Law, Technology and Society* 201.

preserve the integrity of works, especially those that are, as emphasized by the Delhi High Court in the *Sehgal* decision, historically and culturally significant. As I noted in an earlier editorial on this subject:

“If the goal is to promote the public interest, India needs to think again. Bharati’s case shows that nationalisation, whilst a powerful tool, may be a blunt instrument where a fine chisel is needed—a policy that shatters the very form it hopes to shape. Nationalisation may be the right course of action, but it must be pursued with clarity of purpose. If wisely pursued, it may even help to protect our precious cultural heritage from the harsh effects of commerce. But the goals must be clearly articulated and unerringly pursued. Where nationalisation is concerned, let us try to attain that most difficult of achievements and learn from past experience.”⁴⁵

Conclusion

In its approach to copyright law, India has become a true innovator. A developing country that has been a relative latecomer to the field, India has still had the courage, and the daring, to approach copyright as cultural law. It has explored the possibilities of moral rights, copyright term extension and the nationalisation of copyright, in the broadest sense of the term, as possible means of lending support and strength to the cultural domain. Some of its experiments have failed, while others have had encouraging results. India’s exploration of moral rights, in particular, remains half-realised, as much of the Indian public, including the groups and individuals responsible for important parts of India’s heritage, continues to be hesitant about copyright law. To some degree, moral rights remain relatively obscure beyond the confines of the courtroom. No doubt, the experiments will continue. In a world where the cultural side of copyright seems largely to have been forgotten, it is to be hoped that India’s approach will help to remind us of why we have copyright law and of what it can help us to achieve.

⁴⁵ Rajan, “The Lessons of the Past” (2009) 6 *SCRIPTed—A Journal of Law, Technology and Society* 201.

The Compatibility of Modern Intellectual Property Protection Norms with Islamic Principles: Lessons from History

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☞ Intellectual property; International law; Islamic law; Unfair competition

*Read through the name of your Lord who created you.
Who created humans from congealed blood.
Read and your God is most bountiful.
Who taught through the pen.
Who taught humans what they did not know. (Quran, verse 96)*

The debate surrounding the relationship between religion, knowledge and science dates back for centuries. The emergence of Islam in the seventh century, and the subsequent transformation of the Arabian society from its tribal roots to an urban one as a result of the outward expansion and spread of Islam beyond the Arabian Peninsula, coupled with the need to innovate and become more competitive regionally and globally, revived such a debate particularly during the 10th and 11th centuries taking it to new levels of sophistication.

Islamic history contains rich volumes of literature dedicated to this subject matter. Ibn Sina's (Avicenna) philosophical writings on logic, ethics, science and metaphysics, built upon earlier Greek and Persian works in the field, provide some illuminating insights about how advanced such a debate was. Al Ghazali's 11th century landmark manuscript, *The Incoherence of Philosophers*, and Ibn Rushd's (Averroes) counter arguments in *The Incoherence of the Incoherence* provides a clear indication about the level of sophistication and progressiveness of these debates. Notably, this level of sophistication and advancement was not merely a theoretical one; it is also within that period Islamic civilisation reached its peak becoming the dominant global superpower and a powerhouse engine of innovation and technological progress. By contrast, it was during that period of time the majority of European states were lagging behind failing deep in their dark ages.

One notable feature about the above in relation to contemporary debates is the role played by intellectual property rights and its impact in fostering innovation and creativity within any society. Some modern day theorists supported by knowledge producers argue explicitly that the protection of intellectual property rights is an essential, if not a prerequisite, element for inducing creativity and fostering innovation. They would also argue that the absence of such a regime will also negatively impact the development pace of any country, thus leaving it lagging behind others, unable to compete in today's "knowledge economy".¹

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¹ For more see Joseph Stiglitz, *Making Globalisation Work* (London: Penguin Allen Lane, 2006).

This article sheds light on the development and regulation of intellectual property and knowledge under Islam.² It argues against the generalisation and its confinement to Euro-American academic opinion that modern intellectual property norms are the creation of modern Western technological advancement by demonstrating through reference to various examples emerging from Islamic social history where such concerns were part of the culture in which these scholars produced their works in sciences in general and in medicine in particular. This study will also touch upon Islamic jurisprudence and its compatibility with today's intellectual property protection norms.

IP and Islam: Modern debates, historical foundations

The birth of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) in 1995 laid the foundations for the first official recognition of the relationship between intellectual property and trade. According to this view advocated by developed countries, the lack of or weak enforcement of intellectual property protection would lead to distortions in international trade.³ Of course there was nothing “inventive” about such a step; in fact, in all ages and climes intellectual property protection has been given the importance it deserves in accordance with the standards of the day. The reason is that it impacts all aspects of life and therefore is not merely “trade-related”. The impact of intellectual property extends to many aspects including health, education, food, technology transfer, climate change, development and much more.

In a previous book,⁴ this author's curiosity directed him to explore an additional link, manifested in the call for the religious-relatedness of intellectual property, a notion gaining increased popularity particularly within the Arab and Islamic world.⁵ In accordance with this, the author observed the tendency towards issuing a number of *fatwas*⁶ explicitly forbidding the copying of copyrighted material or the imitation of famous trademarks leading some to go as far as calling such activities as theft.⁷ In one *fatwa* related to software piracy the grand mufti at Al Azhar in Cairo, the highest religious authority in Sunni Islam, Sheikh Ibrahim Atta Allah, went as far as declaring that “[p]iracy is the worst type of theft and is prohibited by Islam”.

The author finds the issuance of such *fatwas* troubling particularly in the absence of any specifically dedicated rules on the subject matter under Islamic jurisprudence. This position is based on a number of observations.

The first observation is related to the issue of Islam's treatment of public goods. One definition of public goods provides:

“A product that one individual can consume without reducing its availability to another individual and from which no one is excluded. Economists refer to public goods as ‘non-rivalrous’ and ‘non-excludable’. National defence, sewer systems, public parks and basic television and radio broadcasts could all be considered public goods.”⁸

Remarkably, the above definition of public goods is also extended to include other areas particularly the provision of healthcare and education under Islam, two main areas directly affected by the regulation and protection of intellectual property rights. In line with this, it would be unreasonable to suggest that a poor

² Notably, the debate about the relationship between religion and intellectual property protection is not confined to Islam. For the debates in other faiths and cultures, see Neil W. Netanel and David Nimmer, “Is Copyright Property?—The Debate in Jewish Law” (2011) 12 *Theoretical Inquiries L.* 241; Peter K. Yu, “Intellectual Property and Asian Values” (2012) 16 *Marq. Intell. Prop. L. Rev.* 330.

³ Carlos M. Correa, *Intellectual Property Rights, the WTO and Developing Countries* (London: Zed Books, Third World Network, 2000).

⁴ Mohammed El Said, *The Development of Intellectual Property Protection in the Arab World* (New York: Edwin Mellen Press, 2008).

⁵ El Said, *The Development of Intellectual Property Protection in the Arab World* (2008).

⁶ A *fatwa* is an Islamic religious ruling (edict), a scholarly opinion on a matter of Islamic law.

⁷ M.A. Naser and W.H. Muhaisen, “Share'a: Intellectual Theft or Intellectual Infringement?” (2009) 4 *J. Int'l Com. L. & Tech.* 71.

⁸ See definition of “public good” in “Public Good”, available at <http://www.investopedia.com/terms/p/public-good.asp#axzz27iHMCRCJ> [Accessed October 28, 2012].

student in a less developed or developing country who photocopies a book because he or she is unable to purchase the expensive copyrighted book has in fact committed an act amounting to theft. To the contrary, under Islam, it is the obligation of the state to ensure that knowledge is widely and cheaply—if not freely—available within society based on public interest considerations.⁹ Such an understanding was clearly embedded within the Islamic academic mentality for centuries. In explaining this, Al Masudi, the 10th century Muslim historian, states:

“A younger writer will be able to write more agreeably and more thoroughly, because he has become more experienced, more discerning and more cautious against pitfalls. This explains the growth in the sciences, (which progresses) without *hindrance* or *limitations*, because a later generation discover things which the previous generation did not find ... such a habit ... is but a human nature...” (emphasis added).

Those disagreeing with this reasoning would stage a protest stating that by doing so, one would in fact be encouraging such activities, thereby preventing the author from reaping the fruits of his or her labour and creativity. This would result in the suppression of the incentive to innovate. This opinion is based on the presumption that the intellectual property regime itself is the only incentive scheme which knowledge producers rely on to innovate. This however may not be necessarily the case under Islam, as it is the state’s responsibility to ensure that a multifaceted system of incentives is available with the objective of rewarding innovators. This remains today a fundamental industrial policy ingredient within many industrialised countries whereby the government remains the main supporter of large funded research and development (R&D) projects. Recent calls in a number of developed countries are also in line with this view.¹⁰

It is pertinent to observe that Islam’s position is shaped by the belief that knowledge is a common human heritage which should not be monopolised by a group of people or companies. As Prophet Muhammad stated in his well-known tradition: “Wisdom is the lost property of a believer, it is his, wherever he may find it.”¹¹

Needless to say that the above is not theoretical only, since Islamic history is full of practical examples. At the peak of their scientific and economic advancement, several Islamic states applied a system of reward which was even emulated and adopted hundreds of years later by developed countries themselves when they were making the leap to industrialisation.¹² This system resonates with today’s contemporary development theories.

Tenth century Baghdad was the global epicentre of knowledge excellence, possessing some of the most important research centres, universities and libraries in the world.¹³ The rulers themselves as the patrons of knowledge and scientific innovation understood the importance of technological advancement which enabled them to rule over vast areas of land. More importantly, they also believed that the utilisation of science to serve society was in fact a religious duty.¹⁴ Obsession with inventing timely clocks, navigation tools and astrological machines was essential to enable the people to perform their religious duties and long-distance travelling for trade and performing services in a timely manner.¹⁵ Baghdad, Damascus,

⁹ Steven Jamar, “The Protection of Intellectual Protection of Intellectual Property under Islamic Law” (1992) 21 Cap. U. L. Rev. 1079.

¹⁰ In 2006, a UK task force charged with suggesting changes to the country’s intellectual property laws called the British Government to shift its thinking about knowledge as a public resource first, and a private asset second. Andrew Gowers, *Gowers Review of Intellectual Property* (Norwich: Her Majesty’s Stationery Office, 2006).

¹¹ Josef Assad, “Islam, Intellectual Property, and Free Culture”, available at http://www.josefassad.com/islam_intellectual_property_free_culture_open_source [Accessed November 7, 2012].

¹² Ha-joon Chang, *Kicking away the Ladder: Development Strategy in Historical Perspective* (Cambridge: Cambridge University Press, 2002).

¹³ For more see Hugh Kennedy, *When Baghdad Ruled the Muslim World: The Rise and Fall of Islam’s Greatest Dynasty* (Cambridge, Mass.: Da Capo Press, 2004).

¹⁴ It is believed that the Prophet himself emphasised this by remarking that “*the ink of the scholar is holier than the blood of the martyr*”.

¹⁵ For instance, Al-Khawarizmis’ algebra was aimed towards calculating inheritance as dictated by Quran, while Al-Battani’s trigonometrical solutions were aimed towards identifying Mecca’s direction for prayers.

Cairo, Toledo, Cordoba and many other cities in the Islamic world at that time were too advanced by hundreds of years when compared with other parts of the world.

The Islamic “renaissance” project at that time relied on a number of policies and strategies to achieve its objectives. The process of knowledge appropriation followed by wide dissemination was fundamental in achieving the sought objectives. Indeed, as Saliba proclaims, “for science to flourish, there must be a general infrastructure for it, and a much larger number of people in the society must be able to participate in its production”.¹⁶ In its early days, the region possessed little technological capabilities compared to those long established empires at the time, namely the Roman and Persian empires. Understanding the accumulative nature of knowledge and scientific progress, the state indulged upon the biggest translation project ever undertaken in the history of mankind.¹⁷ For about 200 years, hundreds if not thousands of Indian, Persian and Greek manuscripts in all fields of life and sciences were sought and translated into Arabic, saving many throughout such a process from being lost forever.¹⁸ Of course this was not an easy task, particularly at a time where illiteracy in the region was relatively high. Investing in human capital through providing accessibility to education and healthcare freely was needed.¹⁹ The spread of schools, clinics and hospitals became the norm throughout the Islamic world.²⁰ For those with some educational capabilities, the rewards were high. For instance, securing a job as a translator in one of the translation centres was extremely profitable. Historical accounts reveal the willingness to pay translators as much as 500 dinars a month—the equivalent of 24,000 British pounds today—to provide their services while much bigger rewards were proclaimed for those who would acquire certain valuable manuscripts.²¹

So the first step was what contemporary theorists would call today “knowledge transfer” through making widely available to specialists the state of the art innovations of the day. Once these works were translated, scribes and copyists made multiple copies of them which were subsequently distributed to various parts of the empire, including schools, libraries and courts. Complementing the process of “knowledge transfer” through “dissemination of knowledge” from top-to-down was also part of this strategy. A by-product of such process itself was the spread of other ancillary industries and professions too. For instance, paper manufacturing and production in the region became so advanced to meet mass production and the growing demands and appetite of the market.²² The selling of books to those seeking knowledge and an elated social status became a lucrative business leading to increasing the number of bookstores and bazaars.

Following several years of experimentation with others’ technological advances through “reverse engineering” and active appropriation of their work, the next phase of the development cycle commenced. By acquiring the up-to-date knowledge, Muslim scientists and researchers started to test and apply these theories and innovations to devise more accurate results. For some who had doubts, the need to prove the

¹⁶ George Saliba, *Islamic Science and the Making of the European Renaissance* (Cambridge, Mass.: MIT Press, 2007), p.39.

¹⁷ As observed, “the Graeco-Arabic translation movement of Baghdad constitutes a truly epoch-making stage ... equal in significance ... to that of Pericles Athens, the Italian Renaissance, or the Scientific Revolution of the sixteenth and seventeenth centuries, and it deserves to be recognised and embedded in our historical consciousness”. Statement by Gutas quoted in John Freely, *Aladdin’s Lamp: How Greek Science Came to Europe through the Islamic World* (New York: Alfred A. Knopf, 2009), p.4.

¹⁸ Many translators from different backgrounds, faiths and religions, including Christian and Jewish translators, were heavily involved in such a process. Zachary Karabell, *People of the Book: The Forgotten History of Islam and the West* (London: John Murray, 2007).

¹⁹ Funding for these activities came from various sources including the state, *Zakat* (Islamic income tax), *Waqfs* (religious endowments) and various other endowments.

²⁰ It was reported for instance that there was more than 75 libraries in Cordoba alone, including one of the largest libraries in Europe which contained 400,000 books alone with a catalogue running to 44 volumes. Maria Rosa Menocal, *The Ornament of the World: How Muslims, Jews, and Christians Created a Culture of Tolerance in Medieval Spain* (New York: Back Bay Books, 2002).

²¹ Ehsan Masood, *Science and Islam* (London: Icon Books, 2009), p.44. There were also other types of incentives in place. Ansari reports that Sultan Mahmud the Ghazni, promised to pay the poet Firdausi who was writing the *Book of Kings* one piece of gold for each couplet of his finished epic. When Firdausi completed the book, which turned out to be the longest poem ever written by a single man consisting of over 60,000 couplets, the Sultan asked “Did I say gold?” The Sultan further said “I meant to say silver. One piece of silver for each couplet.” Tamim Ansari, *Destiny Disrupted: A History of the World through Islamic Eyes* (New York: Public Affairs, 2009), p.124.

²² Richard Fletcher, *The Cross and the Crescent: The Dramatic Story of the Earliest Encounters between Christians and Muslims* (New York: Penguin Books, 2003).

inaccuracy of their predecessor's findings also prompted them to investigate matters further.²³ Indeed, the phase of large scale technological innovation was about to begin. Following the absorption of the prevailing knowledge, Muslims were then able to progress and become the most technologically advanced nation at that time developing modern day research methodology and empirical studies and techniques. Highlighting the advancement of Muslims then, Morgan explains:

“Ibn Sina will set down empirical scientific rules for testing and rating the effectiveness of drugs in treating various conditions, rules that will be the backbone of clinical trials nine hundred years later. Rather than take a substance on faith, he will say that the purity of the drug is important, that it must be effective, that the dose must be tried to the severity of the illness, and, finally, that it must be tested on humans under strictly observed and controlled conditions.”²⁴

In other words, Ibn Sina envisioned the role of national drug regulatory authorities more than 900 years ago.

It comes as no surprise to know that Arabic also became the global language of science, literary and trade, just as English is in today's world. As Menocal explains:

“[T]he Arabic language, spilled over the banks of its original religious riverbed and roamed beyond the exclusively religious needs of the Muslim community. This was, after all, the esteemed and powerful language of an empire, and was marked by its vital links to the rest of the civilization. As far as the eye could see, and beyond, Arabic was the lingua franca of all save the barbarians—if not the native tongue, at least the pidgin of traders and travellers.”²⁵

The second observation to be made in this regard is Islam's prohibition of monopolistic practises. Unlike the case of intellectual property, where evidence is to be surmised in light of the advancements made, Islam's position on the prohibition of monopoly is explicit. Within this context, all forms of unfair competition and monopolistic practises (price, goods etc.) are prohibited. Although the Quran itself does not include explicit reference to monopoly and hoarding (*Ihtikar*), the tradition reported on the authority of the Prophet Muhammad mentions that the *muhtakir* (monopolist) is a sinner.²⁶ Equally relevant to the debate about intellectual property abuse is the prohibition of hoarding under Islam; the practice of holding something or a product from the market so that prices may rise owing to this artificial dearth of supply in the market. Indeed, today hoarding represents an important strategy of many multinational companies which take similar practises even further by acquiring patents with the intention of blocking other companies from entering the market and competing with them.²⁷ In relation to intellectual property protection, a school of thought within Islam argues that the excessive monopolistic effect created through intellectual property protection may raise some issues. As Imam Yahya an-Nawawi stated:

“The wisdom behind prohibiting monopolistic practices is to prevent the harm that would befall people as a result. Scholars are in agreement that if a person possesses items that people are in dire need of, and they cannot find anyone else to supply it, he is to be forced to sell it in order to lessen the harm and remove difficulty from people.”²⁸

²³ One example is the story of measuring the earth's circumference. In the 820s, Al-Mamun, the 10th century Abbasid ruler instructed his astrological advisers to measure the Earth's circumference. They calculated to be 24,835 miles (compared with the current measurement of 24,906 miles). That measurement remained the most accurate measurement for centuries. Masood, *Science and Islam* (2009), p.126.

²⁴ Michael Morgan, *Lost History: The Enduring Legacy of Muslim Scientist, Thinkers and Artists* (Washington: National Geographic, 2008), p.195.

²⁵ Menocal, *The Ornament of the World* (2002), p.29.

²⁶ The Prophet Muhammad has made explicit and specific statements about it. For example, he said: “Whoever withholds food (in order to raise its price), has certainly erred!” [Muslim] Also: “Whoever strives to increase the cost (of products) for Muslims, Allaah, the Exalted, will seat him in the center of the Fire on the Day of Resurrection.” [Ahmad and al-Haakim] See “Prophetic Prohibition against Economic Monopolies”, available at <http://www.islamweb.net/emainpage/index.php?page=articles&id=164929> [Accessed October 28, 2012].

²⁷ For more on recent developments see Charles Duhigg and Steve Lohr, “The Patent, Used as a Sword”, *New York Times*, October 7, 2012.

²⁸ Duhigg and Steve Lohr, “The Patent, Used as a Sword”, *New York Times*, 2012.

The above discussion provides some valuable analysis about the process of knowledge creation and its subsequent dissemination in Islam. Evidently, Muslims were able to drive the development pace to new heights during a period of time which historians often refer to as the Middle Ages in Europe. They were also able to maintain such a process for centuries. This was done without monopolising the knowledge they developed, keeping the flow free from any restrictions even beyond their geographical boundaries. In fact, had Muslims attempted to monopolise the knowledge they developed, one may argue that it would have been much more difficult for European countries to acquire such knowledge that later set the goals of Renaissance and Enlightenment, ushering the period which saw the emergence of the global superpowers.

Based on this, it seems that the above *fatwas* treating the copying of a book equally with theft are extremely excessive, if not out of context. Indeed this may be attributed to the problem within the *fatwa* literature itself, which builds its foundations upon “a historical” premise and, hence, fails to take into account the “relative” aspect of the rulings that must respond to given time and place. This is increasingly resulting in *fatwas* that do not conform to the issue at hand. Indeed, as El-Bialy and Gouda explains:

“Consequently, Muslim legal scholars might issue adverse fatwas that permit Muslims to pirate IPR products due to their high prices. In other words, IPR-related fatwa generally prohibits piracy actions, but given the extreme high prices of the original products that are imposed by international monopolistic firms, without any consideration of the necessity of the product to the poor, fatwas might become more lenient leading to a controversial effect to the extent of supporting piracy. This fact can explain why there are numerous fatwas prohibiting IPR piracy and at the same time, Islamic countries have such a high level of piracy”.²⁹

Before moving on, one point should be made clear. Islam’s position on the protection and preservation of private property is uncompromising. The Prophet himself acknowledged this in his Farewell Sermon:

“Verily your blood, your property are as sacred and inviolable as the sacredness of this day of yours, in this month of yours, in this town of yours.”³⁰

Therefore, counterfeiting activities against the creations of others are clearly prohibited if the aim of such activities is the commercial gain and free riding on their investment and labour. However, *fatwas* should be issued narrowly and be confined to these particular types of practises and should not be made in generality.

Then and now

Following the above discussion, an important question arises within this context: to what extent the above Islamic reasoning is reflected in modern day intellectual property laws and legislation within the Islamic world?

There is little evidence to suggest that the above reasoning has in fact been applied practically anywhere in the Islamic world. Save for a few examples such as the Unified Gulf Cooperation Council Patent Law (the GCC Patent Law) and the 2004 Saudi Patent Law, the author was unable to find other legislation making reference to the compliance with Islamic principles and Sharia a prerequisite for awarding or preserving intellectual property protection. In this regard, art.2 of the GCC Patent Law states:

“To qualify for a patent according to the provisions of this Regulation and its Bylaws, an invention shall be new, involves an inventive step, and industrially applicable. It shall not conflict with the

²⁹ See Nora El-Bialy and Moamen Gouda, “Can Shari’a be a Deterrent for Intellectual Property Piracy in Islamic Countries?” (2011) 14 J. World Intell. Prop. 441, 454.

³⁰ See the translation of Sahih Muslim, Book 7, *The Book of Pilgrimage (Kitab Al-Hajj) Chapter 17, No:2803*, quoted in S. Beltrametti, “The Legality of Intellectual Property Rights under Islamic Law” in Tomas Mach et al. (eds), *Prague Yearbook of Comparative Law* 2009. (Prague: Prague Centre for International and Comparative Law., 2010), pp.55–94.

laws of *Islamic Shariya*, or public rules of conduct observed in the Cooperation Council States, whether that was pertaining to new products, industrial processes, or to manufacturing methods.”³¹

Reference to Islamic Sharia under this article is unique and is worthy of further analysis. Under the TRIPS Agreement, a patent may be granted provided that it meets the patentability criteria under art.27.1 of the Agreement comprising of novelty, inventiveness and industrial applicability. The TRIPS Agreement further explicitly excludes inventions dangerous to human, animal or plant life or health or seriously prejudicial to the environment. However, the Agreement is silent on the issue of religious compatibility.

So the relevant question to be raised within this context in relation to the GCC and Saudi Patent Laws is as follows: Would it be possible for someone to argue that the monopolistic impact a patent may have does in fact conflict with the principles of *Sharia* on unfair competition grounds and therefore seek its nullification or rejection? Would it also be possible for the same to argue that the intentional hoarding of intellectual property rights face the same fate? Although not tested yet, surely this possibility may be appealing particularly for those who are in dire need of educational materials and/or pharmaceutical drugs. Indeed I would explicitly argue that this interpretation awards Islamic and Arab states with considerable flexibility and policy space in this field which should be clearly utilised.

When more is less

The manner by which the modern regulation of intellectual property protection has developed raises some concerns in terms of democratic governance and the role of interest groups in shaping and steering that process.^{32,33} Increasingly, developing countries are finding it harder to attain to the needs of their poor. Accessibility to educational materials and pharmaceutical products is also becoming more difficult, jeopardising the development priorities and goals of many countries.³⁴ Of more concern is the recent attempts by developed countries, particularly the United States and European Union, to introduce TRIPS-plus conditions upon other developing countries through various multilateral, bilateral or unilateral means, thus reducing and limiting these countries’ remaining policy space.³⁵

The impact of bilateral free trade agreements (FTAs) and other plurilateral agreements including the Anti-Counterfeiting Trade Agreement (ACTA) in prolonging the monopolistic impact of intellectual property rights is already proven.³⁶ Indeed this logic goes against the notion of the freedom of knowledge, which has been in place for thousands of years. Islamic social history provides some valuable lessons through its experience in dealing with the issue of intellectual property regulation as in many other areas such as Islamic banking and finance. Stiglitz reflects on the recent developments in this regard:

“The changes in intellectual property regimes in recent years reflect not only changes in the economy but also changes in the political influence of corporate interests. Large corporations like monopoly—it is far easier to sustain profits by having a strong monopoly than by continually increasing efficiency; and so to them, monopolization is a pure benefit, not a societal cost. Though one might have hoped

³¹ In addition, art.4(a) of the 2004 Saudi Arabia Law of Patents, Layout Designs of Integrated Circuits, Plant Varieties, and Industrial Designs states: “The protection document shall not be granted if its commercial exploitation violates the *Shari’ah*.” Under the TRIPS Agreement, there are three permissible exceptions to the basic rule on patentability. One is for inventions contrary to *ordre public* or morality; this explicitly includes inventions dangerous to human, animal or plant life or health or seriously prejudicial to the environment. The use of this exception is subject to the condition that the commercial exploitation of the invention must also be prevented and this prevention must be necessary for the protection of *ordre public* or morality (art.27.2).

³² See Stiglitz, *Making Globalisation Work* (2006).

³³ See Oxfam International, “All Costs, No Benefits: How TRIPS-Plus Intellectual Property Rules in the US-Jordan FTA Affect Access to Medicines”, available at <http://www.oxfam.org/sites/www.oxfam.org/files/all%20costs,%20no%20benefits.pdf> [Accessed November 7, 2012].

³⁴ Mohammad El Said and Amy Kapczynski, “Access to Medicines: The Role of Intellectual Property Law and Policy”, Working Paper prepared for the Third Meeting of the Technical Advisory Group of the Global Commission on HIV and the Law, July 7-9, 2011.

³⁵ Mohammed El Said, *Public Health Related TRIPS-Plus Provisions in Bilateral Trade Agreements: A Policy Guide for Negotiations and Implementers in the Eastern Mediterranean Region* (Geneva: WHO and ICTSD, 2010).

³⁶ See Oxfam International, “All Costs, No Benefits”, available at <http://www.oxfam.org/sites/www.oxfam.org/files/all%20costs,%20no%20benefits.pdf> [Accessed November 16, 2012].

that legislatures and courts would have carefully balanced the costs and benefits of each provision, in practise intellectual property law has evolved in a much more haphazard way. But there is one major trend: the corporate interests that care intensely about intellectual property have succeeded in getting more and more of what they want. Many within the United States—myself included—believe it has gone too far.”³⁷

Conclusion

Evidently, the current dysfunctional global intellectual property protection regime is unable to meet the objectives of fostering creativity and promoting innovation.³⁸ The fragmentation of policy making and the proliferation of bilateral TRIPS-plus agreements is undermining the foundations of the global trading regime. The current regime favours technology exporting countries against importing ones; favours producers against consumers; and more worryingly, favours the private interest against the interest of the public. Although the number of voices calling for reforming the regime has been on the rise in recent years, more should be done to counter these attempts. As Al Masudi observed in his time over a thousand years ago, it is time to restore the human nature to knowledge creation and sharing. Islamic social history provides some valuable lessons in this regard.

³⁷ Stiglitz, *Making Globalisation Work* (2006), pp.115–116.

³⁸ Peter Drahos, *The Global Governance of Knowledge: Patent Offices and Their Clients* (Cambridge: Cambridge University Press, 2012).

Is the Jewish Tradition Intellectual Property?

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☞ Cultural property; Human rights; Intellectual property; Judaism

Introduction

Whether works of authorship should be protected from unauthorised changes and, if so, for how long, are questions of endless fascination to intellectual property scholars. At base, these types of inquiries concern whether there is a perceived societal benefit to safeguarding a work's original authenticity and, if so, under what circumstances. If there is a perceived value to safeguarding a text's authenticity, this benefit must be weighed against a competing social interest in fostering creativity and in developing subsequent works of authorship based on previous works.

Jewish law is not typically considered a "work of authorship", although it can be so viewed in many ways, as will be discussed more fully in this article. Jewish religious law, known as *halakhah*, has a dualistic quality. In one sense, *halakhah* possesses a narrow meaning as Jewish religious law. In a much broader sense, however, *halakhah* "provides a 'worldview' through which all of the world and life's experiences are perceived".¹ Rabbi Joseph Soloveitchik, a leading modern authority on Jewish law, fittingly captured this idea when he wrote that *halakhah* "penetrates into every nook and cranny of life".² Soloveitchik's observation underscores the power of the Jewish tradition embodying the legal precepts, the narratives and folklore supporting the legal content,³ and the people's practices. This broad tradition is known as the *mesorah*, and it is best understood as a cultural product of creative human activity designed to be transmitted to future generations. The *mesorah* takes for granted the human component in both the creation and the repudiation of laws. Thus, "the human share in the making of Jewish Law is both undeniable and inevitable".⁴

Halakhah in both its narrow and broader sense has been derived through the Jewish literature, which can be analogised to a vast inverted pyramid, with the Written *Torah* (the Five Books of Moses) at its base.⁵ This body of literature is unique in that "it is creative, original, and vibrant, and yet it presents itself as nothing more than interpretation, a vast set of glosses on the one true book, the *Torah*".⁶ The Sages who commenced the crafting of Jewish literature in the early centuries of the Common Era may have

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¹ Samuel J. Levine, "Halacha and Aggadah: Translating Robert Cover's Nomos and Narrative" (1998) 1998 Utah L. Rev. 465, 484, quoting Joseph B. Soloveitchik, *Halakhic Man*, translated by Lawrence Kaplan (Philadelphia: Jewish Publication Society, 1983), p.94.

² Soloveitchik, *Halakhic Man* (1983), p.94.

³ This non-legal content, known as *aggadah*, includes "a widely heterogeneous body of materials that range from extra-biblical legends and tales about the rabbis to snippets of popular folklore and fully elaborated homilies". David Stern, "Aggadah" in Arthur A. Cohen and Paul Mendes-Flohr (eds), *Contemporary Jewish Religious Thought* (New York: Free Press, 1987), p.7.

⁴ Morris Adler, Jacob Agus and Theodore Friedman, "A Responsum on the Sabbath" in David Golinkin (ed.), *Proceedings of the Committee on Jewish Law and Standards of the Conservative Movement, 1927-1970* (New York: Rabbinical Assembly, 1997), p.1124.

⁵ Barry W. Holtz, "Introduction" in Barry W. Holtz (ed.), *Back to the Sources: Reading the Classic Jewish Texts* (New York: Simon & Schuster, 1984), pp.12-13.

⁶ Holtz, "Introduction" in Holtz (ed.), *Back to the Sources* (1984), p.13.

understood their mission as merely trying to ascertain the meaning of what God intended by the Torah's words, and yet, in performing their task, they revealed the power of their own interpretative endeavours.⁷

Moreover, human creativity is no stranger to the Jewish tradition. According to Soloveitchik, "[t]he peak of religious ethical perfection to which Judaism aspires is man as creator".⁸ Soloveitchik claims that the Torah chose to relate to man "the tale of creation" so that man could derive the law that humans are obligated to create. The Jewish religion introduced to the world that the "most fundamental principle of all is that man must create himself".⁹ According to Jewish law, man was not intended to be a passive recipient of the Torah, but rather "a partner with the Almighty in the act of creation".¹⁰ Significantly, "[t]he power of creative interpretation is the very foundation of the received tradition".¹¹ This perspective sees creativity as rooted in inspirational elements.¹²

The rabbinic interpretation manifested in the Jewish literature produced throughout the ages is intimately connected with the creation of halakhah in both its narrow and broader sense. Moreover, the mesorah that results from this entire enterprise—as it is embodied in both the Jewish texts and lived by the people—is what affords the Jewish people their unique identity. It is the means through which the Jewish people have exercised their particularity throughout the ages. Simply put, the mesorah is a very unique form of cultural property and one that manifests an undeniable human component.

This article is concerned with exploring the mesorah as intellectual or cultural property. In recent years, the discipline of intellectual property has become concerned with matters of cultural appropriation. With respect to intellectual property scholarship, "'culture' is a word on everybody's lips".¹³ Intellectual property scholars are increasingly turning their attention to how cultural theory—or culture-based claims for intellectual property—deserve our attention.¹⁴ Their goal is to develop a cultural account of intellectual property that can supplement our current understanding of the law.¹⁵ According to this paradigm, intellectual property is understood as a legal vehicle for facilitating (or thwarting) recognition of diverse contributors to cultural and scientific discourse.¹⁶ In the intellectual property realm, a cultural perspective of the law empowers a new Participation Age, a peoples' movement that democratically declares that everyone, not just the sacred few, can be a creator.¹⁷

The traditional approach to intellectual property sees intellectual property rights as economically focused incentives to maintain the appropriate degree of societal creativity necessary to promote progress and disseminate knowledge.¹⁸ In contrast, a culturally nuanced approach to intellectual property sees intellectual property in broader terms than the conventional utilitarian justifications suggest. Thus, under a cultural analysis framework, the emphasis is on intellectual property's relationship to a multiplicity of values, such as autonomy, culture, equality and democracy. This type of analysis urges a reconfiguration of intellectual property law to reinforce these objectives.

From this perspective, intellectual property emphasises human input from a diverse and broad array of sources as vital to the development of the law. This view mirrors today's reality that historically disempowered individuals are appropriating intellectual property and using it as a tool for recognition,

⁷ Holtz, "Introduction" in Holtz (ed.), *Back to the Sources* (1984), p.15.

⁸ Soloveitchik, *Halakhic Man* (1983), p.101.

⁹ Soloveitchik, *Halakhic Man* (1983), p.109.

¹⁰ Soloveitchik, *Halakhic Man* (1983), p.81.

¹¹ Soloveitchik, *Halakhic Man* (1983), p.81.

¹² See Roberta Rosenthal Kwall, "Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul" (2006) 81 *Notre Dame L. Rev.* 1945.

¹³ Madhavi Sunder, "IP³" (2006) 59 *Stan. L. Rev.* 257, 321. See also Dan Hunter, "Culture War" (2005) 83 *Tex. L. Rev.* 1105, 1117, noting that in intellectual property circles the discourse is all about the ownership and control of culture.

¹⁴ E.g. David Tan, "Beyond Trademark Law: What the Right of Publicity Can Learn from Cultural Studies" (2008) 25 *Cardozo Arts & Ent. L.J.* 913.

¹⁵ Sunder, "IP³" (2006) 59 *Stan. L. Rev.* 257, 285.

¹⁶ Sunder, "IP³" (2006) 59 *Stan. L. Rev.* 257, 269, calling this "identity politics".

¹⁷ Sunder, "IP³" (2006) 59 *Stan. L. Rev.* 257, 303.

¹⁸ Kwall, "Inspiration and Innovation" (2006) 81 *Notre Dame L. Rev.* 1945, 1955.

human rights and a redistribution of resources.¹⁹ Thus conceived, the development of intellectual property law should reflect the “dynamic processes of shared meaning-making”.²⁰ Critical to this position is the dynamic, interactive nature of culture.

The cultural property and human rights underpinnings of intellectual property

An examination of intellectual property law from a culture-based perspective is related to a growing focus on the relationship between intellectual property and cultural property. In the 1980s, protection of cultural rights began to be understood as including not only tangibles, but also intangibles, such as modes of life, human rights and beliefs.²¹ The 2003 Convention for the Safeguarding of Intangible Cultural Heritage is of particular significance in that it defines intangible cultural heritage as being “transmitted from generation to generation” and is “constantly recreated by communities and groups in response to their environment, their interaction with nature and their history”.²² According to this definition, cultural heritage provides groups of people “with a sense of identity and continuity”. The Convention further provides that social practices, rituals and festive events gather their meaning by reaffirming the identity of their community or group, whether performed privately or publicly.²³

Moreover, intellectual property and cultural property rights are increasingly seen within the framework of international human rights.²⁴ In the human rights arena, rights emerging in cultural terms have particular relevance for traditions whose survival historically or presently is in jeopardy.²⁵ Further, as human rights continue to evolve and expand, there has been a growing trend to augment human rights protections to include groups rather than just individuals.²⁶ Such an expansion is logical given the reality that “[t]he basic source of identity for human beings is often found in the cultural traditions into which he or she is born and brought up” and, therefore, “[t]he preservation of that identity can be of crucial importance to well-being and self-respect”.²⁷ This expansionist tendency parallels the concern with how the law reaffirms the composition of groups and individual identities and values.²⁸ Law and culture scholars focus on how law “simultaneously embodies the interests of particular groups and shapes those interests—and even shapes the identities of those who understand themselves as members of such groups”.²⁹ Thus, Richard Johnson emphasises the “who I am” and the “who we are” of culture, thereby highlighting the relevance of both individual and collective identities.³⁰

According to some cultural property authorities, the purpose of cultural property and cultural tradition is to afford groups autonomy over their communities.³¹ So the operative question becomes “what does the community think is important?” A particular community may face internal conflicts with respect to this question as well as external pressures. These conflicts are the result of the dynamic nature of culture itself, which is subject to both endogenous and exogenous influences. Today, “interactions within and between

¹⁹ Sally Engle Merry, “Law, Culture, and Cultural Appropriation” (1998) 10 *Yale J.L. & Human.* 575, 585–586.

²⁰ Sunder, “IP³” (2006) 59 *Stan. L. Rev.* 257, 268.

²¹ The United Nations Educational, Scientific and Cultural Organization (UNESCO) was created to protect cultural heritage.

²² UNESCO Convention for the Safeguarding of Intangible Cultural Heritage 2003, art.2, para.1.

²³ UNESCO Convention for the Safeguarding of Intangible Cultural Heritage 2003, art.2, para.2.

²⁴ Peter K. Yu, “Reconceptualizing Intellectual Property Interests in a Human Rights Framework” (2007) 40 *U.C. Davis L. Rev.* 1039, 1075.

²⁵ Nihal Jayawickrama, *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence* (Cambridge: Cambridge University Press, 2002), p.230.

²⁶ Yu, “Reconceptualizing Intellectual Property Interests in a Human Rights Framework” (2007) 40 *U.C. Davis L. Rev.* 1039, 1147–1148.

²⁷ Asbjørn Eide, “Cultural Rights as Individual Human Rights” in Asbjørn Eide, Catarina Krause and Allan Rosas (eds), *Economic, Social and Cultural Rights*, 2nd edn (New York: Springer, 2001), pp.289, 291.

²⁸ See e.g. Graham Dutfield, “TRIPS-Related Aspects of Traditional Knowledge” (2001) 33 *Case W. Res. J. Int’l L.* 233, 240, 242–243; Eide, “Cultural Rights as Individual Human Rights” in Eide, Krause and Rosas (eds), *Economic, Social and Cultural Rights* (2001), p.290.

²⁹ Paul W. Kahn, “Freedom, Autonomy, and the Cultural Study of Law” (2001) 13 *Yale J.L. & Human.* 141, 150.

³⁰ Richard Johnson, “What Is Cultural Studies Anyway?” (1986) 16 *Soc. Text* 38, 44.

³¹ Group rights and self-determination are related because recognition of group rights, especially when related to territory or regional autonomy, is the manifestation of self-determination. See Ian Brownlie, “Rights of Peoples in International Law” in James Crawford (ed.), *The Rights of Peoples* (Oxford: Clarendon Press, 1988), pp.1, 6.

groups have to be at the core of any culturally informed analysis”.³² As a result of these interactions, cultural exchange is constant and inevitable. These interactions are at the heart of the balance cultural traditions seek to strike between evolution and authenticity, between preservation and modernity. Indeed, a cultural product or tradition is authentic only if it “maintains a legitimate link to the community”.³³

This reality necessitates grappling with the ultimate questions of whether, and how, preservation of cultural tradition aligns with modern sensibilities. Specifically, cultural dissent and evolution of the cultural tradition in pockets of the community, particularly absent a link to the tradition, can compromise traditional values and result in the loss of something perceived as valuable by other segments of the community. Thus, cultural traditions continually negotiate between preservation and modernity and between evolution and authenticity. This concern with loss of value and dilution of the tradition’s authenticity justifies a perspective that embraces a degree of selectivity with respect to implementing changes in the tradition.³⁴

The Jewish tradition as cultural property

This perspective of intellectual property, steeped in considerations of cultural property and international human rights, illustrates the potential for understanding the mesorah. The instruments guiding the best practices for cultural property highlight the important connection between creative intellectual activity, culture and the importance of transmission from one generation to the next. Although the range of cultural affiliation continues to widen beyond ethnoracial classifications to include religiously defined cultures,³⁵ virtually no attention has been paid to analysing mainstream religion, including the Jewish tradition, through a cultural property lens. The absence of an explicit connection in the literature is surprising because Jewish law, like all law, responds to social and cultural practices.³⁶

The story of the Ethiopian Jews is a familiar one to most Jews at this point in time because the rescue efforts on their behalf in the latter half of the 20th century have been the subject of much discussion within both Israel and the United States.³⁷ More recently, however, the Igbo tribe in Nigeria has come to the attention of Jewish leaders. Whereas Ethiopian Jews have been confirmed to be fully Jewish,³⁸ the status of the Igbo is more uncertain. Still, many members of the Igbo tribe believe they are descended from Israelite religions, and overall they, like the Ethiopian Jews, illustrate a useful connection between mainstream cultural property and the Jewish tradition. The belief concerning the Jewish origin of the Igbo is based on the existence of customs and practices that some tribe members are only able to explain through a link to the Jewish religion in its Biblical form. Some of the commonalities include the following cultural practices: Igbos have been practicing circumcision on the eighth day long before being exposed to the Bible by missionaries and traders; some of the men stay away from their wives’ huts two weeks out of the month³⁹; Igbos sit on the floor following the death of a close relative⁴⁰; and they sound a horn very similar to the shofar, which is used by Jews particularly around the time of the High Holidays.⁴¹ Although many Igbos are officially raised as Roman Catholic, a growing number are beginning to turn to what they

³² Sunder, “IP³” (2006) 59 Stan. L. Rev. 257, 331.

³³ Susan Scafidi, *Who Owns Culture? Appropriation and Authenticity in American Law* (New Jersey: Rutgers University Press, 2005), p.54.

³⁴ Roberta Rosenthal Kwall, “The Cultural Analysis Paradigm: Women and Synagogue Ritual as a Case Study”, 34 Cardozo L. Rev. (forthcoming).

³⁵ David A. Hollinger, *Postethnic America: Beyond Multiculturalism* (New York: Basic Books, 1995), p.14.

³⁶ Robert Post, “Recuperating First Amendment Doctrine” (1995) 47 Stan. L. Rev. 1249, 1272.

³⁷ American-Israeli Cooperative Enterprise, “The History of Ethiopian Jews”, available at <http://www.jewishvirtuallibrary.org/jsource/Judaism/ejhist.html> [Accessed October 28, 2012].

³⁸ American-Israeli Cooperative Enterprise, “The History of Ethiopian Jews”, available at <http://www.jewishvirtuallibrary.org/jsource/Judaism/ejhist.html> [Accessed October 28, 2012].

³⁹ This custom seems to reflect Jewish law’s emphasis on family purity and avoiding sexual relations during the time of a woman’s menstruation. These laws are derived from the Torah, see e.g. *Leviticus* 15:19–33, 18:19, 18:29, 20:18, but they were developed significantly during the Talmudic period and even afterward. See e.g. *Niddah* 66a (Talmud Babylonian).

⁴⁰ In Biblical times, mourners would sit on the ground. David L. Lieber, Jules Harlow, United Synagogue of Conservative Judaism and The Rabbinical Assembly, *Etz Hayim: Torah and Commentary* (Philadelphia: Jewish Publication Society, 2001), p.127, fn.3, commenting on Genesis 23:3.

⁴¹ Lieber, Harlow, United Synagogue of Conservative Judaism and The Rabbinical Assembly, *Etz Hayim* (2001), pp.822–823, commenting on Numbers 10:1–9.

believe are their Jewish roots. In fact, Nigeria now has an official Chief Rabbi, Rabbi Howard Gorin, who also leads a congregation in Rockville, Maryland.⁴²

The tribal nature of the Igbo, and Nigerian society overall, draws them to the more Biblical aspects of Judaism. For the most part, they have not been exposed to the subsequent rabbinic tradition, and to some degree, they are culturally resistant to its fluidity.⁴³ Religious purity is a powerful component of their mentality. Contemplating the Igbo allows for a consideration of the structure of Biblical Judaism prior to the rabbinic period, during which the rabbis developed a large body of Jewish law. Moreover, to the extent the Igbo are the type of society more typically of interest to cultural property scholars, they reaffirm a connection between cultural property and the Jewish tradition.

Three reasons support examining the mesorah in its entirety in cultural property terms. First, Jewish law, especially as it has been developed through the rabbinic tradition, governs every aspect of human behaviour, regulating man's relationship to God and to fellow human beings.⁴⁴ Jewish law is intended to be an organic system that is all-encompassing. In short, Jewish law exists to protect a set of practices that are integral to the survival of the Jewish people.⁴⁵

Secondly, Jews have faced a long history of danger regarding the loss of their particularity, as is true of many groups who are the intended beneficiaries of the emerging law of cultural property. In modern times, the murder of six million Jews during the Holocaust is the paradigmatic illustration of this point. Interestingly, the current legal framework regarding international human rights "was brewed in the cauldron of World War II."⁴⁶ The Second World War and the Holocaust motivated the passage of the Universal Declaration of Human Rights (UDHR), the first document composing the International Bill of Rights, the core of the human rights framework for intellectual property.⁴⁷ During the drafting process, the UDHR delegates repeatedly condemned forced intellectual labour, which was among the numerous atrocities committed by the Nazis against the Jews during the war.⁴⁸

Thirdly, the essence of Jewish law is similar to any type of cultural property in that it has been developed and adapted by humans throughout the ages. Judaism has evolved considerably from its Biblical origins that are so appealing to the Igbo. Although Jewish law differs from secular legal systems in that God is viewed as the ultimate Author of the laws, in practice, the operation of Jewish lawmaking historically has incorporated a pronounced human element. This human element necessarily entails both subjectivity and fluidity of interpretation. Significantly, Jewish law is a cultural product of creative human activity that represents the product of human judgment about God's will.

The human dimension of the Rabbinic tradition

Jewish law is characterised by a dualistic developmental framework, which concerns two distinct relationships of power. Jewish law is rooted in the concept of Divine Revelation, and this component of its framework largely embodies a vertical model with the operative power relationship existing between God and the Jews. In contrast, the development and interpretation of Jewish law is within the purview of human beings. Because humans are, in theory, equal to one another, this model essentially can be understood as a horizontal one.

⁴² Joanne Palmer, "Becoming Jewish, How a Nice Jewish Boy Became a Chief Rabbi in Nigeria", *United Synagogue Review*, May 30, 2006.

⁴³ Palmer, "Becoming Jewish", *United Synagogue Review*, May 30, 2006.

⁴⁴ Moses Maimonides, *The Guide for the Perplexed*, 2nd edn (Berkeley: University of California Libraries, 1904), p.129 (translated from the Original Arabic Text by Dr M. Friedlander).

⁴⁵ See Kwall "The Cultural Analysis Paradigm", 34 *Cardozo L. Rev.* (forthcoming).

⁴⁶ James W. Nickel, *Making Sense of Human Rights* (Berkeley: University of California Press, 1987), p.1.

⁴⁷ The framers of the UDHR often discussed these events even though the instrument itself does not refer specifically to these motivations. Yu, "Reconceptualizing Intellectual Property Interests in a Human Rights Framework" (2007) 40 *U.C. Davis L. Rev.* 1039, 1050–1051.

⁴⁸ See Roberta Rosenthal Kwall, *The Soul of Creativity: Forging a Moral Rights Law for the United States* (Stanford: Stanford University Press, 2010), pp.100–101, for a discussion of Dina Gottlieb Babbitt, the Auschwitz prisoner forced to paint portraits under the direction of Josef Mengele, the infamous Nazi doctor known as the Angel of Death.

The core doctrine of Jewish law under the vertical model is Revelation by God of His will to the Jewish people at Mount Sinai. Jewish tradition maintains that through this Revelation, the Divine presence permeated the earth with instructions, laws and commands. Although the exact content of this Revelation is uncertain and the subject of endless debate and discussion, it is clear that throughout history, the tradition understood the Written Law, also known as the Torah or the Five Books of Moses, “as the source of authority and the starting point for the entire Jewish legal system”.⁴⁹ With respect to the Written Law, Steven Resnicoff, writing from the perspective of an Orthodox legal scholar, has observed that “Jewish law, as understood by a majority of its most influential authorities, assumes that the words are God’s or, at least, the ones that God wants us to have”.⁵⁰ Thus, Jewish law is steeped in a vertical conception of Divine authority over mankind.

According to the tradition, Revelation encompassed not only the Written Law, but also the Oral Law, which provided explanations and elaborations upon the Written Law. The most universally well-known codification of the Oral Law is the Babylonian Talmud, which was codified around 500 C.E. and still is regarded as the central book of Jewish law and life.⁵¹ The conception of authority inherent in the Oral Law is both vertical and horizontal. Although the part of the Oral Law that the tradition assumes God revealed directly to Moses is a product of the same vertical paradigm as the Written Law, the Oral Law also included a pronounced horizontal paradigm that supports a rich tradition of human interpretation. That is to say, a part of the Oral Law was “committed to halakhic authorities” in every generation “to fashion and develop”.⁵² The seeds of this horizontal model for the Oral Law can be traced back to a verse in Deuteronomy, which provides that people must abide by the judicial verdicts that are announced by the Levitical priests or the judges in charge.⁵³ The tradition understands this language as applying to more than judicial verdicts so that it also invests halakhic authorities in subsequent generations with the authority to solve new problems.⁵⁴

The concept that Jewish law is subject to human interpretation, even at the expense of the Divine, is illustrated by one of the most famous stories in the Talmud known as the Oven of Akhnai. This narrative involves a dispute between Rabbi Eliezer and the majority of Sages that purports to be about the ritual purity of a particular oven. In reality, however, the dispute is much more global. The Talmud discloses that Rabbi Eliezer invoked various miraculous events, which culminated in the appearance of a Heavenly Voice declaring that his position is the correct one. The Sages replied that the law is “not in Heaven”.⁵⁵ Instead, after the Revelation, the law was to be interpreted by humans; thus, the Sages prevailed over Rabbi Eliezer. In discussing this narrative in an article published in the *Utah Law Review*, Samuel Levine has observed:

“[T]he Sages followed their own opinion, based on the principle that the duty and authority to interpret the law was given to humans, and thus the law is determined according to human, rather than Divine, logic.”⁵⁶

A cultural property perspective emphasises that much of the existing power dynamics between humans are a product of cultural production. In other words, the power structure in place at any given time reflects the give and take of human dynamics and relationships. This type of analysis is relevant to the horizontal model of lawmaking operative under Jewish law. The existence of the horizontal paradigm’s focus on human lawmaking authority was as palpable during the Talmudic period as it was afterward. Throughout

⁴⁹ See Menachem Elon, *Jewish Law: History, Sources, Principles* (Philadelphia: Jewish Publication Society, 1994), Vol.1, p.232.

⁵⁰ Steven H. Resnicoff, “Autonomy in Jewish Law—In Theory and in Practice” (2009) 24 J.L. & Religion 507, 510.

⁵¹ Resnicoff, “Autonomy in Jewish Law—In Theory and in Practice” (2009) 24 J.L. & Religion 507, 528 fnn.112–113.

⁵² Elon, *Jewish Law: History, Sources, Principles* (1994), p.193.

⁵³ Lieber, Harlow, United Synagogue of Conservative Judaism and The Rabbinical Assembly, *Etz Hayim* (2001), pp.1090–1091, commenting on *Deuteronomy* 17:8–11.

⁵⁴ Elon, *Jewish Law: History, Sources, Principles* (1994), p.217, fn.34.

⁵⁵ *Bava Metzia* 59b (Talmud Babylonian), analysing *Deuteronomy* 30:12.

⁵⁶ Levine, “Halacha and Aggada” (1998) 1998 *Utah L. Rev.* 465, 494; Elon, *Jewish Law: History, Sources, Principles* (1994), pp.262–263.

history, the rabbis sought to establish their authority and power so they could execute their role as lawmakers. In a legal system such as Jewish law, where the root source of authority is a vertically structured model based on Divine authority, this establishment of power by the rabbinic lawmakers was critical. In commenting about the Talmud's story of the Oven of Akhnai, Menachem Elon, the former deputy president of the Supreme Court of Israel, has observed that even though "objective truth" was on the side of Rabbi Eliezer, "legal truth ... follows the majority".⁵⁷ Elon's commentary pointedly shows that, ultimately, Jewish law is not "objectively neutral", but rather the product of a subjective human component. Indeed, he claims that it

"would be difficult to picture a more telling illustration of the exclusive prerogative of the halakhic authorities to declare the law, and of the absolute rule of law, even, as it were, over the divine Legislator Himself".

A culturally sensitive perspective understands law as a product of the human condition, grounded in specific historical contexts, rather than as an objectively neutral system. Significantly, the exercise of human judgment in the application of Jewish law produces the need for this contextualisation and the inevitable reality of contested interpretations. Of course, in every generation, there were always boundaries which the rabbis would not cross, no matter how much their discourse revealed significant differences of opinion and contestation. These boundaries fixed the parameters of the law in each generation. Although in certain instances the boundaries of the law were regarded as fixed and certain, more often than not, they emerged through contested discourse and in historically specific contexts. This has been true throughout Jewish law's history and is no less true today. In short, the tradition is designed so that discontinuous, or new, elements can be embraced as long as there is a historic basis for these elements within the body of the halakhic system.⁵⁸

Consistent with the presence of contestation in the Jewish tradition, the development of Jewish law has, from its earliest beginnings, embraced a multiplicity of values, which have manifested in at least three significant ways. First, the sacred texts of the tradition reveal a multiplicity of meanings on their face. With respect to the Written Torah, for example, Jewish law eschews the idea of textual fundamentalism, rejecting the view that the text itself has a fixed and determinate meaning. Even the text of the Bible itself incorporates "a number of views of God, a number of conceptions of sin, retribution, love, justice, and so forth".⁵⁹ Further, the language of the original text, Hebrew, facilitates this multi-valence of expression given that its "system of grammatical roots allows for fullest and broadest expression of different ideas within a single expression or word".⁶⁰ Significantly, the consequence of a system dependent on human agency is the expectation that human agents will differ in their interpretations. Indeed, "Rabbinic discussion ... is replete with differences of opinion and records of divergent practice" and "difference of opinion and practice was a legacy" of the early rabbis and "recognized as a normal phenomenon".⁶¹

Secondly, the Jewish tradition has embraced a multiplicity of values through its focus on law as a product of both the people and the rabbinic hierarchy. Historically, in practice Jewish law has always blended what the rabbis taught with what the people practiced; it thus consists of both rabbinical rulings that are the product of legal interpretation by the rabbis, as well as the norms of practice by the people.⁶² Given the absence of a legislative body and a police force, the role of custom, or *minhag*, has a special

⁵⁷ Elon, *Jewish Law: History, Sources, Principles* (1994), pp.262–263.

⁵⁸ See Kwall, "The Cultural Analysis Paradigm", 34 *Cardozo L. Rev.* (forthcoming) for a discussion of issues regarding women and synagogue ritual as an example of current contestation.

⁵⁹ Gerson D. Cohen, "The Talmudic Age" in Leo W. Schwarz (ed.), *Great Ages and Ideas of the Jewish People* (New York: Random House, 1956), pp.143, 174.

⁶⁰ Jay M. Harris, *How Do We Know This: Midrash and the Fragmentation of Modern Judaism* (Albany: SUNY Press, 1994), p.215.

⁶¹ Cohen, "The Talmudic Age" in Schwarz (ed.), *Great Ages and Ideas of the Jewish People* (1956), pp.165, 175.

⁶² Elliot N. Dorff, *The Unfolding Tradition: Jewish Law after Sinai* (New York: Aviv Press, 2005), p.59.

significance in the development of Jewish law.⁶³ Professor Joshua Berman, who specialises in the Old Testament, has documented how this concern for “the collective exercise of power” traces back to the book of *Deuteronomy*.⁶⁴ Thus, from the beginning, the Jewish people have maintained a very democratic ideology in that the practices adopted by the Jewish people and which have become part of their lives have a special meaning and cannot be ignored by the rabbis.⁶⁵

Thirdly, both the top-down and bottom-up aspects of Jewish law have been influenced by cultural developments both within the Jewish community and outside of it. Cultures are not hermetically sealed but continuously interact with the world around them. This reality is especially true with respect to Jewish law given that the history of the Jewish people is such that they have been living in foreign cultures in the Diaspora since even before the destruction of the Second Temple in 70 C.E.⁶⁶ These cultures have exerted an enormous influence on the development and application of Jewish law throughout the centuries.⁶⁷

The genius of Rabbinic Judaism lies in the rabbis’ construction of an ordered legal system that was consistent with the tradition of the past, even if not completely identical to it. Thus, halakhah in its narrow sense, referring to Jewish religious law, embodies a seamless continuity of tradition, however much it has changed in form and content.⁶⁸ As used in its broader sense, however, halakhah also has continued to evolve. Just as the worldview of the people of Israel at Sinai was distinct from that of the Jews in the period of the Talmud, the same is true for Jews throughout the centuries and today. Given the development of halakhah as it is used in both of these ways, a central question emerges that has profound significance for Jews in modern times. Specifically, how much of the halakhah, as that term is used to refer to Jewish law in its narrow sense, must be preserved and followed in order to maintain the Jewish tradition characteristic of halakhah in its broader sense? This issue is of vital importance today, as the continuity of the Jewish tradition faces enormous challenges from both external as well as internal influences.

Concluding observations

In *The Idea of Authorship in Copyright*, Lior Zemer posits a redefinition of authorship pursuant to which “the author” is defined as a joint effort by the colloquial author and the public.⁶⁹ In crafting this argument, Zemer relies on the idea that both authors and copyrighted works are “social constructs”.⁷⁰ A somewhat similar type of idea underscores the designation of particular rabbinical Sages quoted in the Talmud. In other words, when the Talmud states “Rabbi X said”, this does not necessarily mean “Rabbi X himself” but rather Rabbi X’s later disciples and the entire tradition that developed in Rabbi X’s name.⁷¹ As William Scott Green has observed:

“The presence of the names of rabbinic masters, then, provides a tangible connective between the present and the past, and the demarcation of the past ... palpably establishes the inter-generational chain of communication fundamental to a traditional culture.”⁷²

The notion that Jewish law can be considered the “property” of the Jewish people collectively has significant implications for how to address and balance preservation of the mesorah and the development of the

⁶³ Dorff, *The Unfolding Tradition* (2005), p.20.

⁶⁴ Joshua Berman, “Culture Matters: Deuteronomy, Culture, and Collective Governance” (2010) DePaul University College of Law Center for Jewish Law & Judaic Studies, available at http://www.law.depaul.edu/centers_institutes/flljs/documents/berman_culture_matters.pdf [Accessed October 28, 2012].

⁶⁵ Dorff, *The Unfolding Tradition* (2005), p.51.

⁶⁶ Isaiah Gafni, “Babylonian Rabbinic Culture” in David Biale (ed.), *Cultures of the Jews: A New History* (New York: Schocken, 2002), p.223.

⁶⁷ See Roberta Rosenthal Kwall, “Creativity and Cultural Influence in Early Jewish Law” (2011) 86 *Notre Dame L. Rev.* 1933.

⁶⁸ Dorff, *The Unfolding Tradition* (2005), p.33, quoting Menahot 29b (Talmud Babylonian).

⁶⁹ Lior Zemer, *The Idea of Authorship in Copyright* (Surrey: Ashgate Publishing, 2007).

⁷⁰ Zemer, *The Idea of Authorship in Copyright* (2007), p.9.

⁷¹ Kwall, *The Soul of Creativity* (2010), p.139.

⁷² William Scott Green, “What’s in a Name?—The Problematic of Rabbinic ‘Biography’” in William Scott Green (ed.), *Approaches to Ancient Judaism: Theory and Practice* (Missoula: Scholars Press for Brown University, 1978), Vol.1, p.89.

tradition in modernity. This inquiry is a familiar one to those who grapple with the intellectual property issues of how, and under what circumstances, a work of authorship can be modified without the original author's permission and under what circumstances attribution must be provided to the original author of a modified work. The intellectual property doctrine of moral rights in particular safeguards the integrity and attribution requirements for conventional works of authorship in order to foster public knowledge and awareness of the original meaning and message of the work.⁷³ Underlying this aspect of moral rights law is a policy judgment that a value exists to preserving to some degree the meaning and message of an original work of authorship; a similar theme underscores cultural property's concern with preserving cultural heritage, particularly for endangered groups and traditions. Thus, the Jewish people, especially the rabbis, of every generation must address whether the mesorah should be modified and the extent to which specific modifications will eviscerate the original meaning and message of the tradition and threaten its continuity in the long run. This brief treatment is not the place to explore this important point further, but situating the mesorah in the context of intellectual and cultural property offers an interesting, and largely unexplored, way of approaching the fundamental issues of Jewish peoplehood and continuity.

⁷³ Kwall, *The Soul of Creativity* (2010).

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