A CRITICAL GUIDE TO INTELLECTUAL PROPERTY

A CRITICAL GUIDE TO INTELLECTUAL PROPERTY

Edited by Mat Callahan and Jim Rogers

ZED

A Critical Guide to Intellectual Property was first published in 2017
by Zed Books Ltd, The Foundry, 17 Oval Way, London SE11 5RR, UK.

www.zedbooks.net

Editorial Copyright © Mat Callahan and Jim Rogers 2017

Copyright in this Collection © Zed Books 2017

The rights of Mat Callahan and Jim Rogers to be identified as the editors
of this work has been asserted by them in accordance with the Copyright,
Designs and Patents Act, 1988

Typeset in Plantin and Kievit by Swales & Willis Ltd, Exeter, Devon
Index by ed.emery@thefreeuniversity.net
Cover design by Andrew Brash

All rights reserved. No part of this publication may be reproduced,
stored in a retrieval system or transmitted in any form or by any means,
electronic, mechanical, photocopying or otherwise, without the prior
permission of Zed Books Ltd.

A catalogue record for this book is available from the British Library

ISBN 978-1-78699-114-0 (hb)
ISBN 978-1-78699-113-3 (pb)
ISBN 978-1-78699-115-7 (pdf)
ISBN 978-1-78699-116-4 (epub)
ISBN 978-1-78699-117-1 (mobi)

CONTENTS

Acknowledgments | vii
List of abbreviations | viii

1 Why intellectual property? Why now? 1
Mat Callahan and Jim Rogers

2 Running through the jungle: my introduction to intellectual property 14
Mat Callahan

SECTION ONE: HISTORICAL CONTEXT AND CONCEPTUAL FRAMEWORKS **31**

3 Intellectual property rights and their diffusion around the world: towards a global history 33
Colin Darch

4 The political economy of intellectual property 56
Michael Perelman

5 I am because I own vs. I am because we are 70
Mat Callahan

SECTION TWO: TERRAINS OF CONFLICT AND TERMS OF ENGAGEMENT **97**

6 Owning up to owning traditional knowledge of medicinal plants 99
Josef A. Brinckmann

7 Using human rights to move beyond reformism to radicalism: A2K for schools, libraries and archives 117
Caroline B. Ncube

8 Meet the new boss, same as the old boss: copyright and continuity in the contemporary music economy 144
Jim Rogers

9 Free software and open source movements from digital rebellion to Aaron Swartz: responses to government and corporate attempts at suppression and enclosure 166
Paul McKimmy (with a coda by Bob Jolliffe)

SECTION THREE: LAW, POLICY AND JURISDICTION 197

10 Rethinking the World Intellectual Property Organization 199
Debora J. Halbert

11 What is intellectual property? 217
Blayne Haggart

12 Piracy, states and the legitimation of authority 238
Mat Callahan

13 Summary and concluding remarks. 257
Mat Callahan and Jim Rogers

About the editors and contributors | 267
Index | 269

3 | INTELLECTUAL PROPERTY RIGHTS AND THEIR DIFFUSION AROUND THE WORLD

Towards a global history

Colin Darch

Introduction

In general, both academic and popular accounts of intellectual property (IP) focus much more on the contemporary legal and economic aspects of the subject than on its history. Ideally, a comprehensive global history of IP, were it to be written, would consist of two intimately intertwined but distinct narratives. One would be the story of how the relationship between "creator" and "creation" – writer and text, inventor and invention, manufacturer and product – was conceived philosophically in different ways in different societies over time. It is clear even in the absence of a comprehensive history, that this was not always or everywhere a property relationship:

> The concept of intellectual property *has not existed at all times or in all places*. Our understanding of its historical development stands at a relatively rudimentary stage.[1]

The other narrative would tell the story of how a historically contingent, post-Enlightenment, Western European and capitalist regulatory system, tightly controlling what is essentially the ownership of ideas, came to its present global hegemonic position.

However, the history of IP as it presently exists – specifically the history of copyright, patents and trademarks – is dominated by local narratives that focus on developments in Europe, and especially in England.[2] Relatively little attention is paid to the experiences of non-Western literate societies. There is also an implicit claim in our widespread current use of the term "intellectual property" that IP in fact constitutes a logically coherent umbrella category, and

is therefore a legitimate object for historical inquiry. Significantly, however, most accounts treat patents, copyright and trademarks as historically distinct phenomena. Much of the historical writing on copyright, for example, is oriented towards literary questions such as the emergence of the idea of the individual "author" and the relationship of that idea to disputes over the nature of property during the Enlightenment.[3]

Current *academic* IP discourse is largely the product of analysis by lawyers and economists, with historical, literary and sociological studies very much bringing up the rear. However, the study of IP is not only fragmented in *disciplinary* terms. More importantly, several competing and irreconcilable contemporary *discourses* around IP – reaching far beyond the academy – constitute a major obstacle to a comprehensive understanding of how this set of legal and economic mechanisms came to worldwide dominance. To rely only on processes of globalization for an explanation is to mistake description for analysis, at least partly because of the fundamental contradiction between the neoliberal ideology of comprehensive *deregulation* of all aspects of economic activity, alongside an increasingly ferocious system of reification and *regulation* in the world of ideas.

Most dangerously, the popular discourse of IP is dominated by an aggressive promotion by commercial interests of the supposedly wide-ranging benefits of copyright enforcement, more and more patents, and strong protection for trademarks. Serious analysis is often drowned out by this noisy propaganda, much but by no means all of it generated by US entertainment industry associations such as the MPAA and RIAA and their various dependent bodies. These ideas are disseminated not only through the media, but also in large quantities of apparently serious glossy research reports produced by a range of industry-funded bodies. Such material should clearly be treated with the same extremely cautious skepticism with which we regard research funded by, for example, the tobacco industry on the health risks of smoking, or by food companies on the dangers of eating fast foods. Historical knowledge of IP is advancing, but the universalizing discourse driven by economic interest continues to muddy the waters.[4]

The dominant discourse generated by the "core copyright industries"[5] and their allies does not depend solely on research of doubtful reliability, however. It is supported by a wide range of other

tactics, some of them implemented by government agencies such as police forces, trade ministries and parliaments. There is constant pressure on legislatures for tougher laws to protect IP rights; IP rights are expanded to cover new areas, and for longer periods; IP violations are gradually criminalized; advertising in cinemas and articles in newspapers hammer home the theme that unauthorized use is a form of theft; and selected file-sharers and others are prosecuted "pour encourager les autres."[6] The constant reiteration of doubtful statistical assertions about the economic damage that results from less than rigorous enforcement is accompanied by claims that IP piracy is a source of funds for both terrorist organizations and organized crime.[7] Ominously, critics of IP are also falsely represented as holding extreme positions that they do not in fact defend, and are accused, strangely, of being "ideologically motivated."[8]

The teleological narrative of IP development serves a particular justificatory purpose. Built into it is the ahistorical argument that first, property is a human right; second, that intellectual property in its various manifestations is an entirely unproblematic component of property in general and therefore also a human right; and last, that it has ever been so. In other words, IP is *not* an historically contingent juridical-economic regulatory system, but is rather an expression of universal human values. By cherry-picking shaky examples from the remote past, evidence for the position is gradually introduced into the public consciousness, as we shall see.

Pushing the present back into the past

Lawyers and economists do not generally think historically about IP.[9] Justin Hughes has pointed out that

> instead of researching and citing primary materials, intellectual property scholarship frequently refers *only* to other legal scholarship for evidence of non-legal data . . . the practice of citing only legal scholarship for evidence of non-legal data means that a few casual but incomplete historical claims by a few respected legal scholars can get replicated through the system – and beyond.[10]

If this is true in the academy, the situation is even worse in popular discourse. For example, an online text claims that "legal protections

for intellectual property have a rich history that stretches back to ancient Greece *and before*."[11] Another asserts confidently:

> The history of intellectual property . . . begins in 500 BCE when Sybaris, a Greek state, made it possible for citizens to obtain a one year patent for "any new refinement in luxury." Patent, trademark and copyright laws have become more complicated in the ensuing centuries *but the intent remains the same*.[12]

A book on TRIPS in China begins by stating that "known references to intellectual property protection in the West can go back as early as ancient Greece and Rome."[13] These quotations are not taken from specialist historical sources, but their sweeping claims are close to becoming accepted popular wisdom.

There are good reasons why this is so. In an assessment of ideas about authorship in ancient Greece, another writer comments that "in almost every case [intellectual property] issues are addressed briefly *in the service of some other project*."[14] It is not hard to see what the other project is: a desire to show that IP is not historically contingent but universal across cultures, stretching back to the beginnings of civilization, and hence immune to critique.

The source for the claim about Sybaris is Phylarchus of Naucratis, a minor Greek historian of mixed reputation whose books are now lost, but who is quoted in a surviving work by Athenaeus, also from Naucratis.[15] The story entered the mainstream, as far as IP is concerned, in the 1940s, when it was repeated in an article on patents.[16] However, the tale of Sybaris was dismissed by a US patent historian as "well-known, but *apocryphal*" as long ago as 1967.[17] The same author noted that "Hellenic Greece *failed to protect inventors* and the era following Alexander's death saw little improvement."[18] It is probably safe to conclude, therefore, that the often-repeated idea that the ancient Greeks had an *operational* concept of a proprietary right is hard to sustain; it boils down to a single reference of doubtful provenance about practices in one Greek city in southern Italy.

The classical historian Mary Beard cautions us in general terms, with reference to the ancients, that while it may be "tempting to imagine [them] as some version of ourselves," at the same time much of their world is "completely alien territory."[19] It makes no sense

to project modern concepts of "property in ideas" backwards into the remote pre-capitalist and pre-technological European past. What seems familiar is all too often actually "completely alien."[20]

The history of IP – an amorphous and scarcely articulated ragbag of legal and economic relationships – fits uneasily into a single, nomothetic narrative in which the intent always "remains the same," and in which other cultures serve simply as illustrative points of reference. On the contrary, both the intent and the content of what appear at first glance to be analogues of modern IP always turn out to be different in significant ways. The kind of history that we need in order fully to understand contemporary *global* struggles over IP rights needs to be constructed out of a wide range of highly idiographic approaches in multiple academic disciplines before a balanced synthesis can become possible.

The excellent existing histories of copyright, patents, and trademarks, as these categories have developed in Western Europe, provide a firm foundation for an understanding of their *local* development, but run the risk of implicitly *generalizing* the history of IP from the experience of its local emergence in England and the United States. In the case of copyright the story focuses on highly specific developments subsequent to the English Statute of Anne (passed in 1710), and in the case of patents on origins within the Venetian legislation of 1474 and the subsequent English Statute of Monopolies of 1624. Account may occasionally be taken of differences in the Franco-European approach to issues such as copyright.[21] But a normative and Eurocentric (or even Anglocentric) historical narrative, valuable as it is, remains insufficient for a complete understanding of *current* circumstances.

Economists, broadly speaking, are uninterested in this perspective, and legal research is ill-equipped to help us. Comparative legal studies – in which Western norms and other traditions are uneasily brought together – have been severely criticized as suffering from "unresolved scholarly problems of a methodological and theoretical nature which too often continue to be ignored within the literature," as well as from "numerous distortions and falsifications that invalidate their scientific status"; they are deficient "in theory and method"; they do not address "important issues of cultural specificity, diversity and contingency"; and they fail to "challenge attitudes of dogmatic complacency and ethnocentricity."[22] They often appear, indeed, to

believe that "the legal culture of *the Others* is not really legal at all," and may presumably be safely ignored.[23]

The impulse towards a nomothetic narrative

In a speech given in the House of Commons in February 1841, Thomas Macaulay characterized IP issues as "a subject with which political animosities have nothing to do."[24] In the twenty-first century it is hard to imagine a more mistaken perspective. We live in a world where global capitalism is well on the way to imposing a standardized, highly regulated and expansionist IP system on most of the countries of the world. Scholars, activists, commercial interests, governments and international organizations are all engaged in constant and heated debate around the topic. David and Halbert have pointed out in a recent book that "the rise of IP over the last three centuries has culminated in the last three decades with an attempt at global IP harmonization alongside radical expansion in reach, duration and depth."[25] Similarly, in an interview published in 2001, the Belgian lawyer and writer Alain Berenboom has commented:

> *s'il y a un domaine où la mondialisation a fait des progrès, c'est bien dans le domaine du droit d'auteur* [if there is one area where globalization has made progress, it is in the field of copyright].[26]

One of the most important elements in this process is ideological in nature, and involves constructing an ahistorical account of intellectual property as an unambiguously beneficial phenomenon that is both an immensely powerful force for social good and simultaneously under massive threat from criminal and terrorist organizations.[27] In this process, it can be argued, memory is erased to protect commercial interest, privilege and wealth, at the expense of both historical truth and the collective interests of the majority.

Justin Hughes has criticized the idea that the actual phrase "intellectual property" is a modern or recent coinage that marks "a massive paradigm shift in how judges think about copyright (and patent)."[28] He points out that "courts and legislatures . . . regularly discussed copyrighted works as 'property' throughout the seventeenth, eighteenth, and early nineteenth centuries."[29] The expressions "industrial property" and "literary property" were also widely used in the

nineteenth century, and not just in English: the Spanish term "propiedad intellectual" dates back to the first half of the nineteenth century, and there are similar examples in French and Italian.[30] But these early examples of both literary and intellectual property are nearly always synonyms for copyright, and are not used as an umbrella term for every kind of IP. There was at that time some recognition of the special character of IP as a form of property that has now largely disappeared. It is therefore fair to say that the history of the term IP is "complex and its use inconsistent, both between jurisdictions and within single jurisdictions."[31] None of this, however, means that current conceptual difficulties disappear.

It is not hard to discern why the popular narrative of the history of intellectual property has developed along this particular path, and what interests are served by it. I have argued elsewhere that the economic weight of the "core copyright industries," especially in the United States, makes them too big to fail, and that they have consequently largely seized control of the process of legislating IP protection, while at the same time the US government actively promotes the adoption of increasingly wide-ranging laws around the world.[32] This phenomenon includes measures for the criminalization of any unauthorized use of protected material.

In the official view, IP is seen unproblematically as a real form of property (which is in turn itself proclaimed a basic human right), with its antecedents (as we have already noted) going back to the ancient Greeks. It is thus represented as both very old and universally recognized. Although few modern-day defenders of the system would now express it quite so bluntly, this is essentially the story of a hypothetical "ancient and eternal idea of intellectual property."[33] The key word here is "property," a concept that is

> so fundamental to the way lawyers think [that they] tend to treat [it] as if it is *a natural way to view the world*. But the language of property has a history. The earliest common law writs, all of which had something to do with rights in land, make no mention of property.[34]

In other words, the concept of property as a legal relationship between a person and a thing is historically contingent. It is neither universal nor timeless: indeed, some societies believe that pretty much

everything can be owned, while others – and not just the surviving hunter-gatherers of the Amazon or southern Africa – still do not.

In modern legal thought, a distinction is usually made between real and personal property (in common law systems) or between immovable and moveable property (in civil law systems); in both cases the first term refers basically to land and the second to personal items. But it is clear that the idea of absolute ownership of either form emerges in Europe only with the demise of feudal land tenure, and in some customary law systems even now it has not necessarily assumed its present Western form. The property relation is essentially a legal right over the thing owned, which may be exclusively possessed, made use of, and disposed of or alienated. Such rights are often, but not invariably legally enforceable.

In addition, the property right is often claimed to be an important *human* right. Although Article 17 of the Universal Declaration of Human Rights (1948) – a document that has no legal force – states that "Everyone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property," the status of the property right as a human right has remained controversial until the present day, and it is omitted from some international instruments. This has implications for claims about IP, which as a form of property, has also been asserted as a human right and hence a universal value.[35] We see this tendency, for instance, in the International Property Rights Index (IPRI), whose website carries an unambiguous statement by Hernando de Soto that "the lack of enforced property rights is an issue of human rights." The index, he goes on to explain,

> ranks countries on three main components: Legal and Political Environment (LP), Physical Property Rights (PPR), *and Intellectual Property Rights* (IPR) . . . the IPR component features three subcomponents: Intellectual Property Protection, Patent Protection, and Copyright Piracy Level.[36]

This is, of course, only an example, but the sleight of hand is easily spotted. First of all, *property itself* is both a human right *and* one of the key characteristics that "[determines] freedom and economic prosperity for a country." Then IP and various aspects of its enforcement are quietly thrown into the mix as just another

type of property, alongside the traditional categories of movable and immovable property. In this way IP becomes an ahistorical and universal value, a part of human nature, an element of *la condition humaine* which must be accepted by everybody as immutable reality. Who, after all, is against freedom or economic prosperity, except perhaps a few *mafiosi* and a handful of terrorists?

Where are property rights in other knowledge traditions?

Carla Hesse has pointed to the fact that the "great civilizations of the modern world – Chinese, Islamic, Jewish, and Christian" were characterized by "a striking absence of any notion of human ownership of ideas or their expressions."[37] But, as Hesse goes on to recognize, the mere absence of an idea of ownership does not necessarily mean that the relationship between author, text or invention, and distribution was not the subject of sophisticated reflection.[38]

Although we have already dismissed the idea of an *operational* concept of a proprietary right among the ancient Greeks, it should be noted that some scholars believe that "*some of the components* of the notion of 'intellectual property' are evident in antiquity."[39] Until the invention of printing, texts were reproduced by scribes who copied them out by hand – the books owned by wealthy Romans, for example, "would have been copied by their own slaves in their own homes."[40] Given that the process of copying itself was hardly an issue, the identifiable proto-components consist primarily of specific concerns around what are now known as moral rights, particularly the issue of textual integrity and the identification or assertion of authorship.

Of these moral rights, as distinguished from the proprietary right of economic exploitation, it does appear that a concern with the integrity of canonical texts existed in the ancient world, most especially in highly juridico-religious cultures – including "both Western (Zoroastrianism, Judaism, Christianity, and Islam) and Eastern (the Pāli canon of Theravāda Buddhism)" examples.[41] Interestingly, some modern scholarship loses sight of this concern; in a study published in 2003, Levinson criticized what he called "literary theory's infatuation with ancient Jewish *midrash*" because of the tendency to romanticize "rabbinic hermeneutics as championing radical textual indeterminancy."[42] On the contrary, Levinson argues that the

> essence of a canon is that it be stable, self-sufficient, and delimited . . . Moses twice admonished his addressees in Deuteronomy: "You must not add anything to what I command you nor take anything away from it" . . . The formula . . . originally sought to prevent royal inscriptions, including law collections and treaties . . . from being altered.[43]

The later Book of Revelation repeats the threat from Deuteronomy in similar terms:

> For I testify unto every man that heareth the words of the prophecy of this book, if any man shall add unto these things, God shall add unto him the plagues that are written in this book;
>
> And if any man shall take away from the words of the book of this prophecy, God shall take away his part out of the book of life, and out of the holy city, and from the things which are written in this book.[44]

Behind these warnings is a recognition of the special canonical status of religious and legal texts (often the same thing) and of the necessity for them to be preserved in a fixed form. The *Quran*, which is considered in Islam to be primarily a recitation rather than a text, was fixed in a similar way. Since the seventh century CE, it has been written or printed with both diacritical marks on consonants as well as vocalization, with the objective of establishing a definitive line of transmission, a fixed text and a fixed pronunciation.

Similarly, the authentic transmission of Islamic *ḥadīth*, the traditions consisting of sayings ascribed to the prophet Muhammad or descriptions of his deeds, was and remains a major focus of attention for Islamic scholars, and can be viewed as an issue of textual integrity, as well as of the attribution of authorship as a means of authentication. The level of confidence that could be attributed to specific transmitters of *ḥadīth*, especially given the known existence of falsifiers, was an important aspect of this preoccupation.[45] Indeed, in these ancient examples, the author–text relationship may be turned on its head, with the attribution of authorship "a property ascribed to a text rather than a fact about its origins" or anything like a statement of intellectual ownership.[46] From this perspective, the attribution of

authorship does not function as a proprietary claim, as Beecroft has argued in a comparative study of both China and ancient Greece:

> If . . . we ignore the possible historicity of biographical anecdotes, and concentrate instead precisely on what those anecdotes say *about the ideologies of their sources*, scenes of authorship become rich sources of information on all sorts of questions concerning the production, distribution, and value of literature. The scene of authorship serves as a link between text and context, not merely claiming to tell us who "wrote" a poem, but also frequently *making a variety of claims about how and why the poem was composed, and how and where and why it should circulate.*[47]

Of all the intellectual traditions outside the Western European one, the most difficult for proponents of "the ancient and eternal idea of intellectual property" to explain is pre-modern China. We must remember that the core argument of defenders of IP expansionism is that without economic incentive, creativity and invention will dry up. "Market capitalism," in other words, is an "unparalleled innovation engine."[48] The US government believes this without reservation:

> the most important, but least understood, of the forces driving innovation [is] the complex system of institutions, laws, and practices referred to as intellectual property (IP) . . . IP laws evolved over centuries as a tool to derive public benefits from the innovation cycle. Because it is so tightly linked to innovation, intellectual property holds a key to our future.[49]

The late Jack Valenti of the Motion Picture Association of America, an aggressively pro-IP industry group, remarked that "copyright protects not just the financial interest of people who create artistic or intellectual property, *but the very existence of creative work*."[50] This argument in its various forms persists even though it has been disproven on multiple occasions. As long ago as 1966, Hurt and Schuchman demonstrated that there are a wide range of intrinsic rewards, including "the propagation of partisan ideas; notions of altruism . . .; desire for recognition; and enhancement of one's reputation."[51] Recent research in behavioral economics has

reinforced the view that monetary compensation can actually be a poor incentive.[52]

Between roughly the Tang Dynasty (618–906 CE) and the sixteenth century, Chinese science and technology was probably the most innovative in the world. This has been exhaustively documented in Joseph Needham's monumental *Science and Civilization in China* (published in 27 books organized in seven volumes), and there is no point in attempting to list all the inventions again here. But there is no trace during this period of any systemic idea of IP protection as an appropriate method of rewarding creativity. Indeed, one of the most exhaustive treatments of the phenomenon, by William P. Alford, warns that, despite the fact that there are some scattered references to

> restrictions on the unauthorized reproduction of certain books, symbols, and products . . . this should not be seen as constituting what we . . . now typically understand intellectual property law to be, for their goal was not the protection of property or other private interests.[53]

Other authors follow Alford:

> there is little if any Chinese tradition of intellectual property rights (IPRs) protection. Throughout China's millennia-long imperial history, except for some fragmentary, individual rules, or official pronouncements protecting author or editor, there has been no centralized uniform system protecting IPRs.[54]

How, then, to explain centuries of innovation in the absence of monopolistic rights of exploitation over an invention or a text? This problem has been posed most famously, if indirectly, as "Needham's Grand Question" or the "Needham Question" which asks why China was eventually overtaken by Western technologies, despite its head start over several centuries.[55] The two aspects of the same question are essentially, why did the emergence of modern scientific method *not* happen in China; and conversely, why *did* it happen in Europe? What were the determinant variables?

Some responses to these hypotheticals have included the suggestion that the absence of strong property rights in general, and IP

rights in particular, was one such variable. It is certainly clear, at least, that pre-modern Chinese legal culture varied significantly from modern Western norms. A person could be punished for an offence that did not break an existing law, for example, and punishments and outcomes varied according to an offender's social standing.[56] But to privilege the absence of IP protection, with the concomitant absence of incentives for innovators seems improbable, given that Chinese innovation was sustained over such a long period, and especially since it is clear that such early Western innovators as Galileo, Boyle or Newton were not driven primarily by a desire to profit from their discoveries.[57]

Contemporary China's subsequent adoption of Western norms of IP protection has been extremely rapid, driven largely by China's need to satisfy trading standards in order to access world markets. "Harmonization" has meant for China – and many other countries – a "growing stress on IP protection, the so-called global 'minimum standards', as against the 'national treatment' principle."[58] In 1980 the China Patent Administration was established, and in the same year the country joined the World Intellectual Property Organization (WIPO). Patent legislation was passed in 1984, and China successively ratified the Patent Cooperation Treaty in 1994, and joined the World Trade Organization (WTO), agreeing to TRIPS enforcement, in 2002.[59] This process required changes that "were sweeping in nature and required the Chinese government to make changes to hundreds of laws, regulations and other measures."[60] In essence, new laws were being transplanted into the Chinese system; legislation developed in the context of one particular society and culture were inserted into a different society and culture in the hope – to stretch the metaphor to its limits – that the recipient body would not reject them. This artificial practice had started with "the introduction of intellectual property laws during the late Qing dynasty [i.e. in the late nineteenth century] and the Republican era" but accelerated sharply with "the recent laws and amendments adopted by the People's Republic."[61]

We have already noted the many difficulties with legal transplants, not the least of which is an unreflective assumption of universalism. The risks involved in basing the process on "false generalisations and universalisations of what are, in fact, little more than localised, western-liberal perspectives" is high.[62] What has been identified as an "objectivist stance" based on the illusion that a "a culturally

and cognitively neutral frame of mind" is achievable, leads all too often to the imposition of a "non-transparent and taken-for-granted Western ideology of [a] value-free scientific approach."[63] It appears that the triumphalist discourse of global IP protection is not especially concerned with such subtleties and complexities, and it is consequently not especially surprising to read in a 2015 US government report that difficulties have arisen that have included

> serious problems with intellectual property rights enforcement . . . including in the area of trade secrets; the Chinese government's wide-ranging use of industrial policies favoring state-owned enterprises and domestic national champions in many sectors; troubling agricultural policies that block US market access; numerous continuing restrictions on services market access; and inadequate transparency.[64]

What is all too easily forgotten is that "*the others also have law as history and as practice*, and it has never in recorded history been possible to avoid contamination."[65]

Socialist and Marxist practice is another case in point. Space does not permit a full exploration of experience in the Soviet Union, post-1948 China or in Cuba but suffice it to say such experience does not neatly conform to norms established in the US or Western Europe. Soviet reluctance to join international copyright agreements was partly inherited from nineteenth-century Russian attitudes, as well representing an attempt to reconcile a recognition of authors' rights with the principles of Marxism-Leninism. The first Russian copyright law was adopted in 1828, but bilateral conventions, first with France and subsequently with Belgium, were both abandoned in the 1880s, and Tsarist Russia did not take part in the Berne conference of 1886.[66] In the early Soviet period works were "nationalized" but some recognition of individual author's rights gradually developed within the context of a collectivist cultural policy in which the state and party played leading roles.[67]

It is clear that Soviet IP practice was initially grounded in an attempt to theorize cultural production within a socialist problematic. Nevertheless, one of the best-known and most widely condemned features of later Soviet copyright practice was the uncompensated translation of foreign works into Russian and other Soviet languages.

One estimate puts the figures as high as one billion copies of foreign books produced between 1917 and 1950, including "seventy-seven million copies of 2700 books by some 200 United States authors."[68]

Historical contingency, or universalism plus individualism

The constituent elements of intellectual property – the proprietary component of copyright, the patent system, trademarks – arose in the specific conditions of early Western European capitalism. All serious historians of the subject agree on this. The invention of printing, the emergence of individualism and the rise of the concept of the author, new theories of knowledge and the scientific revolution, the growth of a leisured middle class, all contributed to the development of what eventually coalesced into what we now designate "IP," with its complex sets of justiciable rights.

It is this *historical* understanding of the *historical* contingency of IP that makes it impossible to accept universalizing claims that IP rights have existed around the world and throughout history, or that they are part of a generalized and accepted "property right."[69] Indeed, even to frame IP as "absent" in other traditions and societies is to implicitly *normalize* the modern Western concept and at the same time to *delegitimize* other ways of understanding the relationship between a creator, located in society, and her creation.[70]

The dominant discourse is, unsurprisingly, one that speaks of encouraging creativity, but creativity conceived of entirely as the product of individual effort – the author writes a text alone, the inventor is struck by a brilliant idea.[71] But individual authorship (and by implication other forms of creative or innovative endeavor) is, as Woodmansee had pointed out, an historically contingent idea that developed in the specific conditions of economic and technological change:

> in its modern sense . . . [authorship] is the *product of the rise in the eighteenth century of a new group of individuals*: writers who sought to earn their livelihood from the sale of their writings.[72]

But Hesse, writing a few years later, suggested that, taking the French revolutionary experience into account,

> literary historians and critics may need *a more complex view of the relationship between the law and cultural change*, one that accounts

> for the political as well as the socio-economic forces at work in the reshaping of the legal world . . . [But] politics, and a concern for public life, mediated the successive negotiations between the private interests of authors and publishers and the concerns of legal authorities. As a consequence, the revolutionary legislators produced a legal conception of authorial identity that not only consecrated *but also limited the author's power of self-determination for the sake of the public good.*[73]

Hesse's writings have played an important role in expanding our understanding of possible alternatives to an Anglocentric narrative within Western Europe, by taking account of the intellectual ferment of the French Revolution from 1789 to 1799, and showing that IP as a mechanism of control may have had multiple origins, not limited only to the commercial needs of the growing bourgeoisie but also taking into account the oligarchy's desire to control and benefit from the flow of information. Hesse draws the English-speaking reader's attention to the debates for and against control involving such figures as Denis Diderot (1713–1784) and the Marquis of Condercet (1743–1794) which raged before, during and after the Revolution.[74] The opposition to propertization was both fierce and coherent:

> Between 1789 and 1793, the mandate to liberate the Enlightenment from censorship and to re-found cultural life on enlightened principles translated itself into a massive deregulation of the publishing world. By 1793 anyone could own a printing press or engage in publishing and bookselling. What is more, with the abolition of privileges and prepublication censorship, it appeared that anyone could print or publish anything. Thus the first few years of the Revolution saw the corporatist literary system of the Old Regime entirely dismantled and replaced with a free market in the world of ideas.[75]

The battle – not only in France – revolved to a significant extent around what have been termed the "modern myths of creativity."[76] The "archetypal" myth of creativity has been described in the following terms: a "clever individual . . . driven by ambition and the promise of great riches, hits upon a brilliant idea in a sudden flash of insight and the world changes."[77] But Marx demolished the idea

of the inspired individual genius in a couple of sentences as long ago as 1844:

> when I am active scientifically, etc., – an activity which I can seldom perform in direct community with others – then my activity is social, because I perform it as a man [*sic*]. Not only is the material of my activity given to me as a social product (as is even the language in which the thinker is active): my own existence is social activity, and therefore that which I make of myself, I make of myself for society and with the consciousness of myself as a social being.[78]

Defenders of IP expansionism have never succeeded in crushing this way of thinking completely, and academic endeavor in particular continues to be seen by many as primarily a collective, social activity in which ideas, arguments, terminologies and phrases bounce around and stick together in unexpected ways to produce new insights:

> against the dictats of the intellectual property border-guards, ideas, critical ideas in particular, can only develop in the fertile hothouse of debate, argumentation and confrontation . . . Nothing I have ever written belongs to me exclusively. Every text is always a tissue of texts and discussions, sounds and thoughts, smells and colours many of which started with others.[79]

Conclusion: towards an idiographic approach to IP history

The history of IP – or, better, the *histories* of author's rights, copyright, patents, trademarks and all the rest – is and are gradually, and in a fragmentary way, being written within sub-disciplinary silos in terms of multiple constituent elements: changing and contested theories of knowledge at various historical conjunctures; the emergence of the author as creator; a growing understanding of the collective nature of inspiration and invention; the impact of technologies of production and reproduction; and the significance of systems of distribution. Such research is essential as we move towards a political economy capable of explaining how aggressive and monopolistic IP legislation and regulation is used, all over the world, to avoid competition, limit innovation and reap "profits in excess of what a competitive market would afford."[80]

But it may be a necessary condition of historical understanding to take another, further step, and to reconfigure the concept of "intellectual property" altogether, by ceasing to grant it, as a category, acceptance as a reflex of a real phenomenon that is a legitimate object of historical inquiry. It is widely accepted that modern IP lacks intellectual coherence as an *umbrella concept*, and therefore also as a social phenomenon. An extremely wide variety of practices and socio-economic, legal and literary relations are now classified as IP. Its reach is constantly expanding in terms of law. But it is far from clear what these varieties of relationships have in common, beyond the fact that they are juridically defined rights of economic monopoly that are extremely ill-equipped to deal with the realities of rapid technological change, and are consequently widely ignored by large numbers of people in their daily lives.

Hughes has shown that the phrase "intellectual property" and its apparent cognates can be found not only in English but in (at least) several Romance languages as well, in the early nineteenth century. As this chapter has argued, the global history of the multiple elements of IP are to be found in an extraordinarily wide range of contradictory and contentious sources and disciplines, and we have only begun to scratch the surface. In 1858, Karl Marx noted in the *Grundrisse* that there are occasions when "the only possible answer [to a question] is a critique of the question and the only solution is to negate the question."[81] This, it seems to me, is precisely one of those occasions.

Notes

1 Pamela O. Long, "Invention, Authorship, 'Intellectual Property', and the Invention of Patents: Notes toward a Conceptual History," *Technology and Culture* 32, no. 4 (October 1991): 848. Emphasis added.

2 The classic studies on copyright include Lyman Ray Patterson's *Copyright in Historical Perspective* (Vanderbilt University Press, 1968); Mark Rose's *Authors and Owners: The Invention of Copyright* (Harvard University Press, 1993); and Adrian Johns' *The Nature of the Book: Print and Knowledge in the Making* (University of Chicago Press, 1998). Also important are the writings of Martha Westmansee, especially on Germany; and on France, Carla Hesse's *Publishing and Cultural Politics in Revolutionary Paris, 1789–1810* (University of California Press, 1991) as well as the anthology edited by Jan Baetens, *Le combat du droit d'auteur: anthologie historique* (Impressions Nouvelles, 2001), which includes texts from Alain-René Lesage (1668–1747) to Victor Hugo (1802–1885), including an extract from *Les majorats littéraires*

(1862) of Joseph Proudhon (1809–1865). Hesse's article "The Rise of Intellectual Property, 700 B.C.–A.D. 2000: An Idea in the Balance," *Daedalus* 131, no. 2 (Spring 2002): 26–45, is notable for beginning by discussing several non-Western European knowledge traditions.

3 The key texts are Hobbes' *Leviathan* (1651; arguing that property rights depend on the existence of the state) and Locke's *Second Treatise of Government* (1689; arguing for a labor-based theory).

4 US entertainment industry associations such as the RIAA and the MPAA are particularly vulnerable to accusations of less-than-rigorously-researched assertions about the impact of IP piracy, for example. See Colin Darch, "Ideology, Illusion and the Global Copyright Regime," in *The IALL International Handbook of Legal Information Management*, ed. Richard A. Danner and Jules Winterton (Ashgate, 2011), 102–103.

5 "defined as [industries] wholly engaged in the creation, production, performance, exhibition, communication or distribution and sales of copyright protected subject matter. These include literature, music, theatre, film, the media, photography, software, visual arts, advertising services and collective management societies" ("Copyright-based Industries: Assessing Their Weight," *WIPO Magazine* no. 3 [May–June 2005]: 22).

6 "In order to encourage [i.e. to scare] the others" – an ironical comment by Voltaire in his novel *Candide* (1759) in reference to the execution of the British Admiral Byng in 1757 after losing a battle against the French.

7 E.g. Gregory F. Treverton and others, *Film Piracy, Organized Crime, and Terrorism* (Rand Corporation, 2009).

8 For example, activists "promote the idea that IP rights should not be recognized" (Global Intellectual Property Center, *Creating Jobs, Saving Lives, Improving the World* (US Chamber of Commerce, 2008). This report is no longer available on the GPC website but has been cited in Darch, "Ideology, Illusion and the Global Copyright Regime," 97; and Deborah J. Halbert, *The State of Copyright: The Complex Relationship of Cultural Creation in a Globalised World* (Routledge, 2014), 68–69.

9 Mainstream economists, that is, as opposed to practitioners of political economy, who have held to an essentially historical perspective since the time of Marx and Engels.

10 J. Hughes, "Copyright and Incomplete Historiographies: Of Piracy, Propertization, and Thomas Jefferson," *Southern California Law Review* 79 (2005–2006): 996.

11 Adam Moore and Ken Himma, "Intellectual Property," in *The Stanford Encyclopedia of Philosophy* (Winter 2014), ed. Edward N. Zalta, http://tinyurl.com/jl4vn2p, accessed May 2, 2016 [emphasis added].

12 Law Office of Jeff Williams, "The Evolution of Intellectual Property," November 11, 2015, http://tinyurl.com/zaqzneg, accessed May 2, 2016 [emphasis added].

13 Guan Wenwei, *Intellectual Property Theory and Practice: A Critical Examination of China's TRIPS Compliance and Beyond* (Springer, 2014), 2.

14 Timothy Donald Behme, "Norms of Authorship in Ancient Greece: Case Studies of Herodotus, Isocrates and Plato" (Ph.D. dissertation, University of Minnesota, 2007), 5.

15 See Athenaeus, *The Deipnosophists*, http://tinyurl.com/h43de55, accessed May 7, 2016 for an English translation of the original passage. Naukratis was a Greek settlement in Egypt.

16 M. Frumkin, "The Origin of Patents," *Journal of the Patent Office Society* 27, no. 3 (March 1945): 143, http://tinyurl.com/3vftfzo, accessed May 7, 2016.

17 Bruce W. Bugbee, *Genesis of American Patent and Copyright Law* (Public Affairs Press, 1967), 166.

18 Ibid., 12, emphasis added.

19 Mary Beard, "Why Ancient Rome Matters to the Modern World," *The Guardian*, October 2, 2015, http://tinyurl.com/nknogkb, accessed May 2, 2016.

20 To cite another example, Gary Richardson's argument that early markings on exported products such as swords and pottery were effectively pre-industrial branding or trademark practices (*Brand Names before the Industrial Revolution* [National Bureau of Economic Research, 2008]) was dismissed as "particularly contentious" by Ilja van Damme, not least because of the producers' lack of control over delivery to market ("From a Knowledgeable Salesman towards a Recognizable Product? Questioning Branding Strategies before Industrialization (Antwerp, Seventeenth to Nineteenth Centuries)," in *Concepts of Value in European Material Culture, 1500–1900*, ed. Bert de Munck and Dries Lyna [Routledge, 2015], 83).

21 Alain Berenboom has argued that there is an "approche différent de l'objectif du droit d'auteur et du bénèficiaire de la protection" between Franco-European and Anglo-American copyright, to the extent that the European system operates "au seul profit de l'auteur." ("Situation actuelle du droit d'auteur: entretien avec Alain Berenboom," in Baetens, *Le combat du droit d'auteur*, 171).

22 Bogumila Puchalska-Tych and Michael Salter, "Comparing Legal Cultures of Eastern Europe: The Need for Dialectical Analysis," *Legal Studies* 16, no. 2 (July 1996): 157–158.

23 Bill Bowring, *The Degradation of the International Legal Order: The Rehabilitation of Law and the Possibility of Politics* (Routledge-Cavendish, 2008), 187, emphasis added.

24 Thomas Macaulay, "A Speech Delivered in the House of Commons on the 5th of February 1841," in *Intellectual Property Rights: Critical Concepts in Law*, ed. David Vaver (Routledge, 2006), 9.

25 Matthew David and Debora Halbert, *Owning the World of Ideas: Intellectual Property and Global Network Capitalism* (Sage, 2015), 42.

26 Berenboom, "Situation actuelle du droit d'auteur," 171.

27 The Global Intellectual Property Center (GIPC) states baldly that "illicit trade is big business, providing a major source of revenue to transnational criminal organizations, including terrorist networks," which it claims was equivalent to US$461 billion in 2013 (Patrick Kilbride, "Global Counterfeiters Are Stealing Your Well-being," GIPC, April 20, 2016, http://tinyurl.com/jh38hvu, accessed May 8, 2016).

28 Hughes, "Copyright and Incomplete Historiographies," 1003.

29 Ibid., 1006.

30 Hughes, "A Short History of 'Intellectual Property' in Relation to Copyright," *Cardozo Law Review* 33, no. 4 (April 2012): 1293–1340.

31 Ibid., 1297. In both articles Hughes largely ignores pro-IP industry propaganda.

32 Darch, "Ideology, Illusion and the Global Copyright Regime," 107–109.

33 F.D. Phager, "The early growth and influence of intellectual property," *Journal of the Patent Office Society* 34, no. 2 (February 1952): 106.

34 Thomas J. McSweeney, "Property before Property: Romanizing the English Law of Land," *Buffalo Law*

Review 60 (2012): 1139–1140, emphasis added.

35 An attempt to obtain recognition of IP in the South African Bill of Rights of 1996 was rejected by the country's Constitutional Court in the mid-1990s. See Colin Darch, "Politics, Law and Discourse: Patents and Innovation in Post-Apartheid South Africa," in *The Sage Handbook of Intellectual Property*, ed. Matthew David and Debora Halbert (Sage, 2014), 634–636.

36 Hernando de Soto, "Introduction," *International Property Rights Index*, 9th ed. (2015), http://tinyurl.com/jfxtb3g, accessed May 7, 2016.

37 Hesse, "The Rise of Intellectual Property," 27.

38 A new study (that I have not seen) deals with a specifically Jewish tradition of copyright jurisprudence since the invention of printing. Written by Neil Weinstock Netanel, the book appeared while this chapter was being prepared, and apparently claims a Jewish tradition going back to a decision by a Rabbinic court in Rome in 1518. See *From Maimonides to Microsoft: The Jewish Law of Copyright since the Birth of Print* (Oxford University Press, 2016).

39 Long, "Invention, Authorship, 'Intellectual Property', and the Invention of Patents," 848, emphasis added. Long herself believes that a "fully developed concept first emerges in the medieval period around the 12th or 13th centuries" but still recognizes its historical contingency.

40 Raymond J. Starr, "The Used-Book Trade in the Roman World," *Phoenix* 44, no. 2 (1990): 156.

41 Bernard M. Levinson, "You Must Not Add Anything to What I Command You: Paradoxes of Canon and Authorship in Ancient Israel," *Numen* 50 (2003): 5–6.

42 Ibid., 2. A *midrash* (pl. *midrashim*) is an interpretative text explaining some aspect of the Hebrew Bible.

43 Ibid., 6.

44 King James Bible, Revelation 22: 18–19.

45 G.H.A. Juynboll, *Muslim Tradition: Studies in Chronology, Provenance and Authorship of Early ḥadīth* (Cambridge University Press, 1983).

46 Alexander Beecroft, *Authorship and Cultural Identity in Early Greece and China: Patterns of Literary Circulation* (Cambridge University Press, 2010), 17.

47 Ibid., 19.

48 Steven Johnson, *Where Do Good Ideas Come From? The Natural History of Innovation* (Riverhead Books, 2010), 247.

49 Michael A. Gollin, "Intellectual Property Rights," *e-Journal USA* (US Department of State) 14, no. 11 (November 2009): 32.

50 Jack Valenti, "There's No Free Hollywood," *New York Times*, June 21, 2000, http://tinyurl.com/zsgr2fj, accessed May 9, 2016.

51 Robert Hurt and Robert M. Schuchman, "The Economic Rationale of Copyright," *American Economic Review* 56, no. 1–2 (March 1966): 425–426.

52 For studies of the complex and non-linear interplay of intrinsic and extrinsic motivations in creativity, see, for example, Roland Bénabou and Jean Tirole, "Intrinsic and Extrinsic Motivation," *Review of Economic Studies* 70 (2003): 489–520; or Emir Kamenica, "Behavioral Economics and Psychology of Incentives," *Annual Review of Economics* (2012): 13.1–13.26.

53 Alford, *To Steal a Book Is an Elegant Offense: Intellectual Property Law in Chinese Civilization* (Stanford University Press, 1995), 3.

54 Nie Jian-Quiang, *The Enforcement of Intellectual Property Rights in China* (Cameron May, 2006), 177.

55 In an extensive literature, see, for example, Nathan Sivin, "Why the Scientific Revolution Did Not Take Place in China: Or Didn't It?" *Chinese Science* 5

(1982): 45–66, and more recently Patrick K. O'Brien, "The Needham Question Updated: A Historiographical Survey and Elaboration," *History of Technology* 29 (2009): 7–28.

56 Feng Yu-Jun, "Legal Culture in China: A Comparison to Western Law," *New Zealand Association for Comparative Law Yearbook* 15 (2009): 1–9. Interestingly, data appears to show that in IP cases even today "foreigners do less well on appeals and receive significantly less damage awards" (US Chamber of Commerce, *US–China IP Cooperation Dialogue 2014–2015* [USCC, n.d.), 9 of the English text.

57 Jin Deng-Jian, *The Great Knowledge Transcendence: The Rise of Western Science and Technology Reframed* (Palgrave-Macmillan, 2016), 31.

58 Sandro Sideri, *The Harmonisation of the Protection of Intellectual Property: Impact on Third World Countries*, UNU/INTECH Working Paper no. 14 (United Nations University, 1994), 26.

59 Chen Zhang-Liang and Gao Wang-Sheng, "IP Rights in China: Spurring Invention and Driving Innovation in Health and Agriculture," in *Intellectual Property Management in Health and Agricultural Innovation: A Handbook of Best Practices*, ed. Anatole Krattiger and Richard T. Mahoney (MIHR, 2007), vol. 2, 1585.

60 US Trade Representative, *2015 Report to Congress on China's WTO Compliance* (USTR, n.d.), 3.

61 Peter K. Yu, "The Transplant and Transformation of Intellectual Property Laws in China," in *Governance of Intellectual Property Rights in China and Europe*, ed. Nari Lee, Niklas Braun and Mingde Li (Edward Elgar, 2016), 20.

62 Puchalska-Tych and Salter, "Comparing Legal Cultures," 158.

63 Ibid., 160.

64 US Trade Representative, *2015 Report to Congress*, 4.

65 Bowring, *The Degradation of the International Legal Order*, 187, emphasis added.

66 Allan P. Cramer, "International Copyright and the Soviet Union," *Duke Law Journal* 14 (1965): 533–534.

67 For a detailed analysis, see Michiel Elst, *Copyright, Freedom of Speech and Cultural Policy in the Russian Federation* (Martinus Nijhoff, 2005), 71–90.

68 Cramer, "International Copyright," 532.

69 Thomas Jefferson, for one, was clear that "ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition . . . Inventions . . . cannot, in nature, be a subject of property." (Letter to Isaac McPherson, August 13, 1813, in *The Writings of Thomas Jefferson*, ed. Andrew A. Lipscomb and Albert Ellery Bergh [Thomas Jefferson Memorial Association, 1905], vol. 13, 333–334, http://tinyurl.com/22udzn, accessed July 6, 2016).

70 See Akalemwa Ngenda, "The Nature of the International Intellectual Property System: Universal Norms and Values or Western Chauvinism?" *Information and Communications Technology Law* 14, no. 1 (2005): 59–79 for further development of this argument in a developmental context.

71 This is precisely the language and the perspective of the Statute of Anne, the language of the copyright clause (Article 1, Section 8, Clause 8) of the US Constitution.

72 Martha Woodmansee, "The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the Author," *Eighteenth-Century Studies* 17, no. 4 (Summer 1984): 426, emphasis added.

73 Carla Hesse, "Enlightenment Epistemology and the Laws of Authorship

in Revolutionary France, 1777–1793," in *Law and the Order of Culture*, ed. Robert Post (University of California Press, 1991), 131, emphasis added.

74 For extracts translated into English, see Arthur Goldhammer, "On Diderot and Condorcet," *Daedalus* 131, no. 2 (Spring 2002): 46–59; Baetens, *Le combat du droit d'auteur*, includes some extracts from Diderot (pp. 25–37) but ignores Condorcet.

75 Hesse, *Publishing and Cultural Politics in Revolutionary Paris*, 3.

76 Trevor Ross, "Copyright and the Invention of Tradition," *Eighteenth-Century Studies* 26, no. 1 (Autumn 1992): 2.

77 Johnson, *Where Do Good Ideas Come From?*, 216.

78 Karl Marx, *Economic and Philosophic Manuscripts of 1844*, 4th rev. ed. (Progress Publishers, 1974), 92.

79 Costas Douzinos, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (Routledge-Cavendish, 2007), ix.

80 David and Halbert, *Owning the World of Ideas*, 1.

81 Karl Marx, *Grundrisse: Foundations of the Critique of Political Economy (Rough Draft)* (Penguin and New Left Review, 1973), 127.