

Intellectual Property Quarterly**1999****Case Comment****INTELLECTUAL PROPERTY AND HUMAN RIGHTS****Peter Drahos.**

Copyright (c) 1999 Intellectual Property Institute and Contributors

Subject: INTELLECTUAL PROPERTY. Other related subjects: Human rights

Keywords: Human rights; Intellectual property

Abstract: Relationship between human rights, right of property and IP rights, conflict with other rights, whether IP rights are now human rights given their universal recognition and need for IP specialists to participate in human rights debates.

***349 1. INTRODUCTION**

The aim of this article is to consider the relationship between human rights, the right of property and intellectual property rights. Intellectual property rights, as section 3 below shows, have spread through a network of bilateral, regional and multilateral treaties. The spread and use of these rights affects human rights. The exercise of patent rights, for instance, has implications for the right to health. What is the relationship between intellectual property and human rights? What should be the relationship?

An answer to these two questions is developed in the following way. Section 3 of the article traces the regulatory globalisation of intellectual property rights. Starting with the Universal Declaration of Human Rights, section 4 then examines the extent to which the right of property has been recognised as a human right. Section 5 examines some arguments for the view that intellectual property rights are fundamental human rights. The conclusion reached in these two sections is that it is difficult to see how intellectual property rights can be classified as fundamental human rights. Section 4 also describes the tensions and conflicts that exist between western intellectual property regimes and the "third generation" of human rights (e.g. the right of development and cultural rights).

Sections 4 and 5 of the article leave open the question of how the relationship between intellectual property norms and human rights might be conceptualised. Section 6, the last section of the article, argues that intellectual property rights are instrumental rights that should serve those needs and interests which human rights discourse identifies as fundamental. The contention is that intellectual property issues can no longer remain the exclusive province of the epistemic community of intellectual property experts. Property has always been a central concept in political theory. The social and political arrangements of feudalism were underpinned by the arrangements for the ownership of land. In information societies, economic and social structures will, in part, be influenced by the arrangements those societies make, both nationally and *350 internationally, for the ownership of information. Those specialists working within intellectual property will have to begin to engage with other epistemic communities and discourses, including those within the human rights community.

2. DEFINITIONAL OBSERVATIONS

"Intellectual Property" is a generic term that probably came into regular use during the twentieth century. [FN1] Trying to define the essence of intellectual property is difficult. Most definitions in fact simply list examples of intellectual property rights or the subject-matter of those rights (often in inclusive form) rather than attempting to identify the essential attributes of intellectual property. [FN2] For the purposes of this discussion,

(Cite as: I.P.Q. 1999, 3, 349-371)

it will be posited that intellectual property rights are rights of exploitation in information. Information is becoming "the prime resource" in modern economic life. [FN3] Even in apparently non-information industries like agriculture, the control and ownership of genetic information has become a major factor, shaping the structure of that industry. It is precisely because information has become the primary resource that the exploitation of information through the exercise of intellectual property rights affects interests that are the subject of human rights claims. Property rights by their nature allow the rights holder to exclude others from the use of this prime resource and so they are likely to produce instances of rights conflict. To illustrate the point somewhat tersely; property in expression (copyright) conflicts with freedom of expression. [FN4]

The following section will, in a brief span, describe the evolution of intellectual property law. The purpose of this historical review is to show the emergence of intellectual property as part of the positive legal order of states. This history shows that intellectual property rights have always been used by states to secure market place objectives, both domestic and international. The fundamental positivist element of intellectual property norms is also highlighted below. All societies have had to devise norms for regulating the ownership and use of different kinds of information. Historically, this has been especially true of religious information. One can thus identify customary equivalents of intellectual property. [FN5] But the western intellectual property tradition is rooted in the idea that intellectual property rights are positive rights created by the state for the benefit of the commonwealth. Within Thomist political theory the validity of positive law was itself to be judged by the axioms of natural law. [FN6] The norms of positive law had to converge with the divine design which natural law communicated to men. The rules of positive law then met the test of validity, not by being a mirror reflection of some metaphysical counterpart, but rather by whether or not they contributed to the overall divine plan. Conceptually speaking, this allowed someone working within the natural law tradition to recognise the right of a state to modify property rights through the enactment of positive law. The engineering of economies using intellectual property norms is not, in other words, necessarily outside of the scope of contemplation of natural law theory.

3. THE POSITIVIST HISTORY OF INTELLECTUAL PROPERTY

The territorial period

The different subject areas of intellectual property originate in different places and at different times. Very probably all these laws can be traced back to the system of royal privilege-giving which seems to have operated in most of medieval Europe. The Venetians are credited with the first properly developed patent law in 1474. In England the Statute of Monopolies of 1623 swept away all monopolies except those made by the "true and first inventor" of a "method of manufacture". Revolutionary France recognised the rights of inventors in 1791 and outside of Europe the United States enacted a patent law in 1790.

The French Revolution is sometimes linked to the idea of intellectual property rights as natural rights. In actual fact the Revolution was much more about the liberation of information than the creation of property rights in information. Under the oppressive privilege system that regulated the production and reading of books in prerevolutionary France large numbers of people connected with the book trade went to jail. The statistics seem incredible to the modern eye. During the 1750s 40 per cent of those in the Bastille were there because of offences related to the book trade. In the 1760s this figure changed to 35 per cent. [FN7] The system reached its Kafkaesque apogee in a law of 1757 sentencing to death anyone involved in writings which amongst other things injured royal authority and troubled the "tranquility of the state". [FN8] The French Revolution brought with it freedom of the printing presses. The freedom of communication and of the press that the Declaration of the Rights of Man proclaimed was made concrete once printers no longer had to obtain the privilege of printing from the King. Publishing went through an extraordinary period of popular participation. A public dialogue and exchange of ideas spread through the medium of journals, newspapers, pamphlets and other ephemeral forms of publishing. In this deregulated market, the commercial production of the large printed book, a symbol of the absolutist past, went into decline. In this relatively short period before copyright law came back to restore "order" to publishing markets there was "an unprecedented democratization of the printed word". [FN9]

The second part of the nineteenth century saw the proliferation in Europe of national intellectual property regimes. It was a period of somewhat chaotic growth with much borrowing and cross-pollination of intellectual property law between states. Outside of Europe intellectual property grew along colonial pathways. So, for example, the self-governing colonies of Australia enacted copyright and patent statutes that were essentially faithful copies of English models.

(Cite as: I.P.Q. 1999, 3, 349-371)

The historical record of this period suggests that right from the beginning a ruthless trade morality drove the development and use of patents. [FN10] Clearly, when English Kings and then later the colonial governments of America granted patents to those who imported innovations that had been developed abroad they were not much concerned about the "natural rights" of the foreign inventor. Copyright was similarly dominated by the protectionist impulse. Right through patent history all states kept a weather eye on the extent to which their patent system recognised the rights of foreign patent holders. It was thought by all states to be a good idea to require foreign patent holders to work their patents in their borders.

The territorial period is dominated by the principle of territoriality, the principle that intellectual property rights do not extend beyond the territory of the sovereign which has granted the rights in the first place. The principle is the product of the intimate connections to be found between sovereignty, property rights and territory. It was a principle which courts recognised in the interests of international comity. [FN11] The principle of territoriality meant that an intellectual property law passed by country A did not apply in country B. Intellectual property owners faced a classic freeriding problem, or putting it in another way some countries were the beneficiaries of positive externalities. Dealing with freeriding and positive externalities led states into the next phase of intellectual property protection: the international period.

The international period

During the nineteenth century states began to take a greater and greater interest in the possibility of international co-operation on intellectual property. At first this interest manifested itself in the form of bilateral agreements. [FN12] Those states that were worried about the freeriding problem began to negotiate bilateral treaties with other states. Those states that saw themselves as recipients of a positive externality remained isolationist. The United Kingdom and the United States provide an example of each *353 response. The United Kingdom found in the eighteenth century that many of its authors were having their works reproduced abroad without permission and without receiving royalties. Much of the "piracy" was taking place in America, where authors like Dickens were very popular with the American public and therefore American publishers.

The United Kingdom response to this problem was to pass in 1838 and 1844 Acts that protected works first published outside of the United Kingdom. These Acts grounded a strategy of reciprocity. Foreign works would only gain protection in the United Kingdom if the relevant state agreed to protect United Kingdom works. The 1844 Act saw a considerable number of bilateral agreements concluded between the United Kingdom and other European states. [FN13] International copyright policy in the United States took a different turn to that of the United Kingdom. The United States Copyright Act of 1790 only granted copyright protection to citizens and residents of the United States. This form of national protectionism prevailed in United States copyright policy for a surprising long period: "For over a hundred years, this nation not only denied copyright protection to published works by foreigners, applying the 'nationality-of-the-author' principle, but appeared to encourage the piracy of such works". [FN14]

Like copyright, the different parts of industrial property also became the subject of bilateral treaty making, mainly between European states. By 1883 there were 69 international agreements in place, most of them dealing with trade marks. [FN15] They operated on the basis of the national treatment principle, this principle itself being the outcome of reciprocal adjustment between states. States had come to accept that if they did not discriminate between nationals and foreigners when it came to the regulation of intellectual property rights, neither would other states. In this way states could secure protection for the works of their authors in foreign jurisdictions.

Bilateralism in intellectual property in the nineteenth century was important in that it contributed to the recognition that an international framework for the regulation of intellectual property had to be devised, and it suggested a content in terms of principles for that framework. But this bilateralism was more by way of prelude. The protection it gave authors was never satisfactory. [FN16] The main movement towards serious international co-operation on intellectual property arrived in the form of two multilateral pillars; the Paris Convention for the Protection of Industrial Property (1883) (Paris Convention) and the Berne Convention for the Protection of Literary and Artistic Works (1886) (Berne Convention).

The Paris and Berne Conventions ushered in the multilateral era of international co-operation in intellectual property. The twentieth century saw the proliferation of international intellectual property regimes. [FN17] Treaty making in intellectual property was accompanied by the rise of international organisations to administer

(Cite as: I.P.Q. 1999, 3, 349-371)

these regimes. *354 The most important of these was the World Intellectual Property Organization (WIPO) which was established by treaty in 1967.

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

In 1992 WIPO administered 24 multilateral treaties. But these treaties had not brought with them a harmonisation of rules. Nor were the obligations they created strongly adhered to by all their members. By 1992 WIPO sensed, perhaps more strongly than anyone, the sea change that was about to take place in the regulation of intellectual property. The trade barbarians across the road from them in Geneva, the GATT, were about to see to that. WIPO stood by as brutish trade lawyers pushed the world of intellectual property into the global era.

The global period

During the international period the harmonisation of intellectual property was a painstakingly slow affair. After the Second World War more and more developing countries joined the Paris and Berne Conventions. These conventions ceased to be Western clubs and under the principle of one-vote-one-state, Western states could be outvoted by a coalition of developing countries. Developing countries were not simply content to play the role of a veto coalition. They wanted an international system that catered to their stage of economic development and so, in the eyes of the West at least, they began to throw their weight around. In copyright, led by India, developing countries succeeded in obtaining the adoption of the Stockholm Protocol of 1967. The aim of the Protocol was to give developing countries greater access to copyright materials. Its adoption provoked something of a crisis in international copyright. [FN18] The Paris Convention also became the subject of Diplomatic Conferences of Revision in 1980, 1981, 1982 and 1984 with developing countries pushing for more liberal provisions on compulsory licensing.

During the 1960s India had experienced some of the highest drug prices in the world. Its response was to design its patent law to help to bring about lower drug prices. Under Indian law, patents were granted for processes relating to the production of pharmaceuticals, but not for chemical compounds themselves. When it came to reforming the Paris Convention, countries like India pushed for provisions that would give developing countries more and more access to technology that had been locked up *355 by means of patents. For India this was rational social policy for the educational and health care needs of its citizens. For the United States it was a case of freeriding. The United States in particular found itself more and more isolated at meetings relating to the Paris Convention. [FN19]

The international period was a world in which a lot of freeriding was tolerated. The only enforcement mechanism under the various intellectual property treaties were appeals to the International Court of Justice and most states took reservations on such clauses. No state was in a position to cast the first stone when it came to freeriding. The United States was not a member of the Berne Convention, but United States publishers took advantage of its higher standards of protection "through the back door" method of arranging simultaneous publication in a Berne country like Canada. [FN20]

Not everybody in the United States was happy with this laissez-faire attitude towards the enforcement of intellectual property rights. For the United States film and pharmaceutical industries in particular, intellectual property (copyright for the former, patents for the latter) represented the backbone of their industries. For pharmaceutical companies like Pfizer, intellectual property was an investment issue. They wanted to be able to locate production anywhere in the world, safe in the knowledge that their intellectual property would be protected. Within the lobbying networks that had been organised by these global business entities, an idea began to be bounced around between a small group of consultants, lobbyists and lawyers who travelled these networks--that of linking intellectual property to trade. [FN21] There were two obvious advantages of such a move. First, if a set of intellectual property standards could be made part of a multilateral trade agreement it

would give those standards a more or less global coverage. Secondly, use could be made of the enforcement mechanisms that states had developed for settling trade disputes.

During the 1980s the United States reshaped its trade law to give it a series of bilateral enforcement strategies against countries it considered had inadequate levels of intellectual property enforcement or which were weak on the enforcement of such rights. [FN22] Beginning in 1984 the United States amended its Trade Act of 1974 several times to include intellectual property in the "section 301" trade process. [FN23] Countries caught up in the 301 process came to learn a simple truth. If they failed to act on intellectual property they would, sooner or later, face retaliatory action from the United States.

At the Ministerial Meeting at Punta del Este in September of 1986, the meeting which launched the Uruguay Round of trade talks, intellectual property was included as a negotiating issue. The United States had the support of Europe, Canada and Japan for the inclusion of intellectual property in the Round but basically it was a United States *356 initiative. It was the United States, more specifically the United States business community, which had made all the running on the matter of intellectual property. On April 15, 1994 the Uruguay Round concluded with the signing in Marrakesh of the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations. More than 100 countries signed the Final Act. It contained a number of agreements including the Agreement Establishing the World Trade Organization and the Agreement on Trade-Related Aspects of Intellectual Property Rights (1994) (TRIPS). [FN24]

Post-TRIPS

TRIPS marks the beginnings of the global property epoch. Via the trade linkage TRIPS reaches all those states that are members of the multilateral trading system or which, like China, wish to become members. More generally, intellectual property has come to feature strongly in regional arrangements of the 1990s, particularly trade arrangements. [FN25] The North American Free Trade Agreement (NAFTA) contains extensive provisions on intellectual property. Those provisions in fact served as something of a model for what might be achieved in respect of intellectual property at the multilateral level during the Uruguay Round of negotiations. Different forms of co-operation and convergence on intellectual property law are taking place amongst the states of the Central European Free Trade Agreement, the Association of South East Asian Nations, the Mekong River Basin Countries and the Asia Pacific Economic Co-operation Forum. [FN26]

TRIPS operates under an institutional arrangement designed to promote compliance. The WTO Agreement establishes a Council for TRIPS, which is required to monitor members' compliance with their obligations under the agreement. The practice which seems to be developing is that lead states in intellectual property production like the United States and Europe are sending questions to states asking them to explain their intellectual property law and whether it complies with TRIPS. The monitoring by the Council for TRIPS, the active interest of the United States and Europe in the enforcement of intellectual property obligations and the fact that disputes under TRIPS can be made the subject of proceedings under the dispute resolution mechanism of the Final Act, mean that TRIPS' obligations will over time become a living legal reality for states rather than suffering the fate of so many conventions, that of remaining paper rules.

The post-TRIPS period has also seen multilateral treaty making in intellectual property continue. On December 20, 1996, under the auspices of WIPO, the WIPO Performances and Phonograms Treaty and the WIPO Copyright Treaty were concluded. With this latter treaty, the United States has been successful in globalising the *357 agenda of copyright owners for higher standards of copyright protection in the digital environment. More importantly, has been the link created between intellectual property and the investment regime. The Multilateral Agreement on Investment (MAI) Negotiating Text has gone through a number of changes, but all versions have defined investment to include every kind of asset including intellectual property rights. [FN27] This connection signals the progressive reconceptualisation of intellectual property as an investor's right rather than a creator's right. One likely long run consequence of this reconceptualisation is that the "use-rights" of capital investors in information are likely to become stronger than either the rights of creators or ordinary consumers of information.

Intellectual property norms are also becoming a part of the emerging lex cybertoria--the trade norms of cyberspace. The International Chamber of Commerce (ICC) in a recent discussion paper stated that "[i]n cyberspace, all assets are intangible and can be classified as intellectual property". [FN28] More generally, governments and business Non-Governmental Organisations (NGOs) have agreed that the intellectual property issues raised by e-commerce have to be clearly settled. So far norm-setting on these issues has proceeded largely

(Cite as: I.P.Q. 1999, 3, 349-371)

by way of model laws that have been generated by international organisations of states (e.g. the UNCITRAL Model Law on Electronic Commerce), national law reform bodies (e.g. the work of National Conference of Commissioners on Uniform State Laws on Article 2B (dealing with the licensing of intellectual property rights)) or business NGOs (e.g. the ICC).

Conclusion

The historical connections between intellectual property rights and human rights are thin at best. The emerging states of medieval Europe used them for political ends such as censorship or alternatively as economic tools. More often than not, they hid a mercantilist devil amongst the detail of their intellectual property legislation. States continue to view intellectual property rights through the prism of economic pragmatism. The discussion of the linkage between intellectual property and trade above makes this clear. The United States continues to push for higher standards of intellectual property protection because, in effect, it is able to extract higher and higher tariffs from the consumption by the rest of the world of its information. The fact that states have been practitioners of pragmatism when it has come to intellectual property rights does not, of course, necessarily subvert the normative thesis that intellectual property rights ought to be or are fundamental human rights. However, for those who justify the *358 place of intellectual property in the list of fundamental human rights using a convention-based account of human rights, state custom and societal practice with respect to intellectual property does constitute a problem that has to be explained. Defences of intellectual property rights as fundamental human rights, which draw on some form of moral objectivism, can afford to be more dismissive of the historical record, but then face epistemological and ontological problems as a result.

4. HUMAN RIGHTS, THE RIGHT OF PROPERTY AND INTELLECTUAL PROPERTY

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

The rights of the Declaration are further developed in the International Covenant on Civil and Political Rights (ICCPR) (1966) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966). In the atmosphere of the cold war, led by the former Soviet Union, newly emergent sovereign African and Asian states shaped the drafting of the two covenants with a view to emphasising the rights of self-determination, national sovereignty over resources and freedom from racial discrimination. [FN29] The general right of property with its impeccable liberal pedigree stretching back to the Declaration of the French Revolution and the United States Bill of Rights did not make it into the two Covenants. Article 15.1(c) of the ICESCR recognises the right of an author to "benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production" produced by the author. By implication the Article assumes that authors are entitled to the protection of their interests. The right recognised in Article 15.1(c) is itself one element of a general right, the other two elements being essentially rights of access to cultural life and to the *359 benefits of scientific progress. Together the two Covenants place a discernible emphasis on the interests that humans have in the diffusion of knowledge. [FN30]

The two Covenants along with the Declaration form the edifice upon which the international law of human rights rests, the International Bill of Rights as they are generally called. [FN31] Some international human rights instruments do recognise a general right of property or something close to it. The African Charter on Human and Peoples' Rights (1981) [FN32] in Article 14, does guarantee the right to property, although it then goes on to recognise that that right may be encroached upon in the "interest of public need or in the general interest of the community". The American Convention on Human Rights of 1969 in Article 21(1) recognises a right of property, a right which no one is to be deprived of "except upon payment of just compensation" (see Article 21(2)). A right to property was not included in the European Convention on Human Rights because of

(Cite as: I.P.Q. 1999, 3, 349-371)

controversy over its drafting, but a right to peaceful enjoyment of one's possessions was included in Article 1 of Protocol 1. [FN33] That Article then goes on to recognise the right of a "State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest".

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

In an interesting discussion of these issues, Schermers concludes that most property rights cannot be included in the category of fundamental human right. [FN34] His argument assumes that human rights and property rights can be broken up into categories. Fundamental human rights, he suggests, are "human rights of such importance that their international protection includes the right, perhaps even the obligation, of *360 international enforcement". [FN35] In Schermers' view, most property rights do not fit into this category. Certainly it is hard to see how intellectual property rights do. He suggests that the only possible exceptions to this are those needs-based personal property rights, without which the exercise of other rights like the right to life would be meaningless. Moreover, the absence of the general right of property from the ICCP weakens the claim that it is part of customary international law. [FN36] Attempting to put the property right into the category of fundamental human rights also encounters a conceptual problem. Both private international and public international law recognise the right of sovereign states to regulate property rights, to adjust them to economic and social circumstances. [FN37] Yet this is precisely not the way in which we think about fundamental human rights norms that prohibit genocide, torture and slavery, norms that at least some scholars argue are part of customary international law. [FN38] States cannot adjust these norms to suit their convenience. In the case of property, however, not only is it convenient for states to adjust property norms, but it seems vital to the development of their economies that they have the power to do so. It is for this kind of reason that the European Commission on Human Rights concluded that the grant under Dutch law of a compulsory licence in a patented drug was not an interference in the patent holder's rights under Article 1 of Protocol 1 of the European Convention on Human Rights. The "compulsory licence was lawful and pursued a legitimate aim of encouraging technological and economic development". [FN39]

Thinking about the right of property in the context of human rights reveals nicely the "paradox of property". At one level it is inconceivable that the development of human personality and the protection of individual interests within a group can take place in the absence of property rules that guarantee the stability of individual possession. Yet within the context of the social group no other rules require the continuous adjustments that the rules of property do. [FN40] Modern governments continuously change the rules relating to the use of land, personal chattels, tax, welfare and so on. In modern societies property rights are in a constant state of adjustment. They are the means by which governments solve externality problems. It is for this reason that, when a general right of property is recognised in a human rights instrument, it is made subject to some sweeping public interest qualification.

Within information societies, societies where more and more individuals make their living through the production, processing and transfer of information, the paradox of *361 property intensifies. One reason is that information in various complex ways becomes implicated in the exercise of fundamental human rights. So, to take an example, freedom of expression in a pre-literate, pre-industrial world is a classical negative right. In the global digital village, however, the right of freedom of expression becomes a means by which to protect other more complex activities than simply the right not to be interfered with when one stands on a soapbox in the park. Citizen groups begin to demand access to the media so that their interests qua citizens are recognised. Freedom of communication is appealed to in this process, not as a classical negative right, but rather as a right of access, a positive right. Expression itself takes on many more forms. The complex jurisprudence that has arisen in the United States around freedom of speech is testimony to the way in which changing technological contexts force us to reconceptualise rights. [FN41]

(Cite as: I.P.Q. 1999, 3, 349-371)

Another reason that the paradox of property continues to deepen in our world is that the human rights regime continues to expand, so much so that some scholars have called for quality control on the origination of such rights. [FN42] The result of this expansion is that many more interests become the subject of rights claims, claims that involve use of information. Human rights scholars, at one point, talked of three generations of human rights; classical rights (first generation), welfare rights (second generation) and peoples' rights or solidarity rights (third generation). [FN43] These third generation rights are the subject of continuing debate at the levels of conceptual coherence, identification, and status in international law. [FN44]

It is important to note that the identification and recognition of such rights in international law offer more potential points of conflict or tension with intellectual property rights. It is tension and conflict that is involved rather than breach. Human rights instruments tend to be drafted at the level of principle and in open textured ways. The precise content of these rights is difficult to formulate. Moreover, many of these instruments exist in that twilight zone of normativity known to international lawyers as soft law. These instruments are often recommendatory for member states or represent the views of NGOs. The Declaration of Principles of Indigenous Rights (1984), for example, is a declaration of the Fourth Assembly of the World Council of Indigenous Peoples. The Convention on Biological Diversity (1992) [FN45] does recognise the concept of indigenous intellectual property, but it does so in language that requires a *362 specification of content through protocols and other instruments. [FN46] Most of the norms of international intellectual property law by sharp contrast derive from treaty law. [FN47]

One candidate for a peoples' right is the right to development. The content of this right is, naturally enough, the subject of debate. [FN48] The Declaration on the Right to Development (1986) [FN49] is vague about the positive obligations of assistance that the right places on those against whom the right is being asserted. [FN50] Bedjaoui, in his discussion of the right, maintains that it involves the right of a people to choose its own model of development (by implication a negative right) as well as the right to receive a share of resources that under the principle of the common heritage of mankind belong to all states (by implication a positive right). [FN51] Clearly, there is considerable tension between intellectual property rights and the right to development. Patent systems, for example, restrict access to life-saving drugs, by raising the price of those drugs. Raising drug prices globally will, all else being equal, generally adversely affect the health of the populations of poorer states. [FN52] The preventable death of large numbers of a state's population lowers its stock of human capital thereby interfering in its development prospects. The argument has a particular bite in the context of information, since information once in existence can be made available at zero or little cost. The recognition of a right to development might be the basis on which to argue that states should co-operate in lowering levels of intellectual property protection in some areas, or at least not advance those levels. However, it is important to note that there is no necessary conflict between the right of development and intellectual property. If it *363 turns out to be empirically true that intellectual property rights contribute to economic development, there is no conflict. [FN53]

The precise content of cultural rights are amongst the most difficult to formulate of all peoples' rights. Nevertheless in those instruments that deal with cultural rights in the context of peoples' rights one can discern two broad principles, the thrust of which run counter to the policies of western intellectual property regimes. The first is a proprietary principle in which the right of a people to claim its entire culture is recognised. An example is Article 14 of the Universal Declaration of the Rights of Peoples (1976) [FN54] which simply states that "every people has the right to its artistic, historical and cultural wealth". Similarly, the Declaration of San José, which elaborates and condemns the concept of "ethnocide", claims that Indian peoples have natural and inalienable rights of access, use, dissemination and transmission in the cultural heritage of their territories. [FN55] A proprietary claim to an entire cultural heritage is not a right that is presently recognised by western intellectual property systems. The second principle evident in peoples' cultural rights is, somewhat paradoxically, a principle of cultural diffusion, based on the idea that cultures are part of a global intellectual commons to which all humans have some rights of access. The UNESCO Declaration of the Principles of International Cultural Co-operation (1966), for example, in Article VII.1 states that "[b]road dissemination of ideas and knowledge, based on the freest exchange and discussion, is essential to creative activity, the pursuit of truth and development of the personality". At the abstract level, a principle of cultural diffusion is not necessarily inconsistent with western intellectual property regimes, since most of those regimes allow their subject-matter to fall back into the commons under certain *364 conditions. But as was noted at the beginning of this article, intellectual property systems are expanding in scope and strength of protection. At the concrete level it is hard to see how a principle of cultural diffusion is to work, if the practical effect of increasingly stronger intellectual property regimes is to raise the cost of educational, cultural and scientific information. Putting a price on or increasing the price of information necessarily inhibits its diffusion.

More generally, peoples' rights are increasingly being used in campaigns by indigenous groups all over the world to reclaim or protect their traditional lands and resources. These include traditional resource management techniques, biological resources, and specific knowledge about the practical uses of those biological resources. [FN56] Protecting these informational resources within the context of the existing intellectual property regime raises some well-known problems. The present international intellectual property regime, as noted above, is a western positive law regime that has been shaped by liberal political traditions. National intellectual property systems around the world link the origination of rights to individual persons and maximise the capacity of individual owners to trade in these rights. The sharp divisions, for example, that western lawyers draw between real and personal property rights do not resonate in indigenous cultures where the connections between land, knowledge and art form part of an organic whole. The practical outcome for indigenous groups is that many of their traditional informational resources fail to obtain protection. [FN57] Often this means that they can be freely appropriated.

The response of indigenous peoples, as well as western NGO groups, [FN58] has been to begin a political struggle to change the existing intellectual property regime. During the course of this struggle, intellectual property has become linked to much bigger issues including the sovereignty and self-determination of indigenous peoples, the protection of culture, food security, biodiversity, sustainable development, health policy and biotechnology. [FN59] In these contests, for activists, peoples' rights have become the language of emancipation, western intellectual property regimes the medium of oppression. Indigenous groups have generated numerous declarations condemning prevailing intellectual property systems as, in the words of the COICA statement, ""colonialist", ""racist" and ""usupatory". [FN60]

*365 One important point about these declarations is that they do not, however, abandon the concept of intellectual property altogether. Instead they assert and call for the recognition of indigenous intellectual property rights. [FN61] Indigenous peoples, it seems, are seeking to make intellectual property serve a function beyond that of appropriation of value. They want property to function in a way that allows them to control the use of cultural information which in some deep sense is part of them, to which they are attached, cultural information they do not necessarily want to become the subject of global processes of commodification and appropriation. For them, intellectual property should first and foremost function to preserve their way of life.

5. INTELLECTUAL PROPERTY RIGHTS: UNIVERSALLY RECOGNISED OR UNIVERSAL RIGHTS?

It is an empirical fact, as the historical survey in section 3 above has shown, that intellectual property rights are universally recognised. Does it follow from their universal recognition that they are universal norms, i.e. human rights? If universal norms are defined as those that are universally recognised, the answer is obviously yes. This definitional solution would probably be unsatisfactory to someone within the human rights tradition, especially for those theorists that defend human rights within a framework of moral realism. [FN62] For moral realists, the existence of universal rights is not contingent upon the test of recognition. If universal moral rights exist, they do so outside of the framework of positive law. Even for non-moral realists, a simple recognitional test seems an unsatisfactory way of deciding whether or not something has the status of a human right. The norms of etiquette that govern the interaction of travellers at international airports round the world are examples of widely recognised norms. Does it follow that the right to queue, for instance, has the same universal status as the rights of life and liberty? There seems to be ""something more" involved in the idea of a universal human rights norm whether or not one is a moral realist. [FN63]

One means by which to derive this ""something more" for intellectual property norms would be to argue that intellectual property rights are a species of natural right. One argument for justifying the existence of intellectual property rights is to claim that they are natural rights. Presenting intellectual property as a human right using the conceptual apparatus of natural right theory faces a number of difficulties. The first is *366 that, even if one can justify the right of private property as a natural right, one is left with the question of whether intellectual property rights are natural property rights. A possible reply here is that intellectual property rights must be property rights because legislatures around the world declare them to be personal property rights. This begs the question. The existence of a natural right by definition cannot depend on a legislative declaration.

There are other problems. Intellectual property rights exist for a limited period of time, or their continued existence is subject to requirements of registration. The strongest candidates for natural rights must surely be the right to life and liberty. Those rights are not thought of as being limited in time during the life of the rightholder. Human rights are also regarded as rights that belong to all humans (see Article 2 of the Universal Declaration of

Human Rights). Can it plausibly be said that all states should enact a petty patent system, and those that do not breach a human right? Nor does the conceptual apparatus of natural rights theory lead neatly from the exercise of labour to a natural right of property. [FN64] Within natural rights theorising about property it was accepted that property rights had about them a conventional character and could be circumscribed by the State.

A second conceptual path to the conclusion that intellectual property rights are fundamental human rights would be to suggest that rights that protect the connection between a creator of an information-product and the information-product belong in the category of human rights because they protect the personality of the creator. A personality-based approach to justification already serves to underpin the civil law systems of authors' rights. One issue is whether a personality-based theory could plausibly underpin all intellectual property rights. [FN65] It might turn out that very few intellectual property rights make it into the category of human right. Even if we accept that there is a personality right that belongs in the category of human rights, it does not follow that all intellectual property rights protect the personality interest of originators of intellectual property.

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

The upshot of this short discussion is that the view that all intellectual property rights are human rights by virtue of their universal recognition is problematic. [FN66] This should cause no great surprise. Having one's artwork copied is not the same as being stripped of one's bedding, food, medicines or other personal possessions that form the *367 essentials of a daily existence. This still leaves the issues of how the relationship between intellectual property norms and human rights might be conceptualised. The next section suggests how this might be done.

6. INTELLECTUAL PROPERTY AND HUMAN RIGHTS: AN INSTRUMENTAL VIEW

It is now accepted in rights theory that the existence and exercise of some rights presupposes the existence of other rights. [FN67] Philosophers now agree or concede that the classical negative rights of traditional liberalism require for their exercise other kinds of rights. Rights of freedom need to be accompanied by welfare rights. Rights, as it were, come in clusters. It is also clear that important complementary elements obtain between rights. So, for instance, the right to education on the face of it aids the meaningful exercise of a right of freedom of speech.

Some rights, then, are instrumental in securing the feasibility of claiming other types of rights. The central claim made below is that the rights created through the enactment of intellectual property laws are instrumental rights. Ideally, under conditions of democratic sovereignty, such rights should serve the interests and needs that citizens identify through the language of human rights as being fundamental. On this view, human rights would guide the development of intellectual property rights; intellectual property rights would be pressed into service on behalf of human rights. Of course, the history of intellectual property does not square with this ideal. It has as much to do with powerful elites using such privileges to obtain economic rents for themselves as it has to do with parliaments working on behalf of citizens to design rights that maximise social welfare. This should not be surprising. The economic theory of legislation, the theory of public choice argues that legislation is essentially a market process in which legislators and interest groups transact business in a way that sees the public interest subordinated to private interest. [FN68]

Yet the ugly truths that public choice scholars reveal about this or that bit of legislation should not obscure a broader historical truth concerning the way in which property rights have in the long sweep of the history of western states come to serve humanist values. Moving across a history that begins roughly in the fifteenth century three generalisations may be advanced. [FN69] States have made increasing use of property rules, both civil and criminal, for a variety of purposes. Property rights have become progressively more secure, progressively more immune from arbitrary confiscation by the ruling power. The evolution of the law of contract has made it more possible to negotiate transfers of property with certainty of effect.

These trends towards the expansion, security and negotiability of property have been more or less universal. States which did not guarantee property and contract did not *368 flourish economically compared to states that

(Cite as: I.P.Q. 1999, 3, 349-371)

did. Those states that failed to pursue the goal of efficient property rights paid the price in terms of reduced growth and loss of hegemony. [FN70] Property and contract law have indeed been foundational in enabling capitalism to take off. While some states were slow to learn this, today there is no national regime on the globe that has not accepted it as a lesson of history. (Although it should be said that, while the formal law of every state stands behind secure property rights and the enforcement of contracts by courts that are independent of the state, in many parts of the world the independence of the judiciary is a fiction.)

The emergence of well-defined, secure property rights was a part of a much broader historical process in which absolute monarchies and their legitimating political philosophies lost their institutional dominance to be replaced by the institution of the modern State and secular political philosophies that recognised the rights of individuals within and against the State. [FN71] Peasants, serfs and vassals became citizens and citizens came to hold property rights created by the sovereign of the State. Woman stopped being property of their husbands and became property owners. In all this the creation of secure, well-defined property rights that citizens could trade gave expression to a deeper philosophy of the equality and freedom of man. The idea of a natural right of property was one crucial premise in John Locke's rejection of the absolute authority of Kings. Redefining, rethinking, redistributing property has always been one way, perhaps the most important way, in which political ideas and philosophies have made themselves concrete in the world.

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

The institutional design issues raised by intellectual property (and contract) are not simply issues of legal technicality or even economic ones. Property, as argued above, is an instrument on which the deeper notes of political philosophies are to be sounded. Property regimes should serve those values, those needs and interests that individuals identify as fundamental to their moral and political philosophies. [FN72] The problem faced in the present time is that the institution of intellectual property has globalised without some set of shared understandings concerning the role that that institution is to play in the employment, health, education and culture of citizens around the world. Linking intellectual property to human rights discourse is a crucial step in the project of *369 articulating theories and policies that will provide guidance in the adjustment of existing intellectual property rights and the creation of new ones. Human rights in its present state of development offers at least a common vocabulary with which to begin this project, even if, for the time being, not a common language.

Generally speaking, those thinkers who are regarded as having an important role in the formation of modern political thought said nothing or very little about intellectual property. To illustrate: John Locke's discussion of property in Chapter V of the Second Treatise has inspired discussions of Lockean theories of intellectual property. [FN73] but there is not one mention of intellectual property in that chapter. Hegel in his *Philosophy of Right* (1821) makes some brief passing observations concerning property and products of the mind. [FN74] Kant, despite being given the credit for inspiring the system of authors' rights, wrote about authors and the nature of genius rather than intellectual property law. [FN75] The truth is that, at best, intellectual property has been little more than a sideshow in broader intellectual traditions. Even within economics the role of information has, until comparatively recently, been largely ignored. [FN76]

One factor which helps to explain this neglect is the fact that the development of intellectual property policy and law has been dominated by an epistemic community comprised largely of technically minded intellectual property law experts. In their hands intellectual property has grown into highly differentiated and complex systems of rules. The development of these systems has been influenced in important ways by the narrow and often unarticulated professional values of this particular group. Emblematic of this partiality has been the narrow interpretation that has been given to the morality clause in Article 53(a) of the European Patent Convention. The *Oncomouse* case, for example, reveals a formalistic treatment of the morality criterion that did not really engage with the matters of principle that the opponents in that case were raising. [FN77] This narrow line of interpretation has persisted despite the fact that there is a strong argument that human rights law operates to affect the interpretation of Article 53(a). [FN78]

The reasons why a technocratic conception of intellectual property law has flourished are complex and in

(Cite as: I.P.Q. 1999, 3, 349-371)

any case are discussed by the present author elsewhere. [FN79] In *370 brief, the intellectual property community has functioned both as an interpretive community and an epistemic community. That is to say, that collectively this community has provided the interpretive judgments concerning the scope and meaning of intellectual property law. It is the ideas, values and mores of this community, its "information ethic" as it were, that are progressively constituting the standards by which the conduct of other communities, such as the artistic community, the library community, computer users and so on, is being judged in the information age. Functioning as an epistemic community, intellectual property experts have been able to persuade governments that their value judgments about the scope of infringement, the size of the public domain, the role of statutory licences and so on represent the right policy settings. The governments of the three lead producers of intellectual property in the global system (the United States, Europe and Japan) have been led by this epistemic community, because these governments see that success within the global economy depends crucially upon knowledge creation. By linking stronger intellectual property protection to global investment flows and knowledge creation intellectual property experts have contributed to a structural situation in which none of the three lead regional economies in the world is prepared to take the risk of weakening or calling a halt to improving intellectual property protection. There is, in the institutional form of the WTO, a global regulatory ratchet in a place for intellectual property, which for the time being is being worked by a technocratic elite. [FN80] As an anonymous referee of this article observed, the result of this ratchet is that "IP law is not, in practice, thought of systematically in relation to human rights law". The irony in all this is that knowledge creation depends on the diffusion of information to knowledge workers as much as it does on norms of appropriation. And it is fundamental human rights such as the freedom of communication and the right to education that help to promote this diffusion.

For policy-makers around the world, the challenge of the coming bio-digital millennium will be to define efficient property rights in information. The precise nature and scope of these property rights will affect not only the workings of the intellectual property regime, but the trade and competition regimes. [FN81] And in turn these regimes will have enormous implications for the welfare of citizens everywhere. No legislature, no policy-maker can, in the quest for efficient property rights, afford to rely on a narrowly constituted epistemic community. The stakes are too high.

Ideally, the human rights community and the intellectual property community should begin a dialogue. The two communities have a great deal to learn from each other. Viewing intellectual property through the eyes of human rights advocates will encourage consideration of the ways in which the property mechanism might be reshaped to include interests and needs that it currently does not. Intellectual property experts can bring to the aspiration of human rights discourse regulatory specificity. At *371 some point the diffuse principles that ground human rights claims to new forms of intellectual property will have to be made concrete in the world through models of regulation. These models will have to operate in a world of great cultural diversity. Moreover, the politics of culture is deeply factional, globally, regionally and locally. It is in this world that the practical issues of ownership, use, access, exploitation and duration of new intellectual property forms will have to be decided. It is here that intellectual property experts can make a contribution.

FN This article is based on a paper presented at the Panel Discussion on "Intellectual Property and Human Rights" to commemorate the Fiftieth Anniversary of the Universal Declaration of Human Rights, organised by WIPO in collaboration with the Office of the United Nations High Commissioner for Human Rights, Geneva, November 9, 1998.

My thanks go to an anonymous referee for his or her helpful and astute comments on an earlier draft of this paper.

FN1. It was customary to refer to industrial and intellectual property rights. The term "industrial" was used to cover technology-based subject areas like patents, designs and trade marks. "Intellectual property" was used to refer to copyright. The modern convention is to use "intellectual property" to refer to both industrial and intellectual property.

FN2. An example of this approach is to be found in Art. 2(viii) of the Convention Establishing the World Intellectual Property Organization, signed at Stockholm on July 14, 1967.

FN3. Thomas Mandeville, *Understanding Novelty: Information, Technological Change, and the Patent System* (Ablex Publishing Corporation, Norwood, New Jersey, 1996), p. 3.

FN4. For an account of how the conflict might be resolved see Melville B. Nimmer, "Does Copyright

Abridge the First Amendment Guarantees of Free Speech and Press?" (1970) 17 U.C.L.A. L. Rev. 1180.

FN5. See R. H. Lowie, *Primitive Society* (New York, 1920), pp. 235-243.

FN6. Quentin Skinner, *The Foundations of Modern Political Thought* (Cambridge University Press, Cambridge, 1978), Vol. 2, pp. 148-149.

FN7. Raymond Birn, "'Malesherbes and the Call for a Free Press" in Robert Darnton and Daniel Roche (eds), *Revolution in Print: The Press in France 1775- 1800* (University of California Press, Berkeley, 1989), pp. 50-66, 51.

FN8. *ibid.*

FN9. Carla Hesse, "'Economic Upheavals in Publishing", in Robert Darnton and Daniel Roche (eds), *Revolution in Print: The Press in France 1775-1800* (University of California Press, Berkeley, 1989), pp. 69-97, 97.

FN10. See Edith Tilton Penrose, *The Economics of the International Patent System* (The Johns Hopkins Press, Baltimore, 1951).

FN11. *British South Africa Co. v. Companhia de Moçambique* [1893] A.C. 602 at 622-624.

FN12. For the history of these agreements in respect of copyright, see Sam Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986* (Centre for Commercial Law Studies, Queen Mary College, Kluwer, 1987), pp. 25-38.

FN13. Brad Sherman, "'Remembering and Forgetting: The Birth of Modern Copyright Law" (1995) 10 *Intellectual Property Journal* 1, 10.

FN14. Harry G. Henn, "'The Quest for International Copyright Protection" (1953) 39 *Cornell Law Quarterly* 43, 52.

FN15. Stephen Ladas, *Patents, Trademarks, and Related Rights: National and International Protection* (Harvard University Press, Cambridge, 1975), Vol. 1, pp. 43, 54-55.

FN16. Sam Ricketson, n. 12 above, p. 39.

FN17. For a survey see Stephen Ladas, n. 15 above.

FN18. H. Sacks, "'Crisis in International Copyright: The Protocol Regarding Developing Countries" [1969] *Journal of Business Law* 26.

FN19. Susan K. Sell, "'Intellectual Property as a Trade Issue: From the Paris Convention to GATT" (1989) XIII *Legal Studies Forum* 407-422.

FN20. Harry G. Henn, "'The Quest for International Copyright Protection" (1953) 39 *Cornell Law Quarterly* 43, 65.

FN21. For the history of this, see P. Drahos, "'Global Property Rights in Information: The Story of TRIPS at the GATT" (1995) 13 *Prometheus* 6-19.

FN22. See Michael Blakeney, *Trade Related Aspects of Intellectual Property Rights* (Sweet & Maxwell, London, 1996), Ch. 1.

FN23. Myles Getlan, "'TRIPS and Future of Section 301: A Comparative Study in Trade Dispute Resolution" (1995) 34 *Columbia Journal of Transnational Law* 173, 179.

FN24. TRIPS is binding on all members of the World Trade Organization. See Art. II, 2 of the

(Cite as: **I.P.Q. 1999, 3, 349-371**)

Agreement Establishing the World Trade Organization (WTO Agreement). Both TRIPS and the WTO Agreement are part of the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Marrakesh, April 15, 1994.

FN25. Early examples of regionalism in intellectual property are the Montevideo Conventions of 1889 which dealt with patents and trademarks, involving Argentina, Bolivia, Brazil, Chile, Paraguay, Peru, and Uruguay. The Treaty of Rome (1957), the treaty that constituted the European Common Market, provided for conditional protection of national intellectual property rights in Art. 36.

FN26. Michael Blakeney, "The Role of Intellectual Property Law in Regional Commercial Unions in Europe and Asia" (1998) 16 *Prometheus* 341-349.

FN27. The text of the MAI is available at <http://www.oecd.org/daf/cm/mai/maitext.pdf>. The MAI negotiation like the Uruguay Trade Round is proving to be a protracted affair. For the time being negotiations at the OECD have stopped. The application of the MAI to intellectual property raises some as yet unresolved conceptual problems. Amongst other things, the regulation of intellectual property rights by governments (e.g. compulsory licensing) might constitute expropriation for the purposes of the investment regime. Moreover, since, on one view, intellectual property rights are monopoly rights they might be argued to stand in the way of investment flows just as much as they facilitate them. Clearly some clever drafting will be required to overcome these kinds of potential problems.

FN28. International Chamber of Commerce, "E-commerce Roles, Rules and Responsibilities: A Roadmap", June 4, 1998, 11.

FN29. James W. Nickel, *Making Sense of Human Rights* (University of California Press, Berkeley, 1987), pp. 66-67.

FN30. See, e.g. Art. 11 of the ICESCR (promoting the dissemination of knowledge in the context of freedom from hunger), Art. 15.2 (stating that the right in Art. 15.1 requires states to take steps to diffuse science and culture), Art. 15.3 (requiring respect for freedom of scientific research) and Art. 19.2 of the ICCPR (linking freedom of expression to the flow of information).

FN31. H. J. Steiner and P. Alston, *International Human Rights in Context* (Clarendon Press, Oxford, 1996), p. 121.

FN32. (1982) 21 *I.L.M.* 59-68.

FN33. For a discussion see Francis G. Jacobs and Robin C. A. White, *The European Convention on Human Rights* (Clarendon Press, Oxford, 2nd ed., 1996), pp. 246-247.

FN34. Henry G. Schermers, "The International Protection of the Right of Property", in Franz Matscher and Herbert Petzold (eds), *Protecting Human Rights: The European Dimension* (Carl Heymanns Verlag KG, Köln, 1988), pp. 565- 580.

FN35. *ibid.*, pp. 565, 579.

FN36. Richard B. Lillich, "Global Protection of Human Rights", in Theodor Meron (ed.), *Human Rights in International Law: Legal and Policy Issues* (Clarendon Press, Oxford, 1984, 1992 reprint), pp. 115-170, 157.

FN37. During the drafting of Art. 17 of the Universal Declaration it was agreed that ownership of property was subject to national laws, but that there was no need to state this in the Declaration. See Richard B. Lillich, n. 36 above, pp. 115-170, 157, fn. 29.

FN38. For an argument to this effect see Anthony D'Amato, *International Law: Process and Prospect* (Transnational Publishers, Dobbs Ferry, New York, 1987) Ch. 6.

FN39. Application 12633/87 *Smith Kline and French Laboratories Ltd v. The Netherlands*, October 4, 1990 (1990) 66 *Decisions and Reports* 70, 80 *European Commission on Human Rights*.

FN40. The right of governments to regulate the ownership of property through positive law was recognised by natural rights theorists like Locke. See Peter Drahos, *A Philosophy of Intellectual Property* (Dartmouth, Aldershot, 1996), pp. 48-53.

FN41. See T. Campbell and W. Sadurski (eds), *Freedom of Communication* (Aldershot, 1994); F. Schauer, *Free Speech: A Philosophical Enquiry* (Cambridge University Press, Cambridge, 1982). On copyright, internet and freedom of speech, see Stephen Fraser, "'The Conflict Between the First Amendment and Copyright Law and its Impact on the Internet'" (1998) 16 *Cardozo Arts & Entertainment Law Journal* 1-52.

FN42. P. Alston, "'Conjuring Up New Human Rights: A Proposal for Quality Control'" (1984) 78 *A.J.I.L.* 607.

FN43. It is now fashionable to refer to the indivisibility of human rights. See 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 *Indiana Journal of Global Legal Studies* 59, 60.

FN44. For a discussion of the issues, see James Crawford (ed.), *The Rights of Peoples* (Clarendon Press, Oxford, 1988).

FN45. (1992) 31 *I.L.M.* 818.

FN46. On the issue of "'softness'" of norms in the environmental context, see Julie Ayling, "'Serving Many Voices: Progressing Calls for an International Environmental Organisation'" (1997) 9 *Journal of Environmental Law* 243, 255-258.

FN47. There are examples of where the concept of indigenous intellectual property gains some recognition in treaty law. The most obvious example is the Convention on Biological Diversity. Article 8(j) of that Convention requires states to respect, preserve, maintain and promote indigenous knowledge and lifestyles relevant for the conservation and sustainable use of biodiversity. Article 16.2 of that same Convention provides that any technology which is the subject of intellectual property rights and which is transferred pursuant to the objectives of the Convention must be transferred "'on terms which recognize and are consistent with the adequate and effective protection of intellectual property rights". Article 18.1 of the Convention to Combat Desertification (1994) also makes it clear that the process of technology transfer must take account of the need to protect intellectual property rights.

FN48. For a history of the right in the North-South context, see P. Alston, "'Revitalising United Nations Work on Human Rights and Development'" (1991) 18 *Melbourne University Law Review* 216.

FN49. United Nations General Assembly Resolution 41/28.

FN50. Article 4.1 provides that states have the duty to take steps, individually and collectively, to formulate international development policies with a view to facilitating the full realisation of the right to development.

FN51. See M. Bedjaoui, "'The Right to Development'", in M. Bedjaoui (ed.), *International Law: Achievements and Prospects* (UNESCO, Martinus Nijhoff Publishers, Paris and The Netherlands, 1991), pp. 1177-1193.

FN52. Within India, for example, the National Working Group on Patent Laws has pointed out that the implementation of TRIPS will cause drug prices to rise dramatically. The drug Zantac retails in India for 18.53 rupees, in the U.K. at the equivalent of 484.42, and in the USA at the equivalent of 1050.70. Under TRIPS India is obliged to introduce product patents for medicines. Pakistan has introduced product patents. Zantac now retails in Pakistan at the equivalent of 260.40 rupees, i.e. 11.27 times its price in India. See B. K. Keayla, *New Patent Regime: Implications for Domestic Industry, Research & Development and Consumers* (National Working Group on Patent Laws, New Delhi, January 1996), p.

(Cite as: I.P.Q. 1999, 3, 349-371)

20.

FN53. This, of course, is the million dollar question. Most of the empirical evidence that exists on this question has been gathered in the patents field. Much of the evidence here suggests that developing countries in particular are better off without the patent system or at least lower levels of protection. For early important work, see F. Machlup, "An Economic Review of the Patent System" (Study No. 15 of the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, U.S. Senate, 85th Congress, Washington DC, 1958); E. T. Penrose, "International Patenting and the Less-Developed Countries" (1973) 83 *Economic Journal* 766; R. Väyrynen, "International Patenting as a Means of Technological Dominance" (1978) 20 *International Social Science Journal* 315. For a synthesis of much of the literature, see A. S. Oddi, "The International Patent System and Third World Development: Reality or Myth?" [1987] *Duke Law Journal* 831; J. Nogués, "Patents and Pharmaceutical Drugs: Understanding the Pressures on Developing Countries" (1990) 24 *Journal of World Trade* 81. For a discussion of patents in the context of trade and technology policy, see B. Lyons, "International trade and technology policy", in P. Dasgupta and P. Stoneman (eds), *Economic Policy and Technological Performance* (Cambridge University Press, Cambridge, 1987), pp. 169-205; A. Subramanian, "The International Economics of Intellectual Property Right Protection: A Welfare-Theoretic Trade Policy Analysis" (1991) 19 *World Development* 945-956. For an example of literature that deals with the impact of the patent system on a medium-sized country, see *The Economic Implications of Patents in Australia* (Australian Patent Office, Canberra, 1981); *Industrial Property Advisory Committee, Patents, Innovation and Competition in Australia* (Australia, 1984). For a recent critical discussion of intellectual property and conventional economics, see D. Lamberton, "Innovation and Intellectual Property", in M. Dodgson and R. Rothwell (eds), *The Handbook of Industrial Innovation* (Elgar, Aldershot, 1994), pp. 301-309.

FN54. Its status is described by Crawford as an "[u]nofficial declaration of scholars and publicists; basis for activities of Permanent Peoples' Tribunal, a private foundation". See James Crawford (ed.), *The Rights of Peoples* (Clarendon Press, Oxford, 1988), p. 187.

FN55. See Arts 7 and 8 of UNESCO Latin-American Conference, Declaration of San José, December 11, 1981, UNESCO Doc. FS 82/WF.32 (1982), extracted in James Crawford (ed.), n. 54 above, pp. 202-203.

FN56. For a comprehensive discussion of the recent history, see Johanna Sutherland, "Representation of Indigenous Peoples' Knowledge and Practice in Modern International Law and Politics" (1995) 2(1) *Australian Journal of Human Rights* 39-57; Johanna Sutherland, "TRIPS, Cultural Politics and Law Reform" (1998) 16 *Prometheus* 291-303.

FN57. See M. Blakeney, "Protection of Traditional Medical Knowledge of Indigenous Peoples" [1997] 6 *E.I.P.R.* 446; James Tunney, "E.U., I.P., Indigenous People and the Digital Age: Intersecting Circles" [1998] 20 *E.I.P.R.* 335-346.

FN58. The Rural Advancement Foundation International is a western NGO that has been particularly active and successful in the cause of farmers' rights and the recognition of sustainable use of biodiversity.

FN59. The links between biodiversity, sustainable development and indigenous knowledge are recognised in the Convention on Biological Diversity. See Arts 8(j), 10(c) and 18(4). See also Principle 22 of the Declaration of the UN Conference on Environment and Development (1992) and Chapter 26 of Agenda 21.

FN60. The COICA Statement 1994, Statement by the Co-ordinating Body of Indigenous Organisations of the Amazon Basin, on intellectual property rights and biodiversity.

FN61. Two Australian examples of this are the Julayinbul Statement on Indigenous Intellectual Property Rights and the Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples. See Henrietta Fourmille, "Protecting Indigenous Property Rights in Biodiversity", *Current Affairs Bulletin*, March 1996, 36-41.

FN62. Moral realists defend the proposition that moral values are objective. For moral realists moral truth exists.

FN63. Nickel, for instance, in describing the conception of human rights to be found in the Universal Declaration, states that ""human rights are held to exist independently of recognition or implementation in the customs or legal systems of particular countries" (his emphasis). See James W. Nickel, *Making Sense of Human Rights* (University of California Press, Berkeley, 1987), p. 3. See also M. J. Perry, ""Are Human Rights Universal? The Relativist Challenge and Related Matters" (1997) 19 *Human Rights Quarterly* 461-509.

FN64. See Peter Drahos, *A Philosophy of Intellectual Property* (Dartmouth, Aldershot, 1996), Ch. 3.

FN65. For a discussion, see Justin Hughes, ""The Personality Interest of Artists and Inventors in Intellectual Property" (1998) 16 *Cardozo Arts & Entertainment Law Journal* 81.

FN66. Human rights activists could easily claim that intellectual property rights are indirectly implicated in human rights abuses. So, e.g. the argument would run that the global protection of intellectual property rights forms part of the structure that allows multinationals like Nike to locate in those poor countries where labour standards are low or non-existent.

FN67. See, e.g. Henry Shue, *Basic Rights* (Princeton University Press, Princeton, 1980).

FN68. For an introduction to the economic literature, see I. Mclean, *Public Choice* (OUP, Oxford, 1991); D. A. Farber and P. P. Frickey, *Law and Public Choice* (University of Chicago Press, Chicago, 1991).

FN69. For a further discussion see J. Braithwaite and P. Drahos, *Global Business Regulation* (Cambridge University Press, Cambridge, in press), Ch. 7.

FN70. Douglass C. North, *Institutions, Institutional Change and Economic Performance* (Cambridge University Press, Cambridge, 1990), p. 139.

FN71. The change in ideological thinking that accompanied these processes is traced by Quentin Skinner, *The Foundations of Modern Political Thought* (Cambridge University Press, Cambridge, 1978), Vols 1 and 2.

FN72. See Jeremy Waldron, ""Nonsense upon stilts?--A reply", in Jeremy Waldron (ed.), ""Nonsense Upon Stilts": Bentham, Burke and Marx on the Rights of Man (Methuen, London and New York, 1987), p. 174.

FN73. See, e.g. Justin Hughes, ""The Philosophy of Intellectual Property" (1998) 77 *Georgetown Law Journal* 287-366; Horacio M. Spector, ""An Outline of a Theory Justifying Intellectual and Industrial Property Rights" [1989] 8 *E.I.P.R.* 270-273; Wendy J. Gordon, ""A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property" (1993) 102 *Yale Law Journal* 1533.

FN74. G. W. F. Hegel, *Philosophy of Right*, translated by T. M. Knox (Clarendon Press, Oxford, 1952), [68].

FN75. Stig Strömholm, ""Droit Moral--The International and Comparative Scene from a Scandinavian Viewpoint" (1983) 14 *International Review of Industrial Property and Copyright Law* 1, 11.

FN76. For the history of the economics of information, see Donald M. Lambertson ""The Economics of Information and Organization", in Martha E. Williams (ed.), *Annual Review of Information Science and Technology* (American Society for Information Science and Technology, White Plains, NY, 1984), Vol. 19, 3-30.

FN77. Amanda Warren, ""A Mouse in Sheep's Clothing: The Challenge to the Patent Morality Criterion Posed by "Dolly"" [1998] *E.I.P.R.* 445, 447.

(Cite as: I.P.Q. 1999, 3, 349-371)

FN78. On the relationship of human rights law to patent treaties, see Deryck Beyleveld and Roger Brownsword, *Mice, Morality and Patents* (Common Law Institute of Intellectual Property, London, 1993), Ch. 2.

FN79. See Peter Drahos, "Biotechnology Patents, Markets and Morality", *E.I.P.R.* (forthcoming, 1999).

FN80. On the theory of global regulatory ratchets, see John Braithwaite and Peter Drahos, *Global Business Regulation* (Cambridge University Press, Cambridge, in press).

FN81. See Christopher Arup, "Competition over Competition Policy for International Trade and Intellectual Property"; Warwick A. Rothnie, "Trade, Competition and Intellectual Property"; Jill Walker, "The Interface between Intellectual Property Rights and Competition Law and Policy: An Australian Perspective", all contained in P. Drahos (ed.), *Special Issue on Trade and Intellectual Property* (1998) 16 *Prometheus* 351-393.

END OF DOCUMENT