

Intellectual Property and Human Rights: Learning to Live Together

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Introduction

Intellectual property and human rights must learn to live together. Traditionally, there have been, as Paul Torremans points out, two dominant views of this “cohabitation,” namely a conflict view, which emphasizes the negative impacts of intellectual property on rights such as freedom of expression or the right to health and security, and a compatibility model, which emphasizes that both sets of rights strive towards the same fundamental equilibrium. This Chapter will take the dualist view that both are right, though there is, and should be, much more truth to the second approach in the coming years.

What are the threads that weave intellectual property and human rights together? First, intellectual property rights claim to have roots in natural law, most famously as the Lockean moral desert theory, which held that property rights should be commensurate with ‘the sacrifice actually incurred.’¹ According to this view, property is justifiable as a (just) reward for work done to create new works from the existing stock ideas of public domain works, or on a significant, industrially useful improvement on the existing stock technological knowledge.

Locke’s original theory turned on the labour sacrifice of a particular land owner. He did not advocate property rights in intangibles. Applying his theory to intangibles raises interesting questions. For instance, if one adopts a natural law justificatory theory for intellectual property, then one might ask whether the protection of intangible should be commensurate with the author’s or inventor’s efforts. If one were to argue for proportionality, a flood of both theoretical and practical questions immediately would race through one’s mind: who could set and enforce the criteria to determine the value of a work or a patent? Which *kind* of value (societal, economic, etc., and according to which set of metrics)? How would temporal elements be factored into the equation (*i.e.*, what is the value now and twenty years hence)? What would be the transaction costs of this determination? And the list goes on.

Is the invisible hand the best judge? Few would argue that the *market* value of a particular piece of music or patent (assuming market value is a valid benchmark) is proportional to the efforts, time or money invested. Poets, whose sweat and coffee stains are often the only visible result of a day’s work and whose success, if and when it happens, will seem picayune compared to the latest techno or hip-hop hit, might agree. The same criticism could be addressed to many physical goods, whose market value bears little relationship to actual production costs.

¹ Barbara H. Fried. *The Progressive Assault on Laissez Faire: Robert Hale and the First Law and Economics Movement*. (Cambridge: Harvard University Press, 1998), at 111.

In spite of those differences between tangible and intangible property, natural law roots are something that intellectual property and perhaps more acutely copyrights and patents, still share with traditional (Eurocentric) human rights theory.² One might disagree with the assertion that private property rights are human rights—at least in a universal conception. At the opposite end of the spectrum, French polemicists asserted that authors' rights were “the most sacred, the most legitimate, the most unassailable and . . . the most personal of all properties.”³ That debate, however, is beyond the scope of this Chapter.⁴ Additionally, as Professor Torremans notes in his chapter, when applied to informational or ideational objects the concept of property is imperfect. At the very least, in that context “property” must have a different purpose and meaning,⁵ because statutory intellectual property rights are not only non-excludable and non-rival,⁶ they are also temporary.⁷

² Since at least Aristotle's *Nicomachean Ethics*, it has been argued that human rights underpin a moral order whose legitimacy precedes contingent social and historical conditions. According to this view, human rights are “naturally” universal.

³ Le Chapelier, rapporteur before the Constituent Assembly, quoted in translation in Michel Vivant, “Authors' Rights, Human Rights?”, (1997) 174 *Revue internationale du droit d'auteur* (RIDA) 60, 62. One could add Lakanal's amplification (quoted in *idem*): “Of all properties, the least disputable, the one whose growth can neither undermine republican equality nor offend freedom, is unquestionably that of productions of genius.” The same was said of patents. That authors' rights are a property rights is formally recognized in Article L.111.1 of the *Code de la propriété intellectuelle* (France). The question whether this is still true in France is occasionally discussed. See M. Vivant, *loc. cit.*, at 81 and foll.

⁴ As Professor Yu demonstrates in his chapter, the synonymy between the reference to “material interests” in the UDHR and other instruments (discussed below), on the one hand, and private property, which many often take for granted, on the other, has not in fact been established. That said, in a number of civil law jurisdictions intellectual property forms part of incorporeal property and is considered as private property in the same way as chattels or land. The two classic divisions of property in those systems are between moveable and immovable and between corporeal and incorporeal (See, e.g., Article 899 of the Civil Code of Quebec). Article 458 of the Civil Code of Quebec is an illustration. It reads in part: “Intellectual and industrial property rights are private property.” Article 909 reads in part as follows: “Property that produces fruits and revenues, property appropriated for the service or operation of an enterprise, shares of the capital stock or common shares of a legal person or partnership, the reinvestment of the fruits and revenues, the price for any disposal of capital or its reinvestment, and expropriation or insurance indemnities in replacement of capital, are capital. Capital also includes rights of intellectual or industrial property...”

⁵ Property confers advantages by ensuring investment and development of resources. The social costs of excludability are acceptable because “the losses that people suffer from exclusion are small compared to the gains that they get both from their ability to privatize their labour and from their ability to enter into trade...” In other words, the main propertization is a clear Pareto improvement, but copyright may be different. In classic property theory, for instance, possession is considered key and the law essentially reinforces the physical control that can be exerted by the owner (by fencing, etc.). No such metes and bounds exist in copyright law. This probably explains why property rights in intangibles have been the subject of many a scholarly debate.

⁶ Non-excludable means that it is impossible to prevent an individual who does not pay for that thing from enjoying the benefits of it. Non-rival goods may be consumed by one consumer without preventing simultaneous consumption by others. Those are the two traditional characteristics of public goods. The increasing recourse to Technological Protection Measures (TPMs) to prevent access to or use of copyright goods is, however, a form of enclosure that attempts to treat information object as excludable property. Tangible patented goods are also obviously excludable, but not the patented information itself, subject to the prohibition of its use to develop a commercial product that would infringe the patent. The level of patent protection in national law may go beyond this prohibition.

⁷ Except of course for trademarks that remain in commercial use.

Leaving that debate aside, then, and against the backdrop of the traditional linkages based on natural law between intellectual property and human rights, Part I of this Chapter will argue that entering the pragmatic realm of trade law, as intellectual property norm-making has done over the past 20 years, might entail abandoning its claim to property and/or human right status. This shift may be observed *inter alia* by the exclusion of moral rights from trade agreements concerning copyright, and the application of an effects-based test (the three-step test) as a common denominator for allowable exceptions to several intellectual property rights in the TRIPS Agreement.

Responding dialectically to Part I, Part II will focus on copyright's internal balance as it relates to and mirrors human rights principles and suggest that copyright at least can (re)anchor itself normatively in such principles even if it abandoned traditional natural law-based claims by becoming a trade-related right. As was noted by other contributors to this book, including the Editor and Professor Laurence Helfer, copyright can rely on both Article 27 of the Universal Declaration of Human Rights (UDHR)⁸ and Article 15 of the International Covenant on Economic, Social and Cultural Rights, as well as regional instruments such as Article 13 of the American Declaration on the Rights and Duties of Man.⁹ Those instruments provide a blueprint for cohabitation, because the human rights principles they embody closely mirror the internal equilibrium of the copyright system, with its limited exclusive rights and exceptions to such rights mainly based on public interest considerations.

Part III will suggest that the emergence of new normative conflicts between intellectual property and human rights, such as the right to health, but also, in the field of copyright, face-offs with privacy, have fundamentally altered the landscape. There have always been perceived conflicts between copyright and rights such as freedom of expression, but it was also argued in parallel that copyright was *intended* to be an engine of free expression.¹⁰ Freedom of creation is a condition precedent to the existence of freedom of expression. Indeed, as is discussed in Professor Yu's chapter, censorship is at odds with the ability to access and contribute to culture and there is, therefore, a convergence of interests in having copyright as the economic underpinning of a free press and publishing industry. That case may be harder to make with respect to privacy and the right to health. The new environment is thus characterized, on the one hand, by human rights with increased visibility and status, and intellectual property "reduced to" trade law status, on the other. Intellectual property rights holders ask for this linkage with trade essentially to benefit from the protection of trade sanctions and cross-sectoral trade-offs in trade agreements¹¹. What they may have underestimated are the "ontological costs" associated

⁸ J.A.L. Sterling, *World Copyright Law*, Sweet & Maxwell (2nd ed, 2003), p. 43.

⁹ Chapman, "Approaching Intellectual Property as a Human Right (obligations related to Article 15(1)(c))", XXXV (2001) Copyright Bulletin, No. 3, 4-36, at 11.

¹⁰ This was the stated intention of the Framers of the Constitution of the United States. See M. Birnhack, "Copyright Law and Free Speech after *Eldred V. Ashcroft*," 76 S. Cal. L. Rev. 1275, 1284 (2003). See also Patrick Masiyakurima's chapter in this book.

¹¹ By this I mean that in trade agreement negotiations, concessions on intellectual property can be compensated by concessions in other areas, such as trade in cotton, cars or banking services.

with what, for intellectual property, amounts to an existential shift. Whether trade remedies can compensate for those costs will be discussed at the end of Part III.

Part I. Intellectual Property as Trade Law

A. The Alignment with Trade

The progressive alignment of trade and intellectual property policy started in the United States in the 1980s through successive amendments to section 301 of the *Trade Act*, which allowed the US Administration to impose trade-based sanctions on countries which, in the view of the United States Trade Representative, did not adequately protect intellectual property rights of United States citizens and companies. There is little doubt that this new weaponry bore fruit. It allowed US companies to obtain improvements in the protection of their intellectual property in several foreign territories, which agreed to increase protection lest they lose most-favoured nation trading status with the United States.

There ensued a well-documented¹² push by the United States government, supported by the European Commission and the Japanese government, to link intellectual property and trade rules in the World Trade Organization (WTO) as part of the Uruguay Round of Multilateral Trade Negotiations, which ended in Marrakesh in April 1994 with the signing of the Agreement Establishing the WTO, Annex 1C of which is the TRIPS Agreement. While critics opined that intellectual property was not proper subject matter for the WTO, enter the house of trade it did, wholesale.¹³

This has at least two important consequences. First, unlike human rights, trade law is essentially pragmatic and results-based, something illustrated by such fuzzy notions under WTO law of “nullification or impairment” of benefits or the doctrine of “reasonable expectations.” Second, trade remedies are generally predicated on a showing of *actual* adverse impact on trade. The protection of intellectual property by trade rules does not seem to mesh with its ideological defence either as a “property” or a human right.

A tort law analogy might be helpful to illuminate the difference. The tort of trespass to land occurs where a person enters or remains upon another's land without permission and is actionable *per se* without the need to prove damage. Trade law is closer to nuisance, because a showing of damage (actual adverse impact) is required. Not surprisingly, since intellectual property trade law moved its home to the trade neighbourhood critics of intellectual property have tried to show that use of copyright works or patented goods

¹² D Gervais. *The TRIPS Agreement: Drafting History and Interpretation*, 2nd ed. (Sweet & Maxwell, 2003); Susan K. Sell. *Private Power, Public Law* (Cambridge University Press, 2003), 96-120; C May. *A Global Political Economy of Intellectual Property Rights: The New Enclosures?* (Routledge, 2000); P Drahos and J Braithwaite, *Information Feudalism : Who Owns the Knowledge Economy?* (New Press, 2003); and A Koury Menescal, ‘Those Behind the TRIPS Agreement: The Influence of the ICC and the AIPPI on International Property Decisions’ (2005) 2 *Intell. Prop. Q.*,155.

¹³ Jagdish Bhagwati, *In Defense of Globalization* (Oxford, 2004) 182-85.

(especially pharmaceuticals) in certain situations would lead to no demonstrable loss of income (*i.e.*, no actual damage) for the rights holders. Logically, they say (if one accepts the premise of trade rules), use should be allowed. Linkage with trade thus reinforces the instrumentalist / consequentialist approach to intellectual property regulation. Intellectual property rights serve a purpose and when they no longer do (as a rule or in a given situation), they should cease to apply.

Rightholders may need to pick which legal horse they want to cross the intellectual property infringement river: if they choose a trade horse, they must accept pragmatism and the related need to show loss of reasonably available income streams. From that viewpoint, rhetorical reliance on “property” is at odds with a strategy that was otherwise highly successful by copyright and patent lobbies to link intellectual property and trade. Perhaps the most direct and concrete illustration of the impact of trade rules on intellectual property is the omnipresence of the effects-based “three-step test”, increasingly viewed as a major normative vector to determine the appropriate scope of intellectual property rights, most notably copyrights, designs and patents in the TRIPS Agreement, as we shall now see.

B. The Three-Step Test

The three-step test has become the cornerstone for almost all exceptions to all intellectual property rights at the international level. It is the central test for exceptions to all copyright rights in the TRIPS Agreement (Article 13), to the rights created by the WIPO Copyright Treaty (Article 10) and the WIPO Performances and Phonograms Treaty (Article 16). It is also the basis for exceptions to industrial design protection (Article 26(2)), and patent rights (Article 30) in TRIPS.¹⁴

The test requires that any exception be (1) a special case; (2) not interfere with normal commercial exploitation; *and* (3) not unreasonably prejudice the legitimate interests of rights holders. It achieves two objectives: first, the test canvasses the areas in which rights holders do *not* need rights to maximize their income; second, it provides a compensation mechanism (the third step) for exceptions that are considered desirable from a public interest perspective but could affect the material interests of rights holders, such as exceptions for private copying. As a result of this rather complete “map” of rights holders’ interests painted by the test, it has been suggested that the test should be reversed in the field of copyright to reveal the optimal scope of exclusive rights, thus greatly simplifying copyright law and aligning it with the economic purpose it embraced by inviting itself to the table of trade.¹⁵

¹⁴ There is, however, a crucial difference in the case of patent rights: The last (third) step of the test [does] not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties.” (emphasis added).

¹⁵ D. Gervais, “Towards A New Core International Copyright Norm: The Reverse Three-Step Test,” 9 *Marq. Intell. Prop. L. Rev.* 1 (2005).

Let us consider briefly each of the three steps. This is only a rather cursory overview and much more detailed commentaries are available elsewhere.¹⁶

1. “Certain special cases”

In the 2001 WTO panel decision concerning section 110(5) of the US Copyright Act,¹⁷ the first part of the three-step test, namely the meaning of “special,” was interpreted for the first time by an international tribunal. The approach taken was essentially to look at the Oxford dictionary:

“The term ‘special’ connotes ‘having an individual or limited application or purpose’, ‘containing details; precise, specific’, ‘exceptional in quality or degree; unusual; out of the ordinary’ or ‘distinctive in some way’.[here was a footnote referring to the Oxford dictionary] This term means that more is needed than a clear definition in order to meet the standard of the first condition. In addition, an exception or limitation must be limited in its field of application or exceptional in its scope. In other words, an exception or limitation should be narrow in quantitative as well as a qualitative sense .”

The approach chosen by the panel is understandable. For valid policy reasons, the WTO Appellate Body has preferred to stick with the ordinary meaning of words, in part to avoid introducing “unbargained for” concessions in the WTO legal framework. As a result, however, the two steps in the test that can truly be operationalized as normative tools are the “interference with commercial exploitation” and the “unreasonable prejudice to the legitimate interests of the author”.

2. Interference with normal commercial exploitation

What is the meaning of “exploitation” in the context of this second step of the test? It seems fairly straightforward: use of the work by which the copyright owner tries to extract/maximize the value of her right. “Normal” is more troublesome. Does it refer to what is simply “common” (*i.e.*, an empirical standard) or does it refer to a normative standard? The question is relevant in particular for new forms and emerging business models which have not thus far been common or “normal”. During the last substantive revision of the Berne Convention (Stockholm Revision Conference, 1967),¹⁸ the concept was clearly used to refer to “all forms of exploiting a work which had, or were likely to acquire, considerable economic or practical importance.” As Paul Goldstein has noted, the purpose of the second step is to “fortify authors’ interests in their accustomed markets against local legislative inroads.”¹⁹ It thus seems that the condition is normative in nature: an exception is not allowed if it covers any form of exploitation which has, or is

¹⁶ Sam Ricketson and Jane C. Ginsburg. *The Berne Convention and Beyond* (Oxford, 2006), at §13.03 and foll. ; and D. Gervais, *loc. cit.*

¹⁷ Title 17, United States Code.

¹⁸ WIPO. *Berne Convention Centenary : 1886-1986* (Geneva : WIPO, 1987).

¹⁹

likely to acquire, considerable importance. In other words, if the exception is used to limit a commercially significant market or, a fortiori, to enter into competition with the copyright holder, the exception is prohibited.

The WTO panel in the 110(5) case concluded as follows on this point:

“[...] it appears that one way of measuring the normative connotation of normal exploitation is to consider, in addition to those forms of exploitation that currently generate significant or tangible revenue, those forms of exploitation which, with a certain degree of likelihood and plausibility, could acquire considerable economic or practical importance.”

The test thus incorporates a dynamic notion of normalcy of commercial exploitation. To be sure, to consider an exception incompatible with the second step because of conflict with a *potential* significant source of revenue requires great caution.

3. Unreasonable prejudice to legitimate interests of rights holders

The third step is perhaps the most difficult. What is an “*unreasonable* prejudice,” and what are “*legitimate* interests”?

Let us start with “legitimate.” It can have two meanings: (a) conformable to, sanctioned or authorized by, law or principle; lawful, justifiable; proper; or (b) normal; regular; conformable to a recognized type. To put it differently, are legitimate interests only “legal interests”?

The third step is a clear indication of the need to balance the rights of copyright holders and interests (under copyright law, not rights under other laws) of users. An analysis of the Records of the 1967 Stockholm Conference shows that the United Kingdom took the view that legitimate meant simply “sanctioned by law,” while other countries seem to take a broader view, meaning “justifiable” in the sense that they are supported by social norms and relevant public policies. The WTO panel concluded that the combination of the notion of “prejudice” with that of “interests” pointed towards a legal-normative approach. In other words, it found that “legitimate interests” are those that are protected by law. The interpretation might have been different if the third step had been formulated as “the reproduction not contrary to the legitimate interests of the author.” With the “unreasonable prejudice” element, however, the legitimate interests are almost by definition legal interests.

This leaves open one key question: what does “unreasonable prejudice” mean? Clearly, the word “unreasonable” indicates that some level or degree of prejudice is justified. For example, while a country might exempt the making of a small number of private copies entirely, it may be required to impose a compensation scheme, such as a levy, when the prejudice level becomes unjustified. To buttress this view, the French version of the

Berne Convention, which governs in case of a discrepancy, uses the expression “préjudice injustifié,” which one would translate literally as “*unjustified* prejudice.” The Convention translators opted instead for “not unreasonable.” The inclusion of a reasonableness/justifiability criterion would allow legislators to establish a balance between, on the one hand, the rights of authors and other copyright holders and the needs and interests of users, on the other. This seems even clearer when the French term (“unjustified”) is used. In other words, there must be a public interest justification to limit copyright.

In that vein, the WTO panel concluded that “prejudice to the legitimate interests of right holders reaches an unreasonable level if an exception or limitation causes or has the potential to cause an unreasonable loss of income to the copyright owner.” A public interest imperative may lead a government to impose an exception to copyright that may translate into a loss of revenue for copyright holders. It can nonetheless be “justified”.

By focusing on economic harm, the panel may have considerably expanded the scope of some exceptions: it is not the fact that a user obtains some value that is determinative, but rather the fact that a rightsholder can show that it stands to lose actual value (revenue)—the “prejudice.” In other words, exceptions to copyright are seen through a trade-related effects-based prism.

4 European “InfoSoc” Directive

The European Union’s Information Society (“InfoSoc”) Directive²⁰ contains two sets of exceptions. The first, and only mandatory, exception is for transient copies “forming an integral and essential part of a technological process.”²¹ Otherwise, the Directive contains an exhaustive list of permitted exceptions (*i.e.*, exceptions that EU member States may choose to use in their national copyright legislation). These are all purpose-specific exceptions. There is no set of criteria comparable to the US fair use doctrine.

However, the preamble to this Directive, which serves as a guideline for the interpretation of the operative part of the text, refers to permitting “exceptions or limitations in the public interest for the purpose of education and teaching” and to the need to safeguard a “fair balance of rights and interests between the different categories of rights holders, as well as between the different categories of rights holders and users” through exceptions and limitations, which “have to be reassessed in the light of the new electronic environment.” Otherwise, the Directive refers to the three-step test as an overarching test for all permitted exceptions. Article 5(5) reads:

“The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal

²⁰ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society. OJ L 167/10, 22.06.2001).

²¹ *Id.*, Article 5(1).

exploitation of the work or other subject matter and do not unreasonably prejudice the legitimate interests of the right holder.”²²

Interestingly, the reference to the test is seen as a “guiding principle” rather than a means to effectively harmonize exceptions in the national laws of the 25 EU member States. Indeed, at the level of national laws, the three-step test could be refined by enumerating certain specific cases, or by providing additional guidance on the interpretation of the three steps. It remains a flexible test which could, however, be used by courts in cases where no such specific exception exists, if allowed to do so under domestic law.

C. Exclusion of moral rights

Article 9 of the TRIPS Agreement incorporates most of the substantive provisions of the Berne Convention (Paris Act, 1971) into TRIPS, though it also states that WTO “Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6bis of that Convention or of the rights derived therefrom”. In other words, the moral right to claim authorship (or to remain anonymous) and the right to “object to any distortion, mutilation or other modification of, or other derogatory action in relation to [a protected] work, which would be prejudicial to [the author’s] honour or reputation” are excluded from TRIPS.

By excluding moral rights the TRIPS Agreement split the copyright coin. One can adhere to a rather simplistic notion of moral rights (as implemented in common law jurisdictions) as a foreign, Continental, Kantian concept imposed on reluctant countries. Or one might see moral rights as forming a part of common law copyright—at least with respect to the right to claim authorship and the right to prevent first publication, which may conceptually be linked to a reputation-based right such as the right to oppose a mutilation of a creative work. In either case, it seems fair to conclude that by removing the non-economic component from its normative framework, TRIPS has weakened the intrinsic equilibrium of copyright and, hence, the “power to convince”, rooted in natural law, which copyright had traditionally enjoyed. In other words, copyright is seen as a purely statutory entitlement enforced through trade rules, one set of rights among many others, one designed to allow for limited market control.

Human rights and intellectual property were natural law cousins owing to their shared filiation with equity. Market optimization is not part of that family. Consequently, the policy debate has become not one of fairness to authors but rather of how much money it is fair for those companies (not authors) to make. This may explain part of the resistance of various user groups to copyright rules and their insistence that music or videos are too expensive, and the related, if generally intuitive, perception that copyright works are public goods.

²² *Id.*

Because copyright claims were transplanted in the soil of trade, natural rights-based views—and with them many of the perceived fairness—of copyright are no longer convincing. For user groups and developing countries implementing TRIPS and TRIPS Plus rules, it has become a numbers game, not one where players can defend a position strictly based on the propertization of creative works.

Nor can ethics guide us in a context of aggressive commercial exploitation: ‘because of the breakdown of traditional social structure or matrix of social practices within which ethical questions have either been resolved or lack a motivation.’²³ In fact, social norms may be moving away from the industry control rhetoric and may give rise to other compensation.²⁴ The social norms do not reflect an understanding of downloading as *malum in se*, as a natural rights justification would suggest, but rather as an (sometimes annoying) *malum prohibitum*, and a prohibition that should be revisited (if not the norm itself then the way it is used and enforced). The lower level of internalization of the rule means that a higher degree of technical control or legal enforcement is required, i.e., exactly what can be observed in the marketplace.

Perhaps some forms of intellectual property that trace their origins to natural law can make claims to human rights status on that basis. It will not be at a greatly detailed level.²⁵ Yet, quite independently of where one draws the line of what constitutes a human right, that trade rules do not qualify as human rights is beyond cavil. There is a cost to be paid in choosing trade. To use rather loosely a Rawlsian analytical framework, one loses deontological pull. Perhaps this can be tied to the loosening of social norms concerning use of copyright material.

Put differently, the trade link and the pragmatic nature of trade rules, and their enforcement in the GATT/WTO context, have forced copyright holders to find a new exposition of the principles according to which their investment should be protected, in what circumstances and to what extent. Term, scope (or rights and exceptions) and rights management are all on the Holmesian table set by the incorporation of copyright in trade. “This is the age of the finance minister. [...] The game of nations is now geo-monopoly.”²⁶ Copyright policy is not, or no longer, an exception. Whether that is for the best remains to be seen.

²³ Alfino, M. (year), ‘Intellectual Property and Copyright Ethics’, *Business and Professional Ethics Journal*, (1991) 10.2: 85-109. Reprinted in Robert A. Larmer (Ed.), *Ethics in the Workplace*, Minneapolis, MN: West Publishing Company, 1996, 278-293. Available at <http://guweb2.gonzaga.edu/faculty/alfino/dossier/Papers/COPYRIGH.htm> (last accessed 9 January 2008), 10.

²⁴ D. Gervais, “The Price of Social Norms: Towards A Liability Regime for File-Sharing”, 12 *J. Intell. Prop. L.* 39 (2004).

²⁵ Costas Douzinas, *The End of Human Rights* (2000), at 7.

²⁶ Thomas L. Friedman, quoted in John H. Jackson, (1997), *The World Trading System: Law and Policy of International Economic Relations*- 2nd ed., MIT Press, at 4.

Part II. Copyright's internal Balance in the Mirror of Human Rights

Especially since it has jettisoned its property/natural law lineage by moving to the trade domain, the ship of copyright policy is anchored more than ever in utilitarian waters. Economic analysis is the sextant that can ensure that it avoids the Charybdis of rent-seeking and the Scylla of free-riding. A unified theory of copyright to navigate those shoals, one that applies to paintings, academic books, Harry Potter, Radiohead and Windows Vista might seem somewhat murky to the purist. But, after all, this is the world of trade law, one in which bananas have been traded for educational services.

The point of this Part is not to challenge the search for a justificatory theory.²⁷ Rather, in seeming contradistinction with Part I, it challenges the assumption that economic analysis must be the only toolbox and suggests that a cogent copyright theory can be based at least in part on a human rights analysis. It may also provide a more solid foundation because “in generating rights to intellectual property on utilitarian grounds we are left with something decidedly less than what we typically mean when we say someone has a right.”²⁸

Copyright could be defended on one of two bases as a human right. First, because it is seen as property, and property in turn seen as a human right. This debate, as mentioned in the introduction, is beyond the reach of this Chapter, though I mention it briefly below.²⁹ Additionally, there are questions as to whether that human right protection of property extends to *private* property.³⁰ Even if one believes that internationally protected human rights include private property rights, the extent to which policy outcomes may be derived from such a finding is limited. For that reason, the issue is better left aside.

The other human right basis for copyright is fact that, as René Cassin noted, “human beings can claim rights by the fact of their creation.”³¹ The thesis explored in this Part is thus that copyright should embrace the challenges posed by its deepening linkages with human rights and affirm its own (credible) justifications in human rights theory based on the creativity of authors and the universal cultural resonance of that role. In doing so, copyright might serve to show that intellectual property and human rights may indeed live together. This Part also suggests that human rights principles and analogies are able

²⁷ Indeed, it may very well that a federation of theories is a better outcome, one that recognizes the characteristics of each type of work. That being said, the search for a theory may reveal with greater clarity the policy purpose of copyright and inform courts in (necessarily) case-by-case determinations. For example, a proper theoretical grounding might allow a court better to craft the proper scope of fair dealing or fair use in terms of societal outcomes: if fair use and fair dealing are designed to allow uses that maximize social welfare while not impeding normal commercial exploitation, a limit reminiscent of the omnipresent three-step test, then surely parody and transformative reuses should be allowed.

²⁸ Adam D. Moore. *Intellectual Property & Information Control*. (Transaction Publishers, 2001), 104.

²⁹ See note 43-44 and accompanying text.

³⁰ Many non-Western legal systems recognize collective property in certain intangible creations. See D. Gervais, “Spiritual but Not Intellectual? The Protection of Sacred Intangible Traditional Knowledge,” (2003) 11 *Cardozo J. of Int'l & Comp. Law* 467-495.

³¹ Quoted in M. Vivant, *loc. cit.* at 86.

to provide normative boundaries to the age-old quest for intrinsic equilibrium in copyright policy: the protection of interests resulting from expressed creativity, on the one hand, and the right to enjoy and share the arts and scientific advancement. In Part III, I will suggest that this analysis can inform the newer, extrinsic equilibria that are emerging in the world of intellectual property, namely the normative balance between intellectual property rights, on the one hand, and other rights such as privacy and consumer protection, on the other.

The purpose of this exercise is not to dethrone economic analysis. After all, now that intellectual property has entered the house of trade law, it may not be possible to do so. Yet, in the very spirit of law & economics, it may be useful to question the *monopoly* of economic analysis on the theoretical discourse surrounding the foundations and evolution of copyright policy.

Article 27 UDHR, which saw the light of day 238 years after the *Statute of Anne*, is an interesting mirror for copyright's sleeping beauty, namely a solid justificatory theory beyond the practicalities of trade. Article 27 protects *both* the right to the protection of the moral and material interests resulting from and scientific, literary or artistic production of which he is the author *and* users' right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. The objective of protection embraces at least indirectly the moral desert theory (protection of interests resulting from scientific, literary or artistic production), while the objective of access is expressed teleologically as a tool to allow everyone to enjoy the arts and to share in scientific advancement and its benefits. By giving a purpose to exceptions, human rights may both serve as guidance to courts³² and compensate for the excessively economic focus of trade law, as embodied in particular in the three-step test interpreted by a trade body, namely the WTO Dispute-Settlement Body.³³ It is interesting to recall François Dessemontet's words: "the Universal Declaration and the UN Covenant [on Economic, Social and Cultural Rights adopted on 16 December 1966] mark the apex of the French vision of literary and artistic property, as opposed to the Anglo-American 'mercantilist' view as enshrined in the TRIPs."³⁴

Indeed, human rights may compensate for an evolution (of copyright policy) that has not always been well thought through. As Peter Drahos aptly noted, "the development of intellectual property policy and law has been dominated by an epistemic community comprised largely of technically minded lawyers. In their hands intellectual property has grown into highly differentiated and complex system of rules. The development of these

³² D. Gervais, The Role of International Treaties in the Interpretation of Canadian Intellectual Property Statutes", in O. Fitzgerald (ed), *The Globalized Rule Of Law: Relationships Between International And Domestic Law*. (Irwin Law, 2006), 549-572.

³³ United States—Section 110(5) of the US Copyright Act, Document WTR/DS/160/R (WTO Dispute Settlement Panel, 2000). See Jane C Ginsburg, "Toward Supranational Copyright Law? The WTO Panel Decision and the "Three Step Test" for Copyright Exemptions" (2001), 187 *Revue internationale du droit d'auteur* (RIDA) 3.

³⁴ F. Dessemontet, "Copyright and Human Rights", in Jan J.C. Kabel, *Intellectual Property and Information Law* (Kluwer law, 1998), 113 at 114.

systems has been influenced in important ways by the narrow and often unarticulated professional values of this particular group.”³⁵

Human rights approaches bring *values* back to the system. The emphasis on culture in human rights instruments, allow one, for example, to acknowledge the limits of economic analysis and theory as a policy-making machine. As Professor Julie Cohen suggests, we need a substantive balance which “concerns the ways in which copyright’s goal of creating economic fixity must accommodate its mission to foster cultural play. Economic analysis can help us to understand some of the considerations relevant to the balance between economic fixity and cultural mobility, but both valuation and incommensurability problems prevent a comprehensive summing of the relevant costs and benefits. Modeling the benefits of artistic and intellectual flux is hard to do.”³⁶ Copyright’s “mission to foster cultural play” may be read against the backdrop of Article 27(1) UDHR and 15 the Covenant, which enshrine the right to participate in cultural life. “Cultural Life must be regarded as a benefit to which every member of the community is entitled. Culture must not be viewed as an esoteric activity of a superior social elite.”³⁷

Economic analysis is both useful and necessary, and follows quite naturally from the shift to trade, but any complete analysis must be informed by broader, less tangible (and measurable) considerations. From copyright’s viewpoint, culture is a two-way street: it provides the essential substratum upon which all creators draw to create, and their creations in turn feed and grow the culture. The phenomenon has taken on an additional layer of complexity with the globalization of Web culture, but a lot of cultural resonance remains local. “Individual creators begin with situatedness and work through culture to arrive at the unexpected.”³⁸

Copyright and culture need new works to be created, though for different reasons (the former to justify its existence, the latter to grow), and to be created those new works need existing works. Conceptually, this can be framed as a “freedom to create,” which, to a certain extent at least, is the freedom to copy. Whether *copying* constitutes copyright *infringement* is a matter of degree. François Dessemontet suggested a list of factors to be taken into account: (a) whether the work copied from fades away in the new work; (b) whether the first work is recognizable and the degree to which it is; (c) the proportionality of “newness” (presumably assessed quantitatively but also, and perhaps mostly, qualitatively) to the amount that is borrowed.³⁹

How can one reconcile human rights and natural law, the new and old sources of legitimacy for intellectual property? Is the question whether copyright is an instrument

³⁵ Peter Drahos, “The Universality of Intellectual Property Rights: Origins and Development,” text of presentation at WIPO (Nov. 1998). Available at <http://www.wipo.int/tk/en/hr/paneldiscussion/papers/pdf/drahos.pdf>

³⁶ Julie Cohen, “Creativity and Culture in Copyright Theory”, (2007) 40 *U.C. Davis Law Review* 1151, 1196.

³⁷ Yoram Dinstein, “Cultural Rights,” (1979) 9 *Israel Yearbook on Human Rights* 58, 76.

³⁸ Julie Cohen, *loc. cit.*, at 1183.

³⁹ F. Dessemontet, *loc. cit.* at 119-120.

for stimulating creativity or a property-like Lockean protection against the illicit appropriation of the work done and the investment made? Not quite. Let us remember that John Locke did not advocate a particular model for copyright.⁴⁰ He believed, to summarize his thought in a few words, that nothing in nature permitted the granting of a particular property right to a particular person.

According to Locke, divine power imposed on each individual moral duties that could be discerned by reason, and this was what should guide the work of judges. Those duties are, in general, reciprocal: what I owe to others, they owe to me in return. Locke placed these duties in two categories: those dealing with liberty and those giving the right to make claims. One of the four great duties he describes was the duty not to impede others from profiting from what they have created or adapted from the public domain through their own efforts.⁴¹ In other words, translated in Pareto-optimal terminology, the “underlying rationale of Locke’s proviso is that if no one’s situation is worsened, then no one can complain about another individual appropriating part of the commons.”⁴² That is the premise used to justify copyright: a new work after all is created from the “public domain” – therefore from ideas and existing works. The rights are derived from intellectual efforts by sovereign moral agents warranting non-interference claims.⁴³ This is indeed close to the rights flowing from the creative process recognized in international human rights instruments.

Natural law, as described by Locke, thus offers an interesting perspective, one that *can* be reconciled with an exegesis of Article 27 UDHR and Article 15 of the Covenant, and more recent instruments discussed by Professor Torremans, Professor Yu and Professor Helfer in their respective chapters. Human rights can, first and foremost, restore a degree of authorial dignity to copyright. “[H]uman beings have fundamental interests, which should not be sacrificed for public benefit, and [...] society’s well-being does not override those interests. Protecting those interests is deemed vital for maintaining individual autonomy, independence, and security.”⁴⁴

Protection of copyright in human rights framework can also be sourced in the continuum between an author and her creation. That is the basis in French and German doctrine,⁴⁵ for the moral right. It is essential to note, however, that this unbreakable link does not justify a perpetual *property* right or right to exclude economic use. The fact that works fall into the public domain has consistently formed part of the human rights discourse concerning authors’ rights since 1948.⁴⁶ True, it has been critiqued as a Western

⁴⁰ Wendy Gordon, “A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property,” (1993) 102 *Yale L.J.* 1533. To return to the source, see John Locke, *Two Treatises of Government*, 2d ed., ed. Peter Laslett (Cambridge Univ. Press, 1967), pp. 269–78 (vol. II, para 4–15).

⁴¹ Wendy Gordon, *loc. cit.*, pp. 1542–3.

⁴² A.M. Moore, *loc. cit.*, 109.

⁴³ *Id.*, 108.

⁴⁴ Orit Fischman Afori, “Human Rights and Copyright: The Introduction of Natural Law Considerations into American Copyright Law,” (2004) 14 *Fordham Intell. Prop. Media & Entertainment L.J.* 497, 499.

⁴⁵ I. Kant, *Metaphysics of Morals*, Doctrine of Right, (Cambridge Univ. Press, 1996), §31, II; G.W.F. Hegel, *Elements of the Philosophy of Right*, (Cambridge Univ. Press, 1991), §§43 and 69.

⁴⁶ M. Vivant, *loc. cit.*, 91-92.

conception of authorship, rooted in individually authored, well identified creations. However, I would argue that the relevant human rights instruments do not embody this limited conception and could be extended to cover other forms of creation, thus adapting the extant intellectual framework to collective or traditional creations and inventions.⁴⁷

I am not suggesting staking a vague claim to specific rights on dignity, but refocusing the policy efforts to operationalize the (supposed) value attached to creation in the traditional conceptual edifice of copyright, recognizing that copyright works (arguably with the huge exception of software⁴⁸) have special status because of their cultural resonance.

Put differently, the trade-economic approach refocused copyright on the industries that produce and distribute copyright content. From a purely policy-oriented perspective, this “decentering” of copyright away from creators reduces the moral imperative of users, whose sympathy for large distribution multinationals (assuming for the sake of this discussion that this is a widespread perception of how the music and film industry are structured) is far from infinite. Conversely, copyright perceived as a right vested in and benefitting creators may have a different resonance, as the relative success of examples of “pay as much as you feel this is worth” models tend to show. Industries which were quick to instrumentalize authors in the 18th century, with some benefit to creators, have lost much in moving to the trade arena and sidelining creators. Phenomenologically, this was greatly reinforced by the introduction in international treaties and now many national laws of protection of Technological Protection Measures (TPMs), the use and/or circumvention of which is illegal in most cases independently of the underlying copyright. TPMs are rarely used by creators. It is an industrial tool, and its protection is generally viewed as such, thus further diminishing the perceived legitimacy of the copyright system.

Human rights, in providing a teleological framework for exceptions, can guide courts⁴⁹ in interpreting whether a particular use should be covered by an exception whose interpretation is unclear, and policy makers in designing new exceptions. One might think this impossible owing to the presence of three-step test straitjacket. However, the third step was interpreted as allowing public interest considerations (i.e., what constitutes an allowable “justification” for the exception), and human rights principles might thus

⁴⁷ See Silke von Lewinski. *Indigenous Heritage and Intellectual Property*. (Kluwer, 2003); and WIPO *Draft Provisions on Traditional Cultural Expressions/Folklore and Traditional Knowledge*, document . WIPO/GRTKF/INF/1, available at http://www.wipo.int/tk/en/consultations/draft_provisions/draft_provisions.html .

⁴⁸ It was decided, first by the courts and then by many legislative bodies, that computer software should be considered literary works, an international consensus now reflected in Article 10.1 of the TRIPS Agreement. The entry of software in the house of copyright was to have major practical repercussions, but one must acknowledge that the conceptual shock was enormous, since it brought into the copyright family works created without any claim to artistic or aesthetic merit but rather on a purely functional basis.

Another conceptual leap caused by the admission en masse of software was that the work being protected (i.e., the code) was not designed to be perceived by anyone. Its role was to make a computer function.

⁴⁹ As was done, e.g., by French courts. See JDI 1989, 1005 note Edelman; (1989) 143 RIDA 301, note Sirinelli).

inform the determination of the proper scope of exceptions. In that respect, the UDHR in particular would allow exceptions that demonstrably augment access where such access (enjoyment) is not commercially reasonable or possible, and the right to reuse and thereby participate in the cultural life of the community. This seems to justify both consumptive use exceptions where commercial access is undesirable or impracticable, including exceptions such as those contained in the Appendix to the Berne Convention for access in developing countries, and exceptions for transformative uses (such as but not limited to parody), the principal element of the United States fair use doctrine.⁵⁰

The UDHR reference to moral and material interests is also fully consistent with the coin of traditional copyright, with its economic side and its moral side. Copyright and human rights can indeed live together and learn from one another.⁵¹

Part III. Intellectual Property and Human Rights: The New Conflicts

A copyright holder who invades users' hard disks to search for unauthorized copies of music may run afoul of privacy laws, as the Sony RootKit case demonstrates.⁵² Yet copies of copyright content available for download will increasingly include codes to identify the purchaser of that copy, a tool to be used in case that copy is later found circulating on the Internet. This information, whether expressed as full name, as a code or in the form of a hash or watermark, is protected by the WCT and WPPT (and national implementations thereof), and cannot be removed or altered knowingly for the purpose of facilitating an infringement.

Patents are rights to prohibit even in the absence of a viable market. Would a patentee's refusal to make available a patented product constitute only a potential abuse of patent rights or is it also or instead a violation of human rights? Here, denial of patented pharmaceuticals to patients who cannot afford them, when they, or their government, could afford those products at a generic rate (that is, without patent rent) is confronted with the right to health and security. These are the new kinds of battles that are starting to emerge in our courts and in international discussions, in the WTO and elsewhere.

Copyright can live with human rights, and indeed reinforce its justification in human rights, but only if we can move the discourse away from property-based rhetoric, and treating any unpaid use as piracy. By moving away from property, whether as a human

⁵⁰ Except, arguably, between *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) and *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 125 S. Ct. 2764 (2005). Sony was interpreted (wrongly in my view) as deciding broadly that private use was fair use (in fact, it says that some forms of time-shifting copying may be fair use). In *Grokster*, the Supreme Court arguably went back to traditional fair use jurisprudence and focused on transformative—instead of purely consumptive--uses.

⁵¹ It has also been suggested that copyright could be used as a model for human rights (i.e., the reverse analogical process). See John R. Morss and Mirko Bagaric, "Human Rights As Copyrights: A Third Way in Human Rights Discourse", (2005) 13 *U. Balt. Intell. Prop. J.*, 103.

⁵² Mark H. Lyon, "Technical Protection Measures for Digital Audio and Video: Learning from the Failure of Audio Compact Disc Protection", (2007) 23 *Santa Clara Computer & High Tech. L.J.* 643, 650-658.

right or as an economic tool, copyright can transcend this debate and find a new, balanced justification based on a human rights framework in which protection and access are seen as *complementary* objectives. The recognition that copyright is not “ordinary” property led some scholars to argue that copyright was a “hybrid property” right⁵³ or a “transmuted right.”⁵⁴ There is a point where this type of debate may no longer provide a solid foundation for a justificatory theory for copyright that can withstand the need for detailed policy scrutiny and normative confrontations with other rights. From this perspective, the pragmatism of the three-step-test, infused with the human rights inspired purposive approach to exceptions and limitations, could thus be seen as a significant step forward.

Can the same be said of patents? The battles with AIDS and public health activists advocating flexibility on behalf of developing countries has left scars on pharmaceutical companies, and impressions on public opinion. Their claims are based on the right to health and security, but also on the more controversial right to development.⁵⁵ Clearly, fighting not only human rights but spokespersons such as *Doctors Without Borders* and Nelson Mandela against a backdrop of dying children to defend a “trade-related” right is a difficult public relations battle, one which should never have been waged. An ethical, human rights approach to public health dictates limits on patent rights when no market is possible. No one is forcing patent holders to produce at or below cost.

At its most basic level, the argument is as follows: when the patent holder cannot reasonably hope to have a significant market in a territory for a product that has life-saving potential, there is no legitimate reason to prevent access to that product if someone is willing to produce it at a cost that the country can afford. There are legitimate concerns on the part of patent holders about re-exportation, and those should be adequately addressed. It can be done, as the solution adopted by the WTO⁵⁶ demonstrates.

It must be stressed that the problem of HIV infection and other severe diseases affecting least-developed countries does not lie entirely with patents, far from it. In several African countries where patent protection would be available, antiretroviral drugs are not patented. Many others have until 2016 to adopt pharmaceutical patent protection under WTO rules. Problems often lie elsewhere, such as in the absence of a capacity of production and the lack of distribution networks. The latter can be solved, though with colossal efforts, by setting up distribution mechanisms, local clinics etc. Concerns about interrupted treatments and the possible emergence of more aggressive viruses must be

⁵³ Claude Colombet, *Propriété littéraire et artistique et droits voisins*, 6th ed. (Paris: Dalloz, 1992), §20.

⁵⁴ M. Vivant, *loc. cit.*, at 84.

⁵⁵ Ruth Okediji, “The Limits of Development Strategies at the Intersection of Intellectual Property and Human Rights”, in D. Gervais (ed). *Intellectual Property, Trade and Development*. 355-384 (Oxford U.P., 2007); and Robert J. Gutowski, “The Marriage of Intellectual Property and International Trade in the TRIPS Agreement: Strange Bedfellows or a Match Made in Heaven?” (1999), 47 *Buff. L. Rev.* at 713, 715.

⁵⁶ Reference is made here to Article 31bis, adopted in 2005 and pending ratification, and the *Declaration on Implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and public health*, Decision of the WTO General Council of 30 August 2003 (WTO Document WT/L/540 and Corr.1 of 1 September 2003).

taken seriously. The former problem required another series of solutions. One could reasonably suggest building public laboratories to produce antiretroviral, anti-malarial or other drugs in each and every country where such products are needed. At the same time, no compulsory license could be issued predominantly for export under TRIPS Article 31 rules. This explains why this prohibition was waived, subject to a number of conditions, in new Article 31bis which, though it has yet not entered into force, was effected by a WTO Decision in 2003.

The ripple effects of the clash with human rights are far from over. The World Health Organization, for example, has actively entered the field and broadened the discussion to the entire financing of pharmaceutical research, questioning the predominance of private, profit-driven enterprises.⁵⁷ There is indeed an enormous amount of publicly-funded research in the United States (*e.g.*, the National Institutes of Health) and elsewhere, including in hundreds of universities worldwide. The recalcitrance of the pharmaceutical industry truly to engage may not be the optimal strategy from a longer term perspective.

Human rights could have a direct impact on the WTO itself. The WTO Appellate Body found that the WTO Agreement “is not to be read in clinical isolation from public international law.”⁵⁸ This principle was reflected in this and subsequent decision, which relied on the case law of other international tribunals, namely the International Court of Justice, the European Court of Human Rights cases and the Inter-American Court of Human Rights, in interpreting the provisions of the WTO Agreement.⁵⁹ This could of course extend to TRIPS.

Naturally, in fields of industrial activity other than pharmaceuticals affected by patents, effects would be different because the right to health would not be implicated, though there may well be developmental impacts and more diffused calls for technology transfers, deeper disclosure of working methods, and abuse issues where no supply of the domestic market is present.

Independently of the ethical considerations, human rights may play a normative role in rescoping intellectual property rights. There is significant opposition to this trend. Part of the international pharmaceutical industry believes there is nothing to be gained by engaging deeply on the human rights terrain. The United States Administration seems to agree. Some of those provisions may form part of and thus be multilateralized by the Anti-Counterfeiting Trade Agreement (ACTA) initiative,⁶⁰ a new TRIPS-Plus Treaty

⁵⁷ World Health Organization. *Draft global strategy and plan of action on public health, innovation and intellectual property* WTO Document A/PHI/IGWG/2/Conf.Paper No.1 Rev.1 (14 December 2007). Available at http://www.who.int/gb/phi/pdf/igwg2/PHI_IGWG2_CPIRev1-en.pdf (last accessed January 11, 2008). The document shows a high degree of consensus among WHO member States.

⁵⁸ *US – Standards for Reformulated and Conventional Gasoline*, WTO doc. WT/DS2/AB/R, paragraph III. B (Appellate Body, 1996).

⁵⁹ *Idem*, footnote 36; and *Japan - Taxes on Alcoholic Beverages*, document WT/DS8/AB/R, part D., footnote 19 Appellate Body, 1996).

⁶⁰ “Ambassador Schwab Announces U.S. Will Seek New Trade Agreement to Fight Fakes.” (Oct. 2007) Available at

that could curtail flexibilities contained in TRIPS and the “normative elasticity” that could be interpreted in accordance with human rights principles by a WTO panel or the Appellate Body. Similar provisions exist in a number of recent free trade agreements concluded by the United States. The question that remains is whether the tension that exists between patents and human rights can be effectively bottled up that way. Trade is indeed king in international relations, and the strategy may well succeed, though at what cost it is hard to say. If successful, the strategy will show that moving intellectual property to the trade realm was the “right” solution to obtain and defend maximum protection. Whether the result is ethically optimal is an entirely different question.

Conclusion

Part I of this Chapter explored had the noble lineage of intellectual property back to its natural law origins, one important groups of rightsholders abandoned when they put their policy eggs in the trade basket. It did so to obtain multilateral concessions that would likely not have been possible absent intersectoral bargaining. It incorporated all existing intellectual property norms into trade rules, and a test, based on economic effects, was used as a filter for almost all exceptions to patent and copyright rights. By doing so, however, intellectual property holders left behind some of the doctrinal armor that could support its normative clashes with human rights. The move to trade also signifies a less persuasive reliance on property rhetoric, independently of whether property is seen as a human right.

Part II suggested that copyright can reclaim its lost heritage, or develop a new one in keeping with its purpose of defending authorial dignity, by embracing the internal balance between protection of interests following from the production of new copyright works and the need to ensure adequate access and reuse of such works, especially in the absence of reasonable market conditions. In fact, the traditional balance between exclusive rights, on the one hand, and limitations and exceptions on the other, mirrors this dual objective of human rights legislation. In spite of occasional conflicts with free expression, for example, copyright and human rights share broadly similar objectives. This may not be true, however, of newer rights such as the protection of TPMs and Rights Management Information, which pull copyright policy further away from creators and may clash with privacy rights.

Part III explored whether a similarly harmonious solution may exist for extrinsic conflicts, those that do not affect the internal balance of intellectual property (between protection and exceptions) but where exclusive protection clashes with a different set of norms. Courts may be able to address TPM or RMI uses that infringe privacy, though the absence of a single set of privacy norms may lead to a variable geometry of national solutions. Patents on pharmaceuticals seem a harder case. In spite of agreeing to a solution in the WTO to allow compulsory licensing for export under strict conditions,

important parts of the pharmaceutical industry are still trying to limit the use of export licenses. The great reluctance of the industry truly to engage has had several effects, including a significant involvement by the World Health Organization. The response of the industry and the United States Government thus far, as illustrated by free trade agreements and recent multilateral efforts outside of WTO and WIPO, points to additional trade-enforced restrictions on existing flexibilities that would be successful in maintaining maximum protection and limiting access to products to sold by the patent holder, but at a potentially high human and ethical cost. This seems like suboptimal cohabitation.

Copyright can be recast as freedom to express oneself, to create, a (potentially perpetual) right (derived from the act of creation and authorial dignity) to be identified as the author (individual or collective) of a creation, and a limited economic entitlement to benefit materially from such creation. It is balanced against the freedom to participate in cultural life and rights to access information, to protect one's privacy and other such rights. Thus a human rights framework can provide specific normative guidance in the elaboration and interpretation of copyright rules. This reasoning may be extended, though it has not traditionally been, to patents and other intellectual property rights, which, like copyright, are in search of a normative anchor as a result of moving into the trade realm and abandoning a (not very useful except as rhetorical tool) property status.