

**THE MULTILATERAL
INTELLECTUAL & CULTURAL
PROPERTY RIGHTS REGIME**

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Introduction

In Cultural Economics, Law is not a technical subject but rather a cultural artifact arising from the unique historical experience of a specific culture with its distinctive pattern of custom, habit and life ways (Schlicht 1998). More to the point, each system of Law has its own definition of what can be bought and sold, *i.e.*, what is property? When one moves to the multilateral level one must therefore accept that: “Law has become nation-specific; lawyers no longer form an international community” (Merryman 1981, 359).

With respect to intellectual & cultural property rights (ICPR’s -- Annex A-D), Law must look outside itself for guidance and understanding. Yet when Law looks outside itself the result can be unfortunate because “the human mind tends toward fusion rather than discrimination, and the result is confusion” (Dewey 1926, 670).

Law in fact looks out at intellectual property rights (IPR’s) with three-faces: one faces trade regulation of a State sponsored monopoly; the second faces the natural or ‘human’ rights of a creator or, alternatively, the rights of a Legal Person or body corporate; and, the third faces an ever growing public domain and the learning it engenders.

Law, in all Nation-States, however, operates in four dimensions: international, statutory, regulatory and case law. International law is made by Nation-States and International Organizations through the treaty-making process. For our purposes what is important is that to ratify a multilateral instrument often requires adjusting domestic laws.

Statutory law is made by domestic legislators in parliaments, legislatures, congresses, *etc.*, while regulatory is made by bureaucrats – domestic and international - interpreting and implementing a statute or treaty. Case law is made by judges – domestic and international - interpreting and enforcing international, statutory and/or regulatory law.

Complicating matters, however, is that when judges “make” Law it is by setting precedent. In the Anglosphere this body of precedent is called the “Common Law”. If a similar case was resolved in the past, a current court is bound to follow the reasoning of that prior decision under the principle of *stare decisis*. The process is called *casuistry* or case-based reasoning.

If, however, a current case is different then a judge may set a precedent binding future courts in similar cases. Sometimes such precedents also compel legislators and bureaucrats to change statutory and regulatory law. This is especially true with respect to intellectual property rights.

Rapidly evolving technology, among other things, increasingly brings novel cases before the courts forcing legislators and bureaucrats to keep up or allow casuistry to run its course. The problem is that a court decision in a specific case can, for better or worse, establish ‘path-dependency’ for emerging techno-economic regimes (David 1990), *e.g.*, in biotechnology, software, *etc.* This reflects the more general psychological *Law of Primacy*: That which comes first affects all that comes after. In Law it is called precedent; in Economics ‘path dependency’.

Furthermore, precedent established in one jurisdiction may ‘spill-over’ into others. This is especially true of IPR precedents set by courts in the United States influencing other Common Law countries such as Canada. The sheer scale of the American economy assures that case law will be more rapidly, if not better, developed than in smaller jurisdictions. This has, for example, been the path followed by software copyright and software patent in Canada, *i.e.*, U.S. case law set the ball in motion (Chartrand 2008).

The resulting complex body of law, judicial interpretation, and administrative practice constituting the IPR regime – national and multilateral – was therefore not created by “any rational, consistent, social welfare-maximizing public agency”. Rather it is ‘a Panda’s thumb’, *i.e.*, “a striking example of evolutionary improvisation yielding an appendage that is inelegant yet serviceable” (David 1992).

How Knowledge becomes Property

In Economics, knowledge is a public good. Such goods have two defining characteristics: (i) they are non-excludable; and, (ii) they are non-rivalrous in consumption.

First, knowledge is non-excludable in that once published one cannot be easily excluded from knowing. In fact, the word ‘publish’ derives from the Anglo-Norman meaning “to make public” or “to make known” which, in turn, derives from the Classical Latin *publice* meaning to make public property or to place at the disposal of the community (OED, *publish*, v, etymology).

Second, knowledge is also a non-rivalrous good, *i.e.*, your consumption does not reduce the quantity available to me. Excludability and rivalrousness are necessary conditions to internalize economic costs and benefits into market price – the idealized outcome. But how can something be exchanged in a market, *i.e.*, bought and sold, if one cannot stop others from taking it for nothing and, if they do take it one’s inventory is not thereby reduced?

The answer is intellectual property rights like copyrights, patents, trademarks and registered industrial designs. Such rights, however, must be imposed by the State thereby breaking one of the implicit tenets of the standard model of market economics – no government involvement in the economy. In fact without government there can be no knowledge-based economy.

In economic theory, IPRs are justified by market failure, *e.g.*, when market price does not reflect all benefits to consumers and all costs to producers such as when market price does not include pollution costs. These are known as external costs and benefits, *i.e.*, external to market price.

IPRs, in this view, are created by the State as a protection of, and incentive to, the production of new knowledge which otherwise could be used freely by others (the so-called free-rider problem). In return, the State expects creators to make new knowledge available and that a market will be created in which it can be bought and sold. But while the State wishes to encourage creativity, it does not want to foster harmful market power. Accordingly, it builds in limitations to the rights granted

to creators. Such limitations embrace both Time and Space. They are generally granted only with full disclosure of the new knowledge, and

- only for a fixed period of time, *i.e.*, either a specified number of years and/or the life of the creator plus a fixed number of years; and,
- only for the fixation of new knowledge in material form, *i.e.*, it is not ideas but rather their fixation or expression in material form (a matrix) that receives protection.

Eventually, however, all intellectual property (all knowledge) enters the public domain where it may be used by anyone without charge or limitation. In other words a public good first transformed by Law into private property is transformed back into a public good. Growth of the public domain is, in fact, the historical justification of the short-run monopoly granted to creators of intellectual property.

Even while IPRs are in force there are exceptions such as ‘free use’, ‘fair use’ or ‘fair dealing’ under copyright. Similarly, national statutes and international conventions permit certain types of research using patented products and processes. And, the Nation-State retains the sovereign right to waive all IPRs in “situations of national emergency or other circumstances of extreme urgency” (WTO/TRIPS 1994, Article 31b), *e.g.*, following the anthrax terrorist attacks in 2001 the U.S. government threatened to revoke Bayer’s pharmaceutical patent on the drug Cipro ([BBC News October 24, 2001](#)).

Forms of Knowledge

In a knowledge-based economy knowledge takes three primary forms – codified, tooled and personal ([Chartrand 2007](#)). The nature of the matrix into which knowledge must be fixed to receive protection (legally called ‘fixation’) differs between them. Just as utility in economics is reified as the dollars and cents a consumer is willing to pay, knowledge is reified into legal property when it is fixed in a material matrix.

Codified knowledge is fixed in an extra-somatic (Sagan 1977), *i.e.*, out-of-body, matrix as *meaning*. Sender and receiver must both know the code if the message is to convey meaning from one human mind to another.¹ Furthermore, the communications media into which codified knowledge is fixed in order to receive copyright protection has no function except to communicate meaning, *i.e.*, the matrix is non-utilitarian. For example, a book may be a good read but makes a poor door jam, or similarly, a CD may yield beautiful music but serves as a second-rate coaster for a coffee cup.

Codified contrasts with tooled knowledge that is also fixed in an extra-somatic matrix but as *function* and is generally protected by patent. Unlike a work of art that is appreciated for what it is, a patented device or process is valued for what it can do, *i.e.*, the matrix into which knowledge is fixed has a utilitarian function.

Tooled knowledge takes two forms – hard and soft. Hard tooled is the physical instrument or process that manipulates matter/energy. As a scientific instrument tooled knowledge extends the human reach and grasp far beyond the meso-scope level of daily life to the micro- and macro-scopes of electrons, quarks, galaxies, the genomic blueprint of

life, *et al.* To see and manipulate matter/energy in such unseen, unreachable spaces and places our tools must go where no human can. They generally report back in numbers (digital) converted into graphics (analogue) to be read by the human eye. Scientific observation, in effect, involves a cyborg-like relationship between a Natural Person and an instrument. This constitutes what is called 'Instrumental Realism' (Idhe 1991). Soft tooled knowledge, on the other hand, refers to the standards, *e.g.*, 110 vs. 220 volt, embedded in a device as well as its programming such as software, operating instructions and techniques to optimize its performance.

Both codified and tooled, in turn, contrast with personal knowledgeⁱⁱ fixed in a Natural Person as neuronal bundles of memory and the trained reflexes of nerve and muscle, *e.g.*, of an athlete, brain surgeon, dancer, sculptor or technician. In this case, the matrix is a Natural Person. Some can be codified; some tooled; but some personal knowledge, however, inevitably remains 'tacit', *i.e.* inexpressible in codified terms but sometimes visible in performance. Personal knowledge is legally protected as the *know-how* of a Natural or, by legal fiction, a Legal Person under Common Law.ⁱⁱⁱ

Ultimately, however, all knowledge is personal because without a Natural Person to decode or push the right buttons codified and tooled knowledge remain a meaningless or functionless artifact. This means that 'know-how' resides in people and their ability to code and decode *meaning* and machine *function* into and out of matter/energy. This is one gauge of the competitiveness of nations in a global knowledge-based economy.

Arguably other IPRs such as industrial designs, trademarks and trade secrets as well as one-of-a-kind or *sui generis* rights are variations on these themes – meaning, function and know-how or 'can do'. In this regard it is important to note that the English verb 'to know' shares the same old English root, *cnaw*, as the verb 'can'. In this sense a knowledge-based economy is a 'can do' economy, not an economy of the mind.

Intellectual & Cultural Property

Traditionally the relationship between intellectual and cultural property is Time. In this view, cultural property is private intellectual property that has, over time, fallen into the public domain and then, in effect, been 'nationalized'. Of course, some is originally produced as and remains a publicly-owned good.

At the extreme, cultural property includes all the artifacts of daily national life. Usually however, it is restricted to a limited range of things distinguishable from the ordinary by their special cultural significance and/or rarity. This is called a nation's 'patrimony' which forms part of its national knowledge-base along with private intellectual property and the public domain. Cultural property is subject to differing national retention policies restricting international trade. As property such artifacts – artworks, books, buildings of architectural merit, *et al* – may be bought and sold domestically but not necessarily internationally. The traditional cultural property economy is populated by artists,

collectors, dealers and auction houses, museums, art historians, archaeologists, ethnographers and, of course, national cultural officials (Merryman 2005).

Within the 1947 *General Agreement on Tariffs and Trade* (GATT), there are four provisions making a distinction between cultural and other goods and services in international trade. First, quotas are protectionist measures that run counter to the free circulation of goods under Article XI. However, an exemption is granted with respect to cinema exhibition. Article III (10) makes reference to the exemption. Second, Article IV is entirely devoted to special arrangements for fixing quotas in the film industry. This provision represented a compromise between the USA film industry and the Europeans keen to maintain quotas first established between 1919 and 1939. They have since been extended to television and other so-called 'cultural industries'.

This clause found renewed support with the 2005 UNESCO *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* which came into force in 2008. At the conference, one hundred and forty-eight countries approved; the United States and Israel voted against; and, four abstained.

Third, under Article XX (a), restrictions on free trade are permitted to protect public morals. To the degree public morals are part of national culture then foreign cultural goods threatening public morals may be restricted. The most obvious example is Islamic societies which hold fundamentally different values from the West about the image of women. Similarly, controversy about sex and violence in books, film, video and TV has also traditionally been used to justify restrictions on cultural goods imported from more 'liberal' countries. The classic example was 'kiddie porn' once exported from Scandinavian countries. Social science research in those countries, at the time, suggested no harm flowing from such products. Under international pressure, however, the trade has since ceased. Multilateral instruments dealing with trade in obscene materials and artifacts in fact form part of the contemporary multilateral intellectual & cultural property rights regime (see Annex A).

Fourth, under Article XX (f) of GATT, exceptions to free trade allow protection of artistic, historic and archaeological treasures. Similarly, Article 36 of the *Treaty of Rome*, which created the European Union, exempts cultural treasures from the general prohibition on quantitative restrictions on trade.

I now turn to the multilateral intellectual & cultural property rights regime itself. I will first establish its foundations in presumptive norms of international law - *jus cogens*; the schism between Anglosphere Common Law and European Civil Code; and the WTO's TRIPS agreement. I will then survey the constituent parts of the regime: industrial property, copyright and cultural property and highlight the role of the United States in shaping its evolution. In conclusion I will assess the impact of TRIPS on the multilateral intellectual & cultural property rights regime.

The Regime

Law is backed by the coercive power of the Nation-State. Sovereignty, at root, is the State's monopoly of force. As suggested by John R. Commons (1934), the probability of the State (or rather its officials) exercising this monopoly to enforce contracts (rule of law) is a primary concern for all business enterprise everywhere.

Jus cogens

Between Nation-States, however, Law relies on *jus cogens* or the presumptive norms of international law, arguably the most elemental of which is *pacta sunt servanda*: meaning 'agreements must be kept'. Such "higher law" may not be violated because it serves the interests of the entire international community, not just the needs of individual States. There is, however, no definitive statement by any authoritative body of what constitutes *jus cogens*. Rather they tend to arise out of case law as well as changing social and political attitudes. Such norms can be both affirmative as with *pacta sunt servanda* or prohibitive as with prohibitions against aggressive war, crimes against humanity, war crimes, maritime piracy, genocide, slavery and torture.

According to *pacta sunt servanda*, all instruments in force are binding on Parties to them who, in turn, must perform them in good faith. Thus Parties cannot invoke domestic law in the case of a State, or internal rules in the case of an International Organization, as justification for failure to perform. The only legal exception is when this norm conflicts with another, *e.g.*, the prohibition against slavery, in which case according to Article 53 of the 1969 *Vienna Convention on the Law of Treaties* such instruments are void.

If a State fails to perform there may or may not be legal recourse for other parties to an agreement, *e.g.*, WTO dispute panels or appeal to the International Court of Justice. Only at the extreme will the Security Council of the United Nations 'legitimize' coercive force against a treaty-breaker.

Accordingly the complex web of global and regional agreements, conventions and treaties that constitutes the multilateral intellectual & cultural property rights regime rests on the 'good faith' of Nation-States (see Annexes A-D). Each comes to the table with its distinct legal tradition as well as wants, needs and desires. To ratify an instrument, however, usually requires a State to adjust domestic laws that conflict with treaty obligations.

In this regard, it is important to note that the multilateral ICPR regime pre-dates the current world-order of Nation-States (a term that did not enter American English until 1919). The first attempts to establish intellectual & cultural property at the multilateral level was arguably at the height of the once great global economy of European colonial empires on which the sun never set. With respect to the cultural property regime, it arguably began in 1874 with Article 8 of the *Declaration of Brussels* (Annex B). The *Paris Convention for the Protection of Industrial Property* was signed in 1883 (Annex C & D) and the *Berne Convention for the Protection of Literary and Artistic Works* in 1886 (Annex A).

Common Law & Civil Code

While Law is increasingly nation-specific, there are two Western legal traditions from which most national systems evolved - Anglosphere Common Law and European Civil Code. While procedural differences attract popular attention, *e.g.*, the jury versus inquisitorial systems respectively, there are also substantive differences affecting evolution of the multilateral ICPR regime.

First, Anglosphere Common Law is based on precedent. Thus, on the one hand, the first Republican Revolution of 1776 overthrew an ancient regime of subordination by birth and created the United States of America. On the other, however, the U.S.A. adopted British Common Law with all its precedents and prejudices concerning intellectual & cultural property – with a vengeance.

Article I, Section 8 of the 1788 *U.S. Constitution* (known as the Intellectual Property or Copyright Clause) states, in Natural Rights terms:

The Congress shall have Power ... To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

Two years later, however, Congress passed the first *U.S. Copyright Act* of 1790 entitled: *An Act for the Encouragement of Learning, by securing the Copies of Maps, Charts and Books, to the Authors and Proprietors of such Copies, during the Times therein mentioned*. The key change is the term “Proprietors” also used in the first English copyright act – the 1710 *Statute of Queen Anne*.

The U.S., from the beginning, looked upon copyright as an instrument of industrial independence from Britain, specifically in the printing trades. It was not and arguably still is not seen primarily as an incentive for creators in the Natural Rights tradition. Thus no royalties were paid to foreign authors (generally British) whose works were cheaply re-printed. Copies were then sold legally in the U.S. and illegally, at very low prices, elsewhere in the English-speaking world including Canada. American printer/publishers had a field day while Canadian competitors languished under royalties imposed by the *Imperial Copyright Act*. While this piratical U.S. regime ended with the *Chace Act* of 1891, the fact remains that until 1984 no book written by an American author could be sold in the United States unless printed there. This was known as the ‘Manufacturing Clause’.^{iv}

The second Republican Revolution of 1789 in France, however, not only overthrew the ancient regime it also overturned the Common Law. This was replaced by the Civil Code rooted in principle rather than precedent, specifically Natural Rights including the “inalienable, unattachable, imprescriptable and unrenouncable rights” of creators (Andean Community, *Common Provisions on Copyright and Neighboring Rights*, Article 11, 1993). In turn, the Civil Code draws heavily on the old Roman law especially the *Institutes of Justinian* from which, ironically, Justice Yates established the Common Law precedent in 1769 that ideas are not protected because they are like wild animals – *ferae naturae* - belonging to everyone and no one. It is only their

fixation in material form commonly called ‘a work’ that receives protection (Sedgwick 1879).

Second, there is a fundamental difference in the treatment of Natural and Legal Persons. Under Common Law, all intellectual property rights of a Natural Person are transferable (or can be waived) by contract to a Legal Person, *i.e.*, a Proprietor. Under Civil Code the Natural Person enjoys rights that a Legal Person cannot claim. In effect they are ‘human rights’. This difference has fueled ongoing trade disputes between the United States and France with the U.S. demanding such rights be extended to American media corporations.^v

Third, under Common Law a patent is justified by growth of the commonwealth while copyright is justified to foster “the encouragement of learning”.^{vi} The concept of the public domain, however, only entered “Anglo-American [legal] discourse through the French of the Berne Convention” in 1886 (M. Rose 2003, 84). The public domain is where private intellectual property goes after monopoly protection runs out and where it becomes a true ‘public good’: free to all. In the Anglosphere tradition it might be called the ‘intellectual commons’.

Unlike a natural commons, however, such as the air and oceans which tend to abuse through overuse, the more the public domain is accessed the faster it grows; your taking does not decrease my share; or, paraphrasing Isaac Newton’s aphorism: “We all stand on the shoulders of giants”. Knowledge feeds on knowledge. Thus another difference between the two legal traditions is that the Civil Code justifies IPRs not primarily as a reward to the creator but rather growth of the public domain, *i.e.*, it has a cultural focus; the Common Law has a primarily economic one (Vaver 1987, 82-83).

Fourth, there has been a lack of interest in common property for the last three hundred years of Anglosphere legal evolution. In effect Common Law has been dominated by questions of private not public property (C. Rose 2003). Introduction of the concept of the public domain from the Civil Code is one example. Others include concepts of national patrimony and cultural property both of which are essentially French in origin.

With the emergence of ecology, the tragedy of the commons, global warming, *et al*, Common Law is returning to questions about common property. The argument, in economic terms, is that if a public good belongs to everyone but to no one then one way to solve the problem of overuse and abuse is to assign ownership to someone. That someone will then have a vested interest to ‘conserve’ the resource. This is the approach taken in the *Convention on the Law of the Seas* (1982), the *Convention on Biodiversity* (1992) and the *Kyoto Protocol*. (1997). In the case of all three ownership is vested in the Nation-State. In the case of Kyoto some States have transferred ownership to private agents – both Natural and Legal Persons, *e.g.*, through carbon auctions and credits.

The Civil Code, however, has more concepts of common property. Thus there are five categories of public property under Roman law: *res nullius*, *res communes*, *res publicae*, *res universatitit* and *res divini juris*. To begin, the Latin word *res* means ‘thing’. *Res nullius* refers to things that are unowned or have simply not yet been

appropriated by anyone such as an unexplored wilderness. *Res communes* refers to things that are open to all by their nature, such as oceans and the fish in them or what under Common Law is called ‘the commons’. *Res publicae* refers to things that are publicly owned and made open to the public by law. *Res universitatis* refers to things that are owned by a body corporate, *i.e.*, within the group such things may be shared but not necessarily outside the group. Finally, *res divini juris* (divine jurisdiction) refers to things ‘unownable’ because of their divine or sacred status (Kneen 2004).

Development of the multilateral ICPR regime reflects ongoing tension between Nation-States following these two Western legal traditions. This, of course, ignores other legal systems such as Islamic Shar’ia that do not play a significant role in current international law.

TRIPS

In 1995 the World Trade Organization (WTO) began operations and a new global economy was born. Today, virtually all member states of the United Nations (UN) belong to the WTO with the notable exception of the Russian Federation. Put another way, global regulation of political and military competition by the UN beginning in 1945 was extended to global regulation of economic competition by the WTO fifty years later. This was possible only because of the triumph of the Market over Marx.

For the first time virtually all Nation-States agreed to abide by common rules of trade recognizing the WTO as final arbitrator of disputes and authorizing it to sanction countervailing measures against offenders of its rules. Given the historical role of trade disputes fueling international conflict, the WTO compliments the UN as a bulwark of international peace, law and order.

As a multilateral instrument, the WTO is a ‘single undertaking’, *i.e.*, it is a set of instruments constituting a single package permitting only a single signature without reservation. One of these instruments is the Trade-Related Intellectual Properties and Services Agreement (TRIPS) that constitutes, in effect, a global treaty on trade in knowledge, or more precisely, in intellectual property rights (IPRs) such as copyrights, patents, registered industrial designs and trademarks. TRIPS, however, is only one part of a complex WTO package that includes the General Agreement on Tariffs and Trade (GATT) and twenty-six other agreements.

With respect to the multilateral ICPR regime TRIPS is, however, only the tip of the iceberg (Annex A-D). Below is a dense web of other relevant global and regional agreements, conventions and treaties including those administered by the World Intellectual Property Organization (WIPO) as well as other international organizations including UNESCO. WIPO, like UNESCO, is a special subject agency of the United Nations.

TRIPS requires accession to some but not all WIPO instruments. TRIPS also explicitly excludes ‘non-trade-related’ intellectual & cultural property rights, *e.g.*, aboriginal heritage rights including traditional ecological knowledge or (TEK), collective or community-based

intellectual property in general (Shiva 1993) as well as the moral rights of the Natural Person.

Furthermore WIPO (an International Organization) has a formal agreement with the WTO (an International Organization) to administer TRIPS as it does the Paris, Berne and many other multilateral instruments. Such agreements are the subject of the 1986 *Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations*. Thus it is no longer just the laws of nations but also the internal rules of international organizations that shape the multilateral regime, *i.e.*, treaties between international bureaucracies. The effects of TRIPS and the WTO/WIPO agreement on the evolving regime will be assessed in my Conclusions.

Intellectual Property

Traditionally, intellectual property breaks out into two classes: industrial property and literary & artistic works. Industrial property includes patents, registered industrial designs and trademarks (inclusive of marks of origin). These were the subject of the first multilateral IPR agreement: the *Paris Convention for the Protection of Industrial Property* of 1883. Literary & artistic works were the subject of the second multilateral agreement: the *Berne Convention for the Protection of Literary & Artistic Works* of 1883. Protection of literary & artistic works under Common Law is called copyright; under the Civil Code, 'rights of the author'. They are not the same.

In general, industrial property involves utilitarian goods and services (knowledge tooled as function) while:

[t]hough copyright is expressed in terms of property, it is not directly analogous to industrial property (patents, trademarks and industrial designs), where the major concern is with the circulation of goods that have economic value apart from their intellectual content. As it deals with purely intellectual matter, copyright can never interfere with a person's physical well-being. (Keyes & Brunet 1977, 3)

With respect to *jus cogens*, presumptive norms or heuristics of the multilateral IPR regime, one is 'national treatment' and another is *lex fori*. *Lex causae* is Latin for 'law of the cause'. It refers to which law has precedence when there is a conflict of laws in an action, *e.g.*, infringement of a patent granted in one State but infringed in another. There are two possibilities – *lex fori* and *lex loci*.

With respect to procedure, the applicable law will always be the law of the court (*lex fori*) hearing the case. With respect to substantive law, however, it may be that of the State granting the right, or *lex loci*. Thus the 1889 *Montevideo Treaty on Literary and Artistic Property* (unlike the Paris Convention) adhered to *lex loci* meaning that the rights of an author were determined by the laws of the country of origin where the work was first published not where the infringement took place.

Under the multilateral intellectual property regime, States provide only 'national treatment' to citizens of other States, *i.e.*, the same rights are extended as if they were nationals but the rights so extended are defined by each national legislature. This means, for example, that Canada must extend to foreign authors and copyright owners the same

rights as granted to Canadian nationals. These rights, however, need not and are generally not the same between countries. The term of copyright in Canada is life of the artist plus fifty years. In the U.S., it is life of the artist plus seventy years. This means that the work of an American artist will enter the Canadian public domain twenty years earlier than in the U.S. While a subject of controversy this treatment contrasts with 'harmonization' characteristic of other WTO efforts, e.g., the definition of subsidies.

Industrial Property

Patents were the centerpiece of the Paris Convention of 1883 which also treated industrial design and trademark. The Convention represented the triumph of the patent movement led by the United States against the anti-patent movement led by Germany. The first U.S. Patent Act: "An act to promote the Progress of Useful Arts", was passed in 1790 more than 60 years before Great Britain passed its first act. The U.S. had developed over that period a system for treating applications, assessing claims and granting patents. This experience informed and shaped the Paris Convention. Success led one American observer to call the Convention "the most perfect example of a multilateral convention affecting economic matters" (Kronstein & Till 1947, 765). Ironically, after Germany acceded to the Paris Convention in 1901 (the last major industrial power to do so) it engaged in 'patent pooling' with the United States in key industries especially chemicals and pharmaceuticals effectively dividing up world markets between them.

Patents

The term 'patent' entered the English language in the 14th century. Patents were originally only one form of monopoly granted by the Crown. Such grants were signified by Letters Patent, open letters marked with the King's Great Seal. At first import patents were granted to foreigners bringing new working knowledge to the kingdom (David 2001, 7). Thus the first English patent was granted by Henry VI to Flemish-born John of Utynam in 1449 for a method of making stained glass not previously known in England but required for the windows of Eton College. Gradually such protection was extended to domestic inventors (UK Patent Office 2004).

By the time of James I, abuse of the monopoly system had become so great that the *Statute of Monopolies* was enacted in 1624. It made all such monopolies illegal except for "any manner of new manufactures within this Realm to the true and first inventor". Furthermore, such monopolies could not be "contrary to the law nor mischievous to the State by raising prices of commodities at home or hurt of trade". It should be noted that copyright, specifically Stationer's Copyright, was also exempted but for political not economic reasons (Chartrand 2000).

For more than 200 years the patent system in Britain developed through case law without statute. It was not until the *Patent Law Amendment Act* of 1852 that a formal patent act came into existence (UK Patent Office, July 13, 2004). As noted above, the first U.S. patent act

was “An act to promote the Progress of Useful Arts” - passed in 1790. Its legal status was based, however, on Article 1, Section 8, Clause 8 of the Constitution.

Patents are granted for new and useful compositions of matter (*e.g.*, chemical compounds, foods, and medicinal products), machines, manufactured products and industrial processes as well as to improvements to existing ones, *i.e.*, it protects tooling knowledge. In some jurisdictions, patents are granted to new plant and animal forms developed through traditional methods as well as genetic engineering. Patents have also been extended to computer software.

The failure of the European Union to ratify, after two attempts (1975 & 1989), a community patent agreement highlights one critical difficulty with any ‘single’ global patent, *i.e.*, language.

In particular the time delays for translating the claims and the authentic text of the claims in case of an infringement remained problematic issues throughout discussions and in the end proved insoluble (Wikipedia, [Community Patent](#), 2008)

A summary index of global and regional instruments making up the multilateral patent regime is displayed in Annex C.

Registered Industrial Design

Industrial design is a form of codified knowledge. Unlike copyright and trademarks, however, knowledge is always fixed as meaning in a utilitarian matrix. Industrial design involves the arrangement of elements or details that contribute a distinctive aesthetic appearance rather than a function to a good. In this sense there is a relationship between copyright protecting a work of art and industrial design. Both involve aesthetics but in the case of a copyright the aesthetic element is fixed in a matrix that has no utilitarian value. By contrast an industrial design is fixed in a utilitarian matrix, *e.g.*, a coffee cup without a design is still a coffee cup.

Industrial design protection can be obtained by both Natural and Legal Persons. It is important to note, however, that industrial design evolved from copyright in the British tradition but from patents in the United States where they are called ‘design patents’. Design protection is granted for a fixed time period (for example, 14 years in the United States) after which the design enters the public domain. Registration and payment of fees are generally required. Industrial design cannot be renewed.

The first design-related legislation in Britain was the *Designing & Printing of Linen Act* of 1787. The *Copyright of Design Act* of 1839 extended protection to other textiles but it was not until the *Design Act* of 1842 that protection was extended to other manufactures including designs made up of functional elements (UK Patent Office 2001). In the United States, an 1842 statute granted design patents to new and original designs for manufactured products and printing on fabric.

Aesthetic design is fundamentally different from technical or functional design such as a more fuel-efficient automobile engine. Its impact on consumer behavior involves what can be called “the best

looking thing that works”. If a consumer does not like the way a product looks, he or she may not even try it. Industrial designs are, however, the ‘weak sister’ among formal IPRs. Duration is one indication, in the U.S., for example, it is 14 years for an industrial design, 70 years for a corporate copyright and 20 years for a patent. Nonetheless, the aesthetic dimension - the ‘look and feel’ of a good or service – or its industrial design has always and continues to play an important role in market competition. A summary index of global and regional instruments making up the multilateral industrial design regime is displayed in Annex D.

Trademark

Trademarks are also a form of codified knowledge. Trademarks and marks of origin, symbolize a Person – Natural or Legal – or a place, respectively. A ‘mark’ is reserved for the exclusive use of its owner as maker or seller. In market terms it embodies the ‘goodwill’ of a going concern, *e.g.*, as a corporate logo. The matrix on which a mark is fixed varies. When fixed on a working device or product like a bottle of wine the matrix is utilitarian; when fixed on a communications medium such as a billboard, letterhead, television or internet advertisement, the matrix is non-utilitarian.

The word ‘trademark’ entered the English language in 1838 (OED, *trademark*, n, a). Functionally, however, it traces back to ancient times and in Western Europe from at least the 13th century. This includes masons marks, goldsmith marks, paper makers’ watermarks and watermarks for the nobility as well as printers’ marks.

While the 1618 case of *Southern v How* is generally considered the birth of commercial trademark law in England, the first national trademark legislation was in fact enacted in France in 1857 followed by Britain in 1862. Subsequently, in Britain, the *Trade Marks Registration Act* of 1875 established the first Trade Marks Registry in the world which opened in London in 1876 (UK Patent Office 2003). In the United States, the first trademark law was passed in 1870 based on the patent and copyright clause of the Constitution. It was, however, subsequently repealed and replaced in 1881 with legislation based on the commerce clause of the Constitution.

Trademark-related rights, including appellations and indications of origin, have been extended to embrace, *inter alia*: advertising slogans, certification marks, collective marks, guarantee marks, labels and emblems, service marks, trade names, well known and distinctive signs and WWW domain names. They arguably extend or will be extended to ‘celebrity rights’, ‘house marks’ used by biogenetic engineers as well as holographic, sound and olfactory marks as virtual reality becomes an increasingly profitable and sophisticated marketplace.

Registration and the payment of fees are generally required. A trademark is granted only for new marks so as not to confuse the public. It is available to both Natural and Legal Persons. But unlike other forms of IPRs, trademarks can be renewed, potentially in perpetuity. A summary index of global and regional instruments making up the multilateral trademark regime is displayed in Annex D.

Copyright

The history of the Berne Convention of 1886 is radically different from the Paris Convention of 1883 which was inspired by the American example. Led by Victor Hugo, European artists and writers in 1878 organized the International Artistic & Literary Association (*Association Littéraire et Artistique Internationale*). First in Paris it then met annually in different European capitals. In 1882, at Rome it agreed to organize an international conference of States about copyright, or rather author's rights. At the Berne conference of September 1883, a draft convention was prepared and brought to the attention of the community of nations by the Swiss Federal Council (Kampelman 1947, 410-411). The Berne Convention of 1886 was the result.

Three years after the Berne Convention the same authorial rationale gave birth, in 1889 to the second major multilateral copyright agreement: the *Treaty on Literary and Artistic Property* done at Montevideo, Uruguay during the South American Congress on Private International Law. This was the first step in development of the Pan-American copyright system. Unlike subsequent agreements, however, it was open to non-American states. It was ratified by Argentina (1891), Bolivia (1903), Paraguay (1889), Peru (1889), and Uruguay (1892) and agreed to by France, Spain, Belgium, Italy, Germany, and Austria. It was, as noted above, also *lex loci* in nature.

It is important to note that Latin American Nation-States had all gained independence from Spain and Portugal by the late 1820s following the third wave of the Republican Revolution lead by Simon Bolivar. All began and continue to operate under variations on the Civil Code. Accordingly they do not recognize copyright but rather author's rights.

Whether due to the Monroe Doctrine by which the United States asserted an obligation to protect the Americas from foreign influences or for economic reasons, a distinct Pan-American copyright regime emerged to challenge the Berne Convention and complicate multilateral copyright relations. The first formal Pan-American copyright convention was signed at the Second International Conference of American States at Mexico City in 1902. The *Inter-American Literary and Artistic Property Convention* was ratified by Guatemala, Salvador, Costa Rica, Honduras, Nicaragua and the United States. It was followed by the *Buenos Aires Convention on Literary and Artistic Copyright* of 1910 and its revision in 1928. The system was finalized with the Pan American Copyright Convention of 1946, or formally the *Inter-American Convention on the Rights of the Author in Literary, Scientific and Literary Works*.

In effect this development split the world into two competing multilateral regimes. First, the Berne Convention is an open treaty, *i.e.*, open to all nations. The Pan American Convention, on the other hand, is a closed treaty open only to countries in the Americas. Second, Berne requires no special procedures such as registration to obtain protection in a participating State, *i.e.*, national treatment is automatic. On the other hand, the Pan American Convention allows for special procedures including use of the '©' symbol on any work claiming protection in a participating State. Third, Berne extended 'courtesy' protection to works

if simultaneously published in a Berne Convention country whether or not they originated in a participating State. Under the Pan American Convention, on the other hand, protection was restricted to works from participating nations. In a sense Berne focuses on the artist/author/creator no matter citizenship while the Pan American Convention protects only works by resident creators.

Before and after the First and Second World Wars various attempts were made to reconcile these two regimes. It was not, however, until the UNESCO inspired *Universal Copyright Convention* of 1952 that an overarching instrument, however flawed, was erected to span the gulf between the two regimes. Arguably, it did not succeed.

Finally in 1989 the U.S. acceded to the Berne Convention and Congress took steps towards recognizing moral rights, e.g., the *Visual Artists Protection Act* of 1990 which eventually became Section 106A of the U.S. copyright act. However, rights of paternity and integrity of one's work is available only to artists of 'recognized' reputation. Recognized by whom? By the Courts! Similarly, the *Architectural Works Copyright Protection Act*, Pub. L. 101-650 was passed in 1990. Its moral rights provisions, however, are so weak that it has not been incorporated into the U.S. copyright act. It is an open question whether the United States has in fact fulfilled its obligations under the Berne Convention. A summary index of global and regional instruments making up the multilateral copyright regime between 1883 and 2008 is displayed in Annex A.

Cultural Property

As noted above, traditionally the relationship between intellectual and cultural property is Time. In this view, cultural property is private intellectual property that has, over time, fallen into the public domain and then, in effect, been 'nationalized'. Similarly, the term has been generally restricted to a limited range of things distinguishable from the ordinary by their special cultural significance and/or rarity. Such cultural property constitutes a Nation-State's patrimony.

Arguably the case is changing. With the 2005 UNESCO *Convention on Cultural Diversity* 'cultural industries' producing current goods and services rather than historical works may now also claim protection as cultural property. Furthermore the 2003 UNESCO *Convention for the Safeguarding of Intangible Cultural Heritage* extends protection to many, but not all, non-trade-related intellectual properties of aboriginal and tribal peoples. Such 'works' now claim multilateral protection as cultural property. A preliminary list of global and regional instruments making up the multilateral cultural property regime between 1874 and 2008 is displayed in Annex B.

Conclusion

The effects of TRIPS on the multilateral ICPR regime are four-fold: First, by excluding moral rights of the Natural Person TRIPS effectively converted copyright or 'protection of literary and artistic works' into industrial property. As demonstrated these are historically two separate classes of intellectual property.

In this regard, Victor Hugo must have turned over in his hallowed Parisian Pantheon crypt when computer software was accepted as ‘a work’ subject to his 1886 *Berne Convention on the Protection of Artistic and Literary Works*. Until then copyright protected only artistic and literary works of words, images, shapes and/or sounds, *i.e.*, human-readable code.^{vii} In effect, Common Law economics trumped Civil Code culture in TRIPS.

Second, TRIPS opened up a new division within the multilateral regime similar to the Berne and Pan American Copyright Conventions. Thus while the 2003 UNESCO *Convention on Intangible Cultural Heritage* and its 2005 *Convention on Cultural Diversity* explicitly state they do not conflict with other agreements, the geo-political-economic reality is otherwise. Any attempt by the U.S. to seek countervail in a WTO panel against measures to protect national cultural industries will be answered by reference to these UNESCO conventions.

Third, TRIPS, a WTO initiative, energized countries like Canada, France and Sweden to use UNESCO as a vehicle to counter its perceived economic bias (Chartrand 2002). TRIPS, however, is administered by WIPO (a UN special subject agency). Therefore together with UNESCO (also a UN special subject agency) the split between Culture and Commerce, between Common Law and Civil Code traditions, has, in effect, been institutionalized in the multilateral intellectual & cultural property regime.

Fourth, the intellectual property rights regime is a critical policy instrument for the competitiveness of nations in a global knowledge-based economy. Preferential public support for production of traditional goods & services such as cars is subject to harmonization under the rules of the WTO. Intellectual property rights under TRIPS, however, remain subject to national treatment. This allows a Nation-State to design an ICPR regime best suited to its purposes – commercial and/or cultural.

Quintessentially, without a Natural Person to decode or push the right buttons codified and tooled knowledge remain a meaningless or functionless artifact. This means that ‘know-how’ resides in people and their ability to code and decode *meaning* and machine *function* into and out of matter/energy. This suggests the Civil Code model with rights rooted in the Natural Person is the preferred path towards national competitiveness and fitness to survive a rapidly changing world. It also suggests that the American Revolution at least with respect to intellectual & cultural property may not be complete

Nonetheless, as human artifacts, both the Common Law and Civil Code traditions have strengths and weakness. The current regime is in fact a Panda’s Thumb. Perhaps it is time for some genetic legal engineering by “a rational, consistent, social welfare-maximizing public agency” (David 1992).

References

- BBC News, “US and Bayer settle anthrax row”, *BBC*, October 24, 2001.
- Dewey, J., “The Historic Background of Corporate Legal Personality“, *Yale Law Journal*, XXXV (6), April 1926, 655-673.
- Chartrand, H.H., “Copyright C.P.U. - Creators, Proprietors & Users“, *Journal of Arts Management, Law & Society*, 30 (3), Fall 2000.
- Chartrand, H.H., “Funding the Fine Arts: An International Political Economic Assessment” *Nordic Theatre Journal*, 14, 2002.
- Chartrand, H.H., *The Competitiveness of Nations in a Global Knowledge-Based Economy – Ideological Evolution*, VDM Verlag Dr Muller, ISBN 978-3-8364-2804-0, 2007.
- Chartrand, H. H., *The Compleat Multilateral Intellectual Property Rights Series:*
Volume 1: *The Compleat Multilateral Copyright & Related Agreements, Conventions, Covenants & Treaties 1886-2007*, Compiler Press, March 2007, ISBN 978-0-9689523-5-1
Volume II: *The Compleat Multilateral Patent & Related Agreements, Conventions & Treaties 1883-2008*, Compiler Press, July 2008, ISBN 978-0-9689523-7-5; and,
Volume III: *The Compleat Multilateral Trademark & Industrial Design Agreements, Conventions & Treaties 1883-2008*, Compiler Press, August 2008, ISBN 978-0-9689523-6-8.
- Chartrand, H.H., “Software: Copyright, Patent or Something Else?”, Compiler Press, April 2008.
- Commons, J. R., *Institutional Economics - Its Place in Political Economy*, University of Wisconsin Press, Madison, Wisconsin, 1934.
- Commons, J. R., *The Legal Foundations of Capitalism* [1924], Macmillan, NYC, 1939.
- Cowan, R., David P.A. & Foray, D., “The Explicit Economics of Knowledge: Codification and Tacitness”, *Industrial and Corporate Change*, 9 (2), 2000, 211-253.
- David, P.A., “The Dynamo and the Computer: An Historical Perspective on the Modern Productivity Paradox”, *American Economic Review*, 80 (2), May 1990, 355-36.
- David, P.A., *The Evolution of Intellectual Property Institutions and the Panda’s Thumb*, Meetings of the International Economic Association in Moscow, 24-28 August 1992.
- David, P.A., “From Keeping ‘Nature’s Secrets’ to the Institutionalization of ‘Open Science’”, *Discussion Papers in Economic and Social History*, University of Oxford, 23, July 2001.
- Dewey, J., “The Historic Background of Corporate Legal Personality“, *Yale Law Journal*, XXXV (6), April 1926, 655-673.
- Ihde, D., *Instrumental Realism: The Interface between Philosophy of Science and Philosophy of Technology*, Indiana University Press, Bloomington, 1991.

- Kampelman, M.M., “[The United States and International Copyright](#)“, *American Journal of International Law*, 41 (2), April 1947, 406-429.
- Kneen, B., “[Intellectual Property, the Commons and the Public Domain](#)”, Paper presented to the Food Group, University of Toronto, on February 13, 2004.
- Keyes, A.A., C. Brunet, *Copyright in Canada: Proposals for a Revision of the Law*, Consumer and Corporate Affairs Canada, Ottawa, April 1977.
- Kronstein, H & Till, I., “A Reevaluation of the International Patent Convention”, *Law and Contemporary Problems*, 12(4), Autumn 1947, 765-781.
- Merryman, J.H., “On the Convergence (and Divergence) of the Civil Law and the Common Law”, *Stanford Journal of International Law*, 17, 1981.
- Merryman, J.H., “Cultural Property Internationalism” *International Journal of Comparative Law*, 12, 2005.
- Nace, T., *The Gangs of America - 14. Judicial Yoga*, Berrett-Koehler, 2005, 161-177.
- OECD, *The Knowledge-Based Economy*, Organization for Economic Cooperation and Development, Paris, 1996.
- OECD, *National Innovation Systems*, Organization for Economic Cooperation and Development, Paris, 1997.
- Polanyi, M., *Personal Knowledge: Towards a Post-Critical Philosophy* [1958], Harper Torchbooks, NYC, 1962.
- Reich, R., *The Work of Nations*, Vintage Books, 1992.
- Rose, C., “[Romans, Roads, and Romantic Creators: Traditions of Public Property in the Information Age](#)”, *Law & Contemporary Problems*, 66 (1/2), Winter/Spring 2003, 89-110.
- Rose, M., “[Nine-Tenths of the Law: The English Copyright Debates and the Rhetoric of the Public Domain](#)”, *Law & Contemporary Problems*, 66 (1/2), Winter/Spring 2003, 75-88.
- Sagan, C., *The Dragons of Eden*, Balantine, NYC., 1977.
- Schlicht, E., *On Custom in the Economy*, Oxford Clarendon Press, 1998.
- Sedgwick, A., “International Copyright by Judicial Decision”, *Atlantic Monthly*, 43 (256), 217-230, February 1879.
- Shiva, V., *Monocultures of the Mind: Understanding the Threats to Biological and Cultural Diversity*, Inaugural Hooper Lecture, Centre of International Programs, University of Guelph, September 21, 1993.
- UK Patent Office, *History of Designs*, London, 2001.
- UK Patent Office, *A brief history of trade marks*, London, 2003.
- UK Patent Office, *Five hundred years of patents*, London, 2004.
- Vaver, D., "Copyright in Foreign Works: Canada's International Obligations", *Canadian Bar Review*, 66 (1), March 1987.
- Woodmansee, M., “[The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the ‘Author’](#)“, *Eighteenth-Century Studies*, 17 (4), Summer 1984, 425-448.

Endnotes

i - Robert Reich notes that workers in a knowledge-based economy are symbol makers and manipulators of numbers, words, images, sounds, etc. (Reich 1992).

ii - Mainstream discussion of the knowledge-based economy is effectively limited to codified and ‘tacit’ knowledge (Cowan, David, Foray 2000) with some treatment of ‘local knowledge’. The later, a form of collective, sociological or ‘team’ knowledge, remains, nonetheless, tacit.

The concept of tacit used in this discussion derives from philosopher of science Michael Polanyi whose master work is: *Personal Knowledge: Towards a Post-Critical Philosophy* (Polanyi 1958). Polanyi believed all knowledge is ultimately personal and tacit in that it results from our tacit integration of subsidiary (background) and focal (foreground) awareness into a gestalt whole called ‘knowing’ (Polanyi Oct. 1962)

Contemporary discussion, however, dissociates tacit from personal transforming it into a ‘corporate asset’. Such disassociation arguably reflects the bias of capitalist economics towards capital and away from labour. In fact one can speak of a labour theory of knowledge and its corollary, the knowledge theory of capital (Chartrand 2007).

Furthermore, in the contemporary public policy debate there is no discussion of tooled knowledge. For Polanyi this too would be unimaginable. To him we live or rather ‘indwell’ in our tools, toys and instruments. We ‘feel’ the hammer hit the nail at the point of impact, not in our hand. For Polanyi scientific instrumentation extends the human senses and grasp. The newer, better, more sophisticated the tool the farther our senses and grasp reach. The knowledge to do so is tooled or fixed into matter/energy as a device or process and can be extracted, if at all, through ‘reverse engineering’.

iii - ‘Know-how’ is generally protected under confidentiality clauses in contracts of employment. It is, however, recognized as a distinct class of intellectual property under NAFTA, WTO treaties and other multilateral treaties.

iv - It should be noted that Austria-Hungary was also a pirate State (Woodmansee 1984, 439).

v - It is ironic that the American Revolution starting with the Boston Tea Party overthrowing the power of the corporation – the East India Company – should in the mid-19th century place such bodies corporate on an equal legal footing with the individual citizen. This question is explored in Ted Nace’s *The Gangs of America* (2005).

vi - The titles of both the 1710 *Statute of Queen Anne* –the first modern copyright act - and the first U.S. *Copyright Act* of 1790 are dedicated to ‘the encouragement of learning’.

vii - At the experimental level, both touch and smell are in the process of being codified to then be played back to a human reader.

EXTRACTED FROM;

The Compleat Multilateral Copyright & Related 1886-2007

ANNEX A

SUMMARY INDEX OF COPYRIGHT INSTRUMENTS

GLOBAL

1. Berne Convention 1886
2. Circulation of Obscene Publications 1910
UN Protocol 1949
3. Film Registration 1989
4. Indigenous Nations 1994
5. Trafficking in Obscene Publications 1924
UN Protocol 1947
6. Type Face (Vienna Agreement) 1973
7. UN Commercial Samples & Advertising Materials 1952
8. UN Performers, Producers of Phonograms & Broadcasting
Organizations (Rome Convention) 1961
9. UNESCO Cultural Diversity 2005
10. UNESCO Educational, Scientific & Cultural Materials
(Florence Agreement) 1950
Protocol (Nairobi Agreement) 1976
11. UNESCO Exchange of Publications 1958
12. UNESCO Government Documents 1958
13. UNESCO Intangible Cultural Heritage 2003
14. UNESCO Visual and Auditory Materials
(Beirut Agreement) 1948
15. UNESCO/WIPO Double Taxation 1979
16. UNESCO/WIPO Folklore 1984
17. UNESCO/WIPO Producers of Phonograms 1971
18. UNESCO/WIPO Satellites 1974
19. UNESCO/WIPO Tunis Model Law 1976
20. Universal Copyright Convention 1952
21. WIPO Convention 1967
22. WIPO Copyright 1996
23. WIPO Databases 1996
24. WIPO Integrated Circuits (Washington Treaty) 1989
25. WIPO Performances & Phonograms 1996
26. WIPO-WTO Agreement 1995
27. WTO GATT Provision 1947
28. WTO TRIPS Agreement 1994

REGIONAL

The Americas

29. Inter-American Copyright Convention 1902
30. Buenos Aires Convention 1910
Revision 1928
31. Pan American Copyright Convention 1946

Latin America

32. Common Provisions on Copyright and Neighboring
Rights, Andean Community 1993
33. Montevideo Treaty 1939

North America

34. Canada-United States Free Trade Agreement 1988
35. North America Free Trade Agreement 1994

Europe

Council of Europe

36. CE Audiovisual Heritage 2001
Protocol 2001
37. CE Broadcasts from Outside National Territories 1965
38. CE Conditional Access 2001
39. CE Cybercrime 2001
40. CE Transfrontier Broadcasting by Satellite 1994
41. CE Transfrontier TV 1989
Protocol 1998
42. CE TV Broadcast Protection 1960
Protocols 1965, 1974, 1983, 1989
43. CE TV Film Exchange 1958

European Union

44. EU Computer Programs 1991
45. EU UNESCO Cultural Diversity 2006
46. EU Databases 1996
47. EU Electronic Commerce 2000
48. EU Harmonizing Certain Aspects of Copyright 2001
49. EU Harmonizing Term of Copyright Protection 1993
50. EU Global Networks 1999
Amendment 2003
51. EU Rental & Lending Rights 1992
52. EU Resale Rights 2001
53. EU Safer Use of the Internet 2005
54. EU Satellite Broadcasting & Retransmission 1993
55. EU Topographies of Semiconductors 1986
56. EU WIPO Copyright Treaty and Performances
& Phonograms Treaty 2000

UN/UNESCO

RESOLUTIONS & RECOMMENDATIONS

57. UN Direct Television Broadcasting 1982
58. UNESCO Access to Cyberspace 2003
59. UNESCO Moving Images 1980
60. UNESCO Status of the Artist 1980
61. UNESCO Traditional Culture & Folklore 1989
62. UNESCO Translators & Translations 1976

EXTRACTED FROM:

The Compleat Multilateral Cultural Property & Related 1874-2008

APPENDIX B

**SUMMARY INDEX OF CULTURAL PROPERTY
INSTRUMENTS**

GLOBAL

General

0. Multilateral Lexicon
1. Vienna Conventions on Treaties
 - (a) On the Law of Treaties 1969
 - (b) Between States & International Organizations 1985
2. General Agreement on Tariffs & Trade (GATT) 1947

Non-Governmental

3. Athens Charter 1931
4. Indigenous Nations Covenant 1994
5. Venice Charter 1964

Pre-Hague

6. Brussels Declaration, Article 8, 1874
7. Oxford Manual, Article 53, 1880

Hague

8. War on Land, Article 23, 1899
9. War on Land, Article 56, 1907
10. War at Sea, Article 5, 1907
11. War in the Air, Articles XXV & XXVI 1923
12. Protection of Cultural Property in Event of Armed Conflict 1954

League of Nations

13. Monuments & Works of Art in Time of War 1939

UNESCO

Agreements

- 14 (a) Educational, Scientific & Cultural Materials (Florence Agreement) 1950
- (b) Protocol (Nairobi Agreement) 1976
15. Visual & Auditory Materials (Beirut Agreement) 1948

Charters

- 16 Digital Heritage 2003

Constitution

17. Article 1(2)(c), 1945

Conventions

18. Illicit Import, Export and Transfer of Cultural Property 1970
19. Diversity of Cultural Expressions (2005)
20. Intangible Cultural Heritage 2003
21. Underwater Cultural Heritage 2001
22. World Cultural & Natural Heritage 1972

Declarations

23. Intentional Destruction of Cultural Heritage 2003
24. International Cultural Co-operation 1966
25. Responsibilities of Present to Future Generations 1997

Recommendations

26. Archaeological Excavations 1956
27. Cultural Property Endangered by Public or Private Works 1968
28. Exchange of Cultural Property 1976
29. Illicit Export, Import and Transfer of Cultural Property 1964
30. Movable Cultural Property 1978
31. National Cultural & Natural Heritage 1972
32. Rendering Museums Accessible 1960
33. Historic Areas 1976
34. Traditional Culture & Folklore 1989

UNIDROIT

35. Stolen or Illegally Exported Cultural Objects 1995

AFRICA

36. Cultural Charter for Africa, OAU 1976

AMERICAS

Latin America

37. Artistic and Scientific Institutions & Historic Monuments (Roerich Pact) 1935
38. Archeological, Historical & Artistic Heritage (San Salvador Convention) 1976

North America

39. Canada-U.S. Free Trade Agreement Articles 2004-7, 1988

EUROPE

Council of Europe

40. Archaeological Heritage 1969
41. Archaeological Heritage 1992
42. Architectural Heritage 1985
- 43 (a) Audiovisual Heritage 2001
- (b) Protocol 2001
44. Cultural Property Offenses 1985
45. European Cultural Convention 1954
46. TV Film Exchange 1958
47. Value of Cultural Heritage 2005

European Union

48. Return of Cultural Objects 1993
49. Treaty of Rome 1957

APPENDIX C
SUMMARY INDEX OF PATENT
INSTRUMENTS

GLOBAL

1. Biodiversity
 - (a) Convention on Biodiversity 1992
 - (b) Cartagena Protocol on Biosafety 2000
2. Deposit of Microorganisms
(Budapest Treaty) 1977, 1980
3. Industrial Property (Paris Convention)
1883, 1900, 1911, 1925, 1934,
1958, 1967, 1979
4. International Patent Classification
(Strasbourg Agreement) 1971, 1979
5. New Varieties of Plants (UPOV)
 - (a) Act of 1961/1972
 - (b) Act of 1978
 - (c) Act of 1991
6. Vienna Conventions
 - (a) On the Law of Treaties 1969
 - (b) Treaties between States &
International Organizations 1985
7. World Intellectual Property Org.
Convention (WIPO) 1967, 1979
8. WIPO Patent Cooperation Treaty
(PCT) 1971, 1979, 1984, 2001
9. WIPO Patent Law Treaty (PLT), 2000
10. WIPO/UPOV Agreement 1982
11. WIPO Agreement with the World
Trade Organization (WTO) 1995
12. WTO Agreement on Trade-Related
Aspects of Intellectual Property
Rights (TRIPS) 1994

AFRICA

- African Intellectual Property Organization*
13. Bangui Agreement 1977, 1999
*African Regional Intellectual Property
Organization*
 14. Lusaka Agreement 1976, 1982, 1986, 1996
 15. Harare Protocol 1982, 1987, 1994,
1997, 1998, 1999, 2001, 2003, 2004

AMERICAS

Latin America

- Andean Community*
16. New Plant Varieties
Decision No. 345, 1993

17. Genetic Resources
Decision No.391, 1996
18. Industrial Property
Decision No. 486, 2000
Mexico
19. Mexico-European Free Trade
Agreement Title IV: On Intellectual
Property 2000

North America

20. NAFTA: Part Six - Intellectual
Properties 1994

EURASIA

21. Eurasian Patent Convention 1994

EUROPE

- Council of Europe*
22. Patent Application Formalities 1953
 23. Classification of Patents 1954
 24. Substantive Patent Law 1963
European Economic Area
 25. EEA: Protocol 28, 1994-2007
European Free Trade Area
 26. EFTA Convention: Chap. VII &
Annex J 1960, 2001
 27. EFTA & Singapore Agreement:
Article 54 & Annex XII 2002
European Patent Office
 28. European Patent Convention 1973
European Union
 29. Community Patents (*not in force*)
 - (a) Community Patent Convention 1975
 - (b) Council Agreement 1989
 - (c) Community Patent Convention 1989
& Protocols
 - (d) On Litigation 1989
 - (e) On Privileges & Immunities 1989
 - (f) On Common Appeal Court 1989
 - (g) On Entry into Force 1989
 30. Protection of Biotechnological
Inventions 1998

SOUTH-EAST ASIA

31. ASEAN Framework Agreement
on Intellectual Property Rights 1995

EXTRACTED FROM:

The Compleat Multilateral Trademark & Industrial Design 1883-2008

APPENDIX D

SUMMARY INDEX OF INSTRUMENTS

GLOBAL

General

1. Vienna Conventions on Treaties
 - (a) On the Law of Treaties 1969
 - (b) Treaties between States & International Organizations 1985
2. World Intellectual Property Organization Convention (WIPO) 1967, 1979
3. WIPO Agreement with World Trade Organization (WTO) 1995

Industrial Property

4. Industrial Property (Paris Convention) 1883, 1900, 1911, 1925, 1934, 1958, 1967, 1979
5. Trade-Related Aspects of Intellectual Property Rights (TRIPS) 1994

Industrial Design

6. Classification of Industrial Designs (Locarno Agreement) 1968, 1979
7. Hague System:
 - (a) Act of 1925/1960
 - (b) London Act 1934
 - (c) Monaco Act 1961
 - (d) Stockholm Act 1967
 - (e) Geneva Act 1999

Trademarks

8. Appellations of Origin (Lisbon Agreement) 1958, 1967, 1979
9. Classification of Marks (Nice Agreement) 1957-1979
10. Figurative Elements of Marks (Vienna Agreement) 1973, 1985
11. Law on Trademarks (Singapore Treaty) 2006
12. Madrid System
 - (a) False or Deceptive Indications 1891
 - (b) Registration of Marks 1891
 - (c) Registration, Protocol 1989, 2006
13. Olympic Symbol (Nairobi Treaty) 1981
14. Trademark Law Treaty 1994

AFRICA

- African Intellectual Property Organization*
15. Bangui Agreement 1977, 1999
- African Regional Intellectual Property Organization*
16. Bangui Protocol on Marks 1993-1999
 17. Harare Protocol on Industrial Designs 1982-2004

AMERICAS

Latin America

- Andean Community*
18. Industrial Property Decision No. 486, 2000
- MERCOSUR*
19. Trademark Harmonization Protocol 1995
- Mexico*
20. Mexico-European Free Trade Agreement Title IV: On Intellectual Property 2000
- Pan-American Union*
21. Protection of Trade-Marks (Buenos Aires Convention) 1910
 22. Marks & Commercial Names 1923
 23. Trade Mark & Commercial Protection 1929
 24. Trade Mark Registration Protocol 1929

North America

25. North American Free Trade Agreement Part Six: Intellectual Properties 1994

EUROPE

- European Economic Area*
26. EEA: Protocol 28 1994-2007
- European Free Trade Area*
27. EFTA Convention: Chap. VII & Annex J 1960, 2001
 28. EFTA & Singapore Agreement Article 54 & Annex XII 2002
- European Union*
29. Approximate Trade Mark Laws 1988
 30. Design Protection 1998

SOUTH-EAST ASIA

31. ASEAN Framework Agreement on Intellectual Property Rights 1995

Presentation concerning
THE MULTILATERAL INTELLECTUAL & CULTURAL
PROPERTY RIGHTS REGIME

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Introduction

In my presentation I will focus on two issues: Methodology and Updated Findings.

1. Methodology

Mark Blaug in [Chapter 17: A Methodological Postscript](#) to his *Economic theory in retrospect* (1996) observes of American Institutionalism that:

... no discussion of methodology in economics is complete without a mention of this greatest of all efforts to persuade economists to base their theories, not on analogies from mechanics, but on analogies from biology and jurisprudence. (Blaug 1996, 700)

He goes on to note that:

There are few economists today who would consider themselves disciples of Veblen, Mitchell and Commons... (Blaug 1996, 703)

I am one of those few. And to its list of heroes I add Harold Innis (1950, 1951) whose work is now appreciated more in communication theory than in economics, Karl Polanyi and his *Great Transformation* (1944) and Joseph Schumpeter (1950) whose work inspired the emerging sub-discipline of Evolutionary Economics which Blaug suggests is an extension of the 'Old' Institutionalism (Blaug 1996 703).

In this regard I consider the "New" Institutionalism (Coase 1992; 1998) like New Economic History (North & Thomas 1970), New Economic Geography (Martin & Sunley 1996), New Economics of Science (Dasgupta & David 1994) and New Growth Theory (Romer 1996) exercises in re-calibrating the standard model to internalize descriptive, institutional and historical evidence that is nonetheless empirical yet previously excluded because of its qualitative nature. While welcomed the professional urge is to fabricate such 'new' evidence into quantitative proxies to be plugged into mathematical models. Thus Romer calls for more sophisticated modeling without expectation of testing because "these kinds of facts tend to be neglected in discussions that focus too narrowly on testing and rejecting models" (Romer 1994, 19-20). So much for Positivism in econometrics!

Blaug also notes that "...the phrase [Institutional Economics] itself has degenerated into a synonym for 'descriptive economics', a sense in which it may be truly said: we are all institutional economists" (Blaug 1996, 702). Following Kenneth Boulding (1955), however, some

phenomena can in fact only be addressed in this way or, more precisely only using descriptive logic – inductive, deductive and abductive. For Boulding: one should not use a chainsaw in cataract surgery nor a scalpel to cut down a tree. Choosing the right tool for the right problem is what methodology is all about. Put another way, mathematics is a tool of thought, it is not thought itself.

Arguably, my paper “The Multilateral Intellectual & Cultural Property Rights Regime” is a case in point. It is written in the tradition of John R. Commons’s *Legal Foundations of Capitalism* (1924) and of Veblen’s cultural economics (1899) with emphasis on comparative law specifically how intellectual & cultural property is defined, and therefore bought and sold (or not), under Anglosphere Common Law *versus* European Civil Code and International Law.

As for Mitchell and his National Bureau of Economic Research, background ‘databases’ to the article (Chartrand 2008) offer but limited opportunity for quantitative analysis, *e.g.*, which Nation-States signed and/or subsequently adhered to which multilateral instruments plus ‘content analysis’ which is not, of course, generally accepted as evidence by mainstream economics. All, of course, subject to *jus cogens*, *i.e.*, the presumptive norms of international law established by Nation-States and International Organizations, *e.g.*, WTO, WIPO, UNESCO, *et al.* In this regard all instruments displayed in Annexes A-D have been compiled, fully tiled and indexed by the author. Most originals are not.

As for biology, I draw your attention to the development of ‘bioinformatics’ which now offers conceptual and mathematical tools that simply did not exist in Veblen’s time. While not applied in this paper, I refer you to the work of biochemist Stuart Kauffman, currently at the University of Calgary, and his ‘Econosphere’ (Kauffman 2000, 211-241). He recommends a set of very sophisticated mathematical techniques derived from biochemistry especially the ‘adjacent possible’ suggesting a theory of compliments and substitutes within emerging techno-economic regimes (David 1990). Their sophistication is such that I am not qualified to judge their merits. I have, however, strong epistemic reservations about low grade social scientific data fueling ever more sophisticated mathematical models, *i.e.*, garbage in, garbage out. Such low quality evidence should not be confused with that generated, essentially without human mediation, in the instrumental natural & engineering sciences including biology. Put another way, economics is governed by human law, not the laws of nature.

2. Updated Findings

With respect to updated findings, first, Annex B changes from a preliminary list to a formal Summary Index of Cultural Property & Related Instruments. It reveals a complex global and regional web of 49 agreements, charters, covenants, conventions, declarations, recommendations and treaties woven together between 1874 and 2008.

Second, this web establishes *protection of cultural property* as *jus cogens*. Traditionally, protection extends from what begins as a public good (knowledge) converted into private property by IPRs that, in time, returns to the public domain and then, in some cases, becomes national patrimony or, ultimately, the global patrimony of all humanity. Arguably this principle gained clearest expression with the 2003 UNESCO *Declaration on the Intentional Destruction of Cultural Property* made in response to Taliban destruction of the colossal Bamiyan Buddhas in 2001. The effectiveness of such protection, however, remains problematic as demonstrated during the recent conflict in Georgia as well as ongoing efforts to return cultural property looted

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during WWII. Furthermore, with respect to international crime, ounce for ounce, Art & Antiquities are more valuable than heroin; they also yield a higher rate of return at less risk and face significantly less punitive punishment (Chartrand 1992).

Third, none of the multilateral instruments making up the web explicitly – in their titles - address the *for-profit* arts & entertainment or so-called cultural industries. Nonetheless, they enable a plethora of bilateral film and other ‘co-production’ agreements to support and subsidize creation of ‘commercial’ works. The right to do so is arguably affirmed by the 2005 UNESCO *Convention on Cultural Diversity* which entered into force in 2008.

To the degree such works are ‘cultural’ there is little controversy. To the degree they are ‘American cultural clones’ primarily intended for sale in and intended to profit from the largest market in the world, the U.S.A., then controversy may mount. The U.S. may, in the future, prohibit sale and distribution of such goods under GATT and TRIPS or claim countervail before a WTO dispute panel. The situation is, however, complex. On the one hand, the U.S.A. is pitted against erstwhile allies Canada, France and Sweden who initiated the 2005 *Convention on Cultural Diversity*; on the other hand, they co-conspired drafting an *Anti-Counterfeiting Trade Agreement (ACTA)* in 2007 that would accelerate conversion of copyright into industrial property.

Fourth, *protection of collective or communal and aboriginal heritage rights* has also become *jus cogens*. It gained clearest expression with the 2003 UNESCO *Convention on Intangible Cultural Property*. It is also apparent, however, in the patent-related 1992 *Convention on Biodiversity* and the 2000 Cartagena *Protocol on Biosafety*. Biotechnology creates a bridge between traditional ecological knowledge (TEK) and industrial property. It has also spawned a new international crime – biopiracy. The U.S.A. has ratified none of these instruments.

Finally, the legal foundation of the global knowledge-based economy is woven from two primary and sometimes conflicting legal traditions – Common Law and Civil Code. Under both, knowledge is reified as intellectual and/or cultural property. Under one – Civil Code - the Natural Person is the foundation of intellectual & cultural property – as a human or natural right

intellectual property is, after all, the only absolute possession in the world... The man who brings out of nothingness some child of his thought has rights therein which cannot belong to any other sort of property.
(Chaffe 1945)

The Legal Person plays a facilitating role.

Under the other – Common Law – the legal fiction that a Natural and Legal Person enjoys the same rights means the Natural Person plays the facilitating role (Dewey 1926). The implications for income distribution in a knowledge--based economy go beyond the limits of the paper as presented.

Nonetheless, traditional distinctions between industrial property, copyright and cultural property are breaking down. The configuration of the new regime, however, is not apparent, at least to this observer.

References

- Blaug, M., *Economic theory in retrospect: Chapter 17: A Methodological Postscript*, Cambridge University Press, 5th Edition, 1996:
Boulding, K.E., *The Limitations of Mathematics: An Epistemological Critique*, Seminar in the Application of Mathematics to the Social Sciences, University of Michigan, December 15, 1955.

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- Chaffe, Z., Jr., 'Reflections on the Law of Copyright: I & II', *Columbia Law Review*, Vol. 45, Nos. 4 & 5, July and September 1945 in Berrings, R.C. (ed), *Great American Law Reviews*, Legal Classics Library, Birmingham, 1984.
- Chartrand, H.H., "Art, Culture & Global Business: Snapshots from the World Economic Forum", *Journal of Arts Management, Law & Society*, 22 (1), Spring 1992.
- Chartrand, H. H., *The Compleat Multilateral Intellectual Property Rights Series: Volume 1: The Compleat Multilateral Copyright & Related Agreements, Conventions, Covenants & Treaties 1886-2007*, Compiler Press, March 2007, ISBN 978-0-9689523-5-1
 Volume II: *The Compleat Multilateral Patent & Related Agreements, Conventions & Treaties 1883-2008*, Compiler Press, July 2008, ISBN 978-0-9689523-7-5; and,
 Volume III: *The Compleat Multilateral Trademark & Industrial Design Agreements, Conventions & Treaties 1883-2008*, Compiler Press, August 2008, ISBN 978-0-9689523-6-8.
- Chartrand, H.H., *The Compleat Multilateral Cultural Property & Related Agreements, Charters, Covenants, Conventions and Treaties 1874-2009*, pending.2009.
- Coase, R.H., "The Institutional Structure of Production", *American Economic Review*, 82 (4), Sept. 1992, 713-719.
- Coase, R., "The New Institutional Economics", *American Economic Review*, 88 (2), May 1998, 72-74.
- Commons, John R., *The Legal Foundations of Capitalism - Chapter VII: The Price Bargain*, © 1924, MacMillan, NYC, 1939.
- Dasgupta, P. & David, P.A., "Toward a new economics of science", *Policy Research*, 23, 1994, 487-521.
- David, P.A., "The Dynamo and the Computer: An Historical Perspective on the Modern Productivity Paradox", *American Economic Review*, 80 (2), May 1990, 355-36.
- Dewey, J., "The Historic Background of Corporate Legal Personality", *Yale Law Journal*, XXXV (6), April 1926, 655-673 .
- Innis, H., *Empire & Communications* [1950], University of Toronto Press, Toronto, 1972.
- Innis, H., *The Bias of Communications* [1951,] University of Toronto Press, Toronto, 1977.
- Kauffman S.A., *Investigations*, Chapter 9: *The Persistently Innovative Ecosphere*, Oxford University Press, 2000, 211-241.
- Martin, R. & Sunley, P., "Paul Krugman's Geographical Economics and Its Implications for Regional Development Theory: A Critical Assessment", *Economic Geography*, 72 (3), July 1996, pp. 259-292.
- North, D.C. & Thomas, R.P., "An Economic Theory of the Growth of the Western World", *The Economic History Review*, New Series, 23 (1), Apr. 1970, 1-17.
- Polanyi, K., *The Great Transformation: The Political and Economic Origins of Our Time* [1944], Boston, Beacon Press, 2001.
- Romer P .M., "The Origins of Endogenous Growth", *Journal of Economic Perspectives*, 8 (1), Winter 1994, 3-22.
- Romer, P. M., "Why, Indeed, in America? Theory, History, and the Origins of Modern Economic Growth", *American Economic Review*, 86(2), May 1996, 202-206.
- Schumpeter, J.A., *Capitalism, Socialism and Democracy*, 3rd ed., [1942, 1947] Harper Torchbooks, 1950
- Veblen, T., *The Theory of the Leisure Class*, 1899.