

GLOBALIZING INTELLECTUAL PROPERTY: LINKAGE AND THE CHALLENGE OF A JUSTICE-CONSTITUENCY

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1. INTRODUCTION

There are historical moments in which invisible forces take a perfectly good idea and turn it into an ideology or even an idol. Such seems to be the case with intellectual property. Twenty years ago, intellectual property hardly existed *as such*. Its individual components—copyrights, patents, trademarks, etc.—had been around for a long time, of course, but they had not coalesced into anything comparable to the unified body of law we have today. Nor were they central to legal practice or significant to law school curriculum. Indeed, as recently as the beginning of the 1980s, debate was still raging over the appropriate name to give to this emerging field (“industrial property” or “intellectual property”) and over its precise boundaries. Almost overnight, however, intellectual property has changed from a complex and generally esoteric body of law—the preserve of specialists in technology and entertainment law—to the stuff of folklore and conversation at cocktail parties, and for some, almost an object of worship. Intellectual property now frequently appears in the company of such lofty notions as freedom and democracy, and has even been hailed as a more potent weapon than bombs and missiles for use against dictators!**

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**Rebecca Mead expressed this point stating:

As with all such things, several historical factors are responsible for this transformation, but the most significant is, I think, evolution in the economic value behind property interests generally. The common law concept of property inaugurated by William the Conqueror, following his spectacular victory at the Battle of Hastings in 1066, saw the subject matter of property almost exclusively in terms of land—*real* property—the foundation of both political power and family wealth. With the Industrial Revolution, the focus of property in the West shifted somewhat to encompass not only land but manufactured goods as well. The latter part of the twentieth century has seen another shift of emphasis from manufactured goods to ideas, information, and images—the subject matter of intellectual property—and it is this shift that is largely responsible for the current elevation of intellectual property to its present lofty status.

The impetus for globalizing intellectual property laws, however, comes from the bewilderingly global nature of intellectual property's subject matter, nicely illustrated by the country music singer Johnny Cash's tale of woe before a Congressional subcommittee last fall. The source of Cash's anguish was that his hit song, "Ring of Fire," had appeared on a website in Slovenia: "Maybe I should be flattered that someone in Slovenia likes my song, but when he or she makes it available to millions of people,

Saddam Hussein may have brought us back from the brink of war by deciding to allow United Nations weapons inspectors access to his contested presidential sites, but there are other violations that the Iraqi premier has yet to rectify. That screening on Iraqi television of a bootleg copy of the movie "Wag the Dog," for a start: a few weeks ago, the Iraqi public was treated to a grainy version of Barry Levinson's film, presumably to illustrate that it is in the nature of an American President caught in a sex scandal to decide that a war overseas is exactly the kind of distraction his country needs. Which raises the following question: If we are not going to war with Iraq, could Saddam Hussein nonetheless be nabbed on copyright law, just as Al Capone was caught on tax evasion?

"This whole piracy situation is serious, because it represents a violation of property," Levinson said by telephone from Hollywood, though he added that he would probably not be pressuring New Line Cinema to take action against Saddam

Rebecca Mead, *A New Plan to Take Out Saddam Hussein, Courtesy of Hollywood*, NEW YORKER, Mar. 16, 1998, at 26-27.

this hardly seems fair.”¹ Cash told attentive members of the House Subcommittee on Courts and Intellectual Property, “[In real life], [o]ur laws respect what we create with our heads as much as what we create with our hands,” and “[that] ought to be true [of] cyberspace too.”² Globalization of intellectual property’s subject matter is, of course, a product of the electronic revolution which makes it possible for one to convert every kind of information—words, pictures, sounds—into the ones and zeros of digital code,³ compress it, and transmit it to the ends of the earth with only a few clicks of the mouse.

Information which has thus burst out of traditional territorial confines can only be protected by rules which are similarly unconstrained, whose reach does not stop at the border. It requires, some suggest, a system of *global* intellectual property as distinct from the traditional *international* intellectual property. International intellectual property is a superstructure of norms that govern the relationship between autonomous, self-contained, and essentially territorial national intellectual property systems. A global intellectual property system, by contrast, is one which brings about *deep integration*⁴ of the various national systems into a single, unified, global network. In this Article, I argue that a global intellectual property of this kind is desirable, but that it involves a socio-ethical examination of near-Herculean proportions into what would make such intellectual property laws work. I shall suggest in Part 2 of this paper, however, that idolatry has set in early and sabotaged that process: The result is not deep integration at all, but a hurriedly constructed system whose only foundation is a thin bargain linkage between trade and intellectual property. In Parts 3 and 4, I shall probe the competing theoretical challenges that I have called “glib universalism” and “postmodern culturalism” which a system of deep integration needs to confront. In Part 5, I suggest that the answer to the challenge of

¹ Rebecca Vesely, *Johnny Cash Talks the Line on Copyright Law*, WIRED NEWS (visited May 5, 1998) <<http://www.wired.com/news/politics/story/6971.html>>.

² *Id.*

³ See generally ESTHER DYSON, *RELEASE 2.0*, 133-34 (1997); PAUL GOLDSTEIN, *COPYRIGHT’S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX* 196, 196-236 (3d ed. 1994) (stating that “[o]ne of the transforming scientific revolutions of the twentieth century has been to capture words, sounds, and images in digital form”).

⁴ See *infra* notes 5-13 and accompanying text.

global intellectual property is neither disembodied universal norms applied in the same way everywhere and without regard for context or local circumstance, nor the construction of a global culture, but lies in the more modest concept of a “justice constituency.”

2. GLOBALIZING INTELLECTUAL PROPERTY: IS ANYTHING NEW?

As I use the term in this paper, *globalization* in relation to the subject matter of intellectual property means instantaneous projection of information all over the globe. In relation to the law, it means the deep integration necessary for a unified global normative system. In both cases, *globalization* is, in my view, qualitatively different from *internationalization*, a term I use here for the occasional traversing of state borders by essentially territorial information, and the relatively modest laws designed to accommodate such modest border-crossings.

Internationalization is no stranger to intellectual property. From earliest times, the kind of information protected by intellectual property—for instance, works of literature and patented inventions—has always had an international dimension in the sense of crossing national borders. The international intellectual property law designed for this process is also of venerable origin, dating back to the nineteenth century. It is found in treaties such as the Paris Convention, created in 1883 to deal with patents, trademarks and industrial designs, and the premier copyright treaty, the Berne Convention for the Protection of Artistic and Literary Works, established six years later in 1889. With a few exceptions, however, these treaties did not create substantive universal intellectual property rules. They were content, for the most part, to prescribe the more modest principle of “national treatment”—the requirement that each member state accord works of nationals of other member states the same rights as those accorded the works of its own nationals. The substantive standards of protection and the procedures for effecting that protection were, largely, left to the autonomy of each member state. National treatment means that an author who is a national of one member country must not be treated any worse in another member country than authors who are nationals of that other country; but this does not mean that authors must receive identical treatment in each member country. *International* intellectual property

law is thus not incompatible with the territorial nature of traditional intellectual property laws.

It is in the context of truly global norms, however, that Johnny Cash's complaint about the fate of his song in Slovenia could be vindicated. What would such territory-transcending rules look like? Although there are modest universal minimum standards in international treaties, such as the Berne Convention, there are really two kinds of territory-transcending intellectual property laws, and both are of recent origin.

2.1. *Super 301: The Realist Option*

The first kind is the "realist" one. It involves the unilateral, extra-territorial enforcement of one nation's laws—for instance the laws of the United States—against countries that do not respect the intellectual property of its nationals. This option is often invoked as a measure of last resort against the most egregious offenders, such as those sometimes described as "one-copy countries"—countries where piracy is so rampant that a single legitimate copy of a computer program or a musical CD is all it takes to satisfy the needs of the entire population! An example of such unilateral measures is the United States' "Super (or Special) 301"—§ 301 of the Omnibus Trade and Competitiveness Act of 1988⁵—which enables the United States to take retaliatory action against countries with inadequate intellectual property laws. Since one nation's laws have no normative force beyond its territory, the external shape of "Super 301" is that of sheer economic muscle. That is the sense in which it might be called "realist." But it might have venerable philosophical roots in the claim of all states to protect the interests of their nationals abroad. Unilateral measures of this sort are built on what we might call a retaliatory linkage: "Protect our national's intellectual property or else." Since Johnny Cash's complaint was made to a Congressional Subcommittee, it could indeed be perceived as an aggrieved citizen's invocation of the realist option. Cash, however, wanted this done through the mediation of recent WIPO treaties.⁶ He was lending

⁵ Omnibus Trade and Competitiveness Act of 1988, 19 U.S.C. § 2901 (1998).

⁶ See World Intellectual Property Organization Copyright Treaty, Dec. 20, 1996, S. TREATY DOC. NO. 105-17, 36 I.L.M. 65; World Intellectual Property Organization Performance and Phonograms Treaty, Dec. 20, 1996, 36 I.L.M. 76.

his voice not to a powerful state's unilateral commands against an offending weaker one, but to the creation of overarching global rules of the kind Kratochwil describes as rules in the "third party mode."⁷ These global rules are the second option for a territory-transcending intellectual property system and it is to them that I turn.

2.2. *Rules in the "Third Party Mode": TRIPS and the Road Toward Deep Integration*

Intellectual property's most dramatic step from its *international* phase towards the *global* one came with the TRIPS Agreement that was part of the GATT Uruguay Round. The TRIPS Agreement did this, in the first instance, by "legislating" beyond the traditional notions of national treatment (albeit with some modest minimum standards) to strong substantive as well as procedural norms; in the second instance, by making such "legislation" *universal* using a linkage to trade to ensure that everyone is either on board or soon will be; and in the third instance by creating an institutional structure in the World Trade Organization ("WTO") to ensure compliance with these norms. The substantive norms create a variety of universal minimum standards of protection, such as those requiring computer programs to be protected as literary works under the Berne Convention, or provisions relating to rental rights, performers' rights, well-known marks or the patent term; procedural norms ensure their enforcement through such mechanisms as injunctions, seizure, and, in some cases, even criminal penalties; and the WTO superimposes upon these a transcendent institutional structure.

We have already noted that one of the causes of the shift from *international* to *global* intellectual property is the electronic revolution mentioned earlier; in addition, this shift is also attributable both to the progressive transfer of autonomy from states to markets, as well as to the world's industrial leaders' desire to sustain high-cost labor economies through the sales of their advanced ideas.⁸ What may not be so well known, however, are the pro-

⁷ See FRIEDRICH KRATOCHWIL, RULES, NORMS, AND DECISIONS: ON THE CONDITIONS OF PRACTICAL AND LEGAL REASONING IN INTERNATIONAL RELATIONS AND DOMESTIC AFFAIRS 13 (1989).

⁸ See W.R. Cornish, *Judicial Legislation, in LAW, SOCIETY, AND ECONOMY: CENTENARY ESSAYS FOR THE LONDON SCHOOL OF ECONOMICS AND POLITICAL SCIENCE 1895-1995* 359, 371 (Richard Rawlings ed., 1997).

found implications of this shift, including for instance the spectacular measures of harmonization a treaty like the TRIPS Agreement has imposed upon its 120-odd member states,⁹ nor the way this treaty may give a foreigner a second chance at litigation—in the form of international litigation—as a means of procuring private rights that could not be procured through direct negotiation.¹⁰ As a keen observer further notes:

The particular point to be made in today's context is that the dispute will be settled by a tribunal of three, of suitably balanced composition. In the early years the panel members are likely to be drawn from those government

⁹ *See id.*

¹⁰ An interesting scenario is sketched out by Cornish:

Imagine for instance a dispute over whether a copyright computer program can be the subject of reverse engineering by “decompilation” in order to produce a compatible, non-infringing program. This will first be litigated through the instances of the country where infringement is alleged. If it is an EC country there will doubtless be a cassational side-trip to the European Court of Justice in order to determine the meaning of the ludicrously complicated Directive on the subject. If it all goes against the plaintiff, that claimant may cause its government to institute proceedings against the refusing State, claiming that under TRIPS no exception is permissible because the reverse engineering prejudices the interests of the right-owner. If the outcome is in favour of the plaintiff's State, it may in its turn insist upon the withdrawal of trade concessions under the GATT which will hurt enough to induce a change in the copyright law.

Indeed after five years it will be possible to raise such a dispute on the basis of prejudicial conduct which escapes violating the actual terms of TRIPS. I have even seen it suggested that, if a country (such as France) chooses to impose a quota on the television showing of foreign films (inevitably American), the copyright owners of the latter will be able to argue from TRIPS that the embargo is impermissible. Forget the fact that copyright itself is a negative right designed to prevent others from using pirated or unlicensed copies for sales or performances; it is not concerned with the copyright owner's or licensee's exploitation of its own material. Forget the fact that negotiations on quotas in the audio-visual sector broke down and nothing was included in the new GATT on the provision of material for broadcasting. It would be enough that some essential spirit of TRIPS had been dishonoured.

Whether such a claim would ever finally be sustained in a WTO dispute settlement claim is wholly speculative. It is the possibility that it can even be contemplated which should be a cause of considerable concern in the new world of trade collaboration.

Id. at 372-73.

negotiators who generated the TRIPs in midnight enclaves, people steeped in the esoteric power-politics of that process, rather than philosophers of the role and purpose of the rights. The Dispute Settlement Panels will work at a total remove from the political institutions of either the State under attack or the attacking State. The settlement could well adopt an activist approach to interpretation of the TRIPs text. It could perhaps rely on some common heritage of international customary law in intellectual property matters, for which certain high-thinking groups are even now seeking recognition. Whatever the outcome, a settlement will have immense influence: it will establish the essential content of the laws on the subject in well-nigh all States.¹¹

Such are the profound implications of a global intellectual property system, and at the formal rule-making level this edifice is a formidable achievement.¹² The tough terrain, however, lies ahead, for the degree of harmonization which this formal set of rules, along with the exigencies of their interpretation by a single body requires, may turn out to be far more than most parties bargained for. It is the kind of deep integration which rides roughshod over not only the strong dualism that seeks to keep treaties and domestic law separate in countries such as Great Britain and Scandinavia, but also in those such as the United States where the legislature plays some role in the treaty-making process and where many intellectual property rules may differ from those of other countries. My principal point is that a deep integration of this kind cannot be sustained by idolatry, or by bargain linkage. Can such an integration be built on a firmer foundation? Possibly yes, but only after one has dealt with the intractable problems raised by two warring camps that inhabit the treacherous conceptual terrain just below the surface of formal rules. I have called the first, "glib universalism." Despite the use of the adjective "glib" to describe this position, mine is really an attempt to put some theoretical flesh on the bare bones of the current system; it is an at-

¹¹ *Id.* at 373.

¹² For an overview of the implementation of the Uruguay Round see generally, JOHN H. JACKSON & ALAN O. SYKES, IMPLEMENTING THE URUGUAY ROUND (1997).

tempt to give the most sympathetic account of the quest for universal rules that have no regard for context or circumstance. Moreover, for the most part, these rules are simply national ones shorn of their domestic socio-ethical roots—disembodied norms orbiting in global space. The second camp, the exact opposite of “glib universalism,” is postmodernity’s “vision of a cultural ‘heterotopia’ which has no edges, hierarchies or centre”¹³ and which is anathema to the very possibility of universal norms. I suggest, however, that there is a way out of the unpalatable choice between the tyranny of disembodied norms and the intransigence of postmodern culturalism. That way out, I suggest, lies in the notion of a “justice-constituency” which I shall sketch in the latter part of this Article. But first, let us elaborate on the rival visions of glib universalism and postmodern culturalism.

3. GLOBAL INTELLECTUAL PROPERTY AND GLIB UNIVERSALISM

I have attributed the factual globalization of intellectual property to three causal factors: the electronic revolution, the triumph of the market, and the perceived interests of industrialized nations. The phenomenon I have called glib universalism is an attempt to put some normative foundations underneath this process. The glib universalist camp draws its strength from a curious collusion of two old enemies: naturalism and legal positivism. Let us look at the contributions of each to their joint venture of providing a normative foundation for global intellectual property.

3.1. *Naturalism*

As already mentioned, intellectual property rights may acquire both a canonical status and presumptive universality by donning the garb of natural or human rights. Human rights are universal because they are rights which all human beings everywhere have by virtue of their humanity. As Professor Henkin reminds us:

[Such rights] do not differ with geography or history, culture or ideology, political or economic system, or stage of societal development. To call them “human” implies that

¹³ STEVEN CONNOR, *POSTMODERN CULTURE: AN INTRODUCTION TO THEORIES OF THE CONTEMPORARY* 19 (1989).

all human beings have them, equally and in equal measure, by virtue of their humanity—regardless of sex, race, age; regardless of high or low “birth,” social class, national origin, ethnic or tribal affiliation; regardless of wealth or poverty, occupation, talent, merit, religion, ideology, or other commitment.¹⁴

The view of intellectual property rights as fundamental human rights is, of course, no idle curiosity. Although this may not be widely known, Article 27(2) of the Universal Declaration of Human Rights—that central pillar of the International Bill of Rights whose fiftieth anniversary we celebrate this year—affirms the right of everyone “to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he [or she] is the author.”¹⁵ Moreover, while the general right of property did not make it to the subsequent treaties, intellectual property rights did find their way into the International Covenant on Economic, Social and Cultural Rights which contains a similar provision.¹⁶

This naturalistic elevation of intellectual property rights to the status of universal human rights has reached new and surprising heights in the oft-repeated description of unauthorized copying and distribution of the protected works as “piracy,” for pirates, along with torturers and slave traders, are among the most egregious violators of human rights. As Judge Kaufman of the United States Court of Appeals for the Second Circuit described them, the torturer, the pirate, and the slave trader are each *hostis humani generis*, an enemy of all humankind.¹⁷ Yet, despite its superficial rhetorical value which thrives on hyperbolic inflation of intellectual property’s universal moral claims, the naturalistic view is unlikely to provide an enduring normative foundation for global in-

¹⁴ LOUIS HENKIN, *THE AGE OF RIGHTS* 2-3 (1990).

¹⁵ Universal Declaration of Human Rights, G.A. Res. 217A, art. 27(2), U.N. Doc. A/810 (1948).

¹⁶ Article 15(1)(c) provides that “[t]he States Parties . . . recognise the right of everyone . . . to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.” International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, art. 15(1)(c), 993 U.N.T.S. 3; see also American Declaration of the Rights and Duties of Man, art. 13, at 19, OAS Doc. OEA/Ser. L/V/II. Doc. 6 (May 2, 1948), available in 9 I.L.M. 673.

¹⁷ See *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980).

lectual property. For a start, no one is likely to mistake Judge Kaufman's characterization of the "pirate" as *hostis humani generis* for a reference to purveyors of bootleg compact discs or computer programs. But more importantly, intellectual property has another handicap, not shared by tangible property, which makes its status as the subject of fundamental human rights more tenuous: The case for its protection is notoriously counterintuitive. This is due, in turn, to what one may call intellectual property's "double intangibility."

For instance, although both lawyers and lay persons habitually draw a distinction between tangible and intangible property, and between corporeal and incorporeal hereditaments, *all* property is in truth intangible. This is because by "property," we really mean "proprietary interests." These are complex socio-legal constructs involving relationships between "persons" (natural, corporate, etc.) and "objects" (tangible or intangible) giving rise to a particular kind of rights (rights *in rem* whose content is typically exclusive use and alienation). In this regard, the distinction between tangible and intangible property, or the historical one between corporeal and incorporeal hereditaments, is, in terms of their "propertyness," conceptually erroneous; for every proprietary interest—whether it be a fee simple, a lease, an easement, a mortgage—is *ex hypothesi intangible*. Now within the general category of proprietary interests, there are some that have as their subject matter, tangible "things" such as houses, automobiles, or furniture; their case for the protection is intuitively self-evident because they are prototypical property in the sense that they can be possessed. Other proprietary interests, however, are saddled with the further intangibility of their subject matter; such is the case with intellectual property whose subject matter consists of literary works, music, inventions—namely, information. Intellectual property is thus doubly intangible: First, by virtue of its "propertyness," and second, because its subject matter is also intangible.

This curse of double intangibility makes the case for the protection of intellectual property counterintuitive for two reasons. The first reason is that it makes them "inappropriable." Basic proprietary interests in tangible objects are intuitively underwritten by their amenability to appropriation: They can be removed from the public domain for all to see, possessed—and possession in all its many-splendoured complexity is a prototypical defining

attribute of ownership both in the law and in the mind. As one writer has put it:

We cannot have our fish both loose and fast, as Melville might have said, and the common law of first possession makes a choice. The common law gives preference to those who convince the world that they have caught the fish and hold it fast. This may be a reward to useful labor, but it is more precisely the articulation of a specific vocabulary within a structure of symbols approved and understood by a commercial people. It is this commonly understood and shared set of symbols that gives significance and form to what might seem the quintessential individualist act: the claim that one has, by "possession," separated for oneself property from the great commons of unowned things.¹⁸

Information, the subject matter of intellectual property, however, is not appropriable in this way. It is only of value in the marketplace, but once released there, it can easily be replicated and used by the whole world. Although this "inappropriability" is normally worked into a utilitarian reason for legal protection of intellectual property,¹⁹ it does render the naturalistic claim hopelessly counterintuitive. Appropriability is not just a fetish of human intuition. It also serves the valuable function of defining the boundaries of each person's private domain. For this reason, a distinction is often made between "choses in possession" (i.e. chattels) and "choses in action" (e.g. a patent, copyright, or debt). The general idea is that choses in possession can be possessed and enjoyed without more ado, whereas enjoyment of choses in action may require the assistance of some further legal action.

The second reason for the counterintuitiveness of protecting intellectual property is what has been called "non-rivalrous" consumption.²⁰ The consumption of a tangible thing deprives others

¹⁸ Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 88 (1985).

¹⁹ See PAUL GOLDSTEIN, *COPYRIGHT, PATENT, TRADEMARK AND RELATED STATE DOCTRINES: CASES AND MATERIALS ON THE LAW OF INTELLECTUAL PROPERTY* 6-7 (4th ed. 1997).

²⁰ See CRAIG JOYCE ET AL., *COPYRIGHT LAW* 18 n.28 (2d ed. 1991).

of it, but the use or enjoyment of information, ideas, and works of art does not deprive anyone else. For instance, a television signal carrying a musical work can be broadcast to the whole world and “consumed” by everyone who has the equipment to receive it, without anyone getting any less of it. Like inappropriability, this unique characteristic of informational goods—that anyone can use them without diminishing their availability to anyone else—leads to a powerful moral intuition against intellectual property law.²¹

In addition to inappropriability and non-rivalrous consumption, there are also counterintuitive reasons of a more cultural kind against intellectual property. For instance, understandings of notions such as authorship and the construction of the public domain provide an example. All these make it doubtful that the naturalistic exaltation of intellectual property claims to the status of fundamental human rights can settle any significant normative issues between Johnny Cash and the inhabitants of Slovenia. Let us turn then to the positivist component of glib universalism.

3.2. *The Positivist Component*

The positivist element of this duo consists of excessive faith in the formal rules of law, separate and apart from law’s socio-ethical ecology. I call this one positivist because it has its roots in legal positivism’s obsession with the “separability” thesis, which insists that law can and should be separable from its social context. The positivist’s misplaced faith in legal rules divorced from context is, in part, a consequence of law’s effectiveness in the domestic sphere. We observe that in the domestic sphere, intellectual property law generally works quite well, and from this observation we intuitively extrapolate that a set of formal rules would work just as well at the global level. Most of the rules of the emerging global system are, indeed, directly transposed from national legal systems.

But we delude ourselves. There is no easy correlation between law’s effectiveness in the domestic sphere and its chances of success in the global arena. Whatever critical legal scholars²² and

²¹ See GOLDSTEIN, *supra* note 19, at 7.

²² For a liberal critique of this movement, see ANDREW ALTMAN, *CRITICAL LEGAL STUDIES: A LIBERAL CRITIQUE* (1990); a broader account of all such movements is discussed and chronicled in GARY MINDA, *POST-*

other anti-formalists might say, formal intellectual property rules have worked pretty well in the domestic sphere. But law's success in the domestic sphere, far from predicting its effectiveness at the universal level, augers ill for universality since both law's domestic success and its floundering at the universal level may be due to the common feature of embeddedness at the heart of law's ontology.

At the national level, formal rules work because they are part of a complex web of social conventions and practices. These social conventions and practices in which law is embedded are for the most part invisible; that may be why positivism tends to pay scant attention to them. In everyday life, we are oblivious to them the way we are oblivious to other aspects of our ecology, until something disturbs them. But these social practices exist and without them formal rules would be well nigh impossible. This embeddedness is not unique to law; it pervades all institutional facts of which law is only one kind. In his book which explores the ontology of such institutional facts, John Searle uses a simple scene to illustrate the immense complexity of the web of social facts I talk about here.²³ The scene involves a visit to a café in Paris where he utters a fragment of a French sentence by which he orders a beer. The waiter brings him the beer, he drinks it, leaves some money on the table, and departs. But, as Searle remarks, the sheer simplicity of this scene belies the fact that "its metaphysical complexity is truly staggering"²⁴ (Searle believes that its "complexity would have taken Kant's breath away if he had bothered to think about such things").²⁵ In particular, this simple transaction is embedded in a bewildering web of social facts. There is hardly anything in this scene which can be adequately described in the language of physics or chemistry—not "restaurant," "waiter," "sentence of French," "money," nor even "chair" and "table." Moreover, beyond these things that have some physical existence, the scene is brimming with what Searle

MODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END (1995).

²³ See JOHN SEARLE, THE CONSTRUCTION OF SOCIAL REALITY 3-4 (1995).

²⁴ *Id.* at 3.

²⁵ *Id.*

describes as “a huge, invisible ontology.”²⁶ He outlines this ontology as follows:

The waiter did not actually own the beer he gave me, but he is employed by the restaurant which owned it. The restaurant is required to post a list of the prices of all the *boissons*, and even if I never see such a list, I am required to pay only the listed price. The owner of the restaurant is licensed by the French government to operate it. As such, he is subject to a thousand rules and regulations I know nothing about.²⁷

Yet, as Searle points out, we can bear the staggering metaphysical burden of this social reality because it is largely “weightless and invisible.”²⁸ Once we are brought up in a particular culture, its web of social reality seems no less natural than physical trees or water. It is this complex web of social reality in which domestic rules of law are embedded.

There is, however, hardly any corresponding set of social reality to underwrite the proliferating rules of intellectual property we are sending into global orbit. For the most part these are disembodied domestic norms, unhinged from their socio-ethical context, floating in space. It is a mistake to believe that since they worked so well in the domestic sphere, they will work well at the global level too, for the socio-ethical reality they have left behind is essential to both their meaning and effectiveness.

The universalist sub-component is intertwined with both the naturalist and the legal positivist ones just discussed, but its main flaw is not so much the former’s claim of intuitive self-evidence nor the latter’s excessive faith in formal rules severed from their socio-ethical context. Its particular sin is that of succumbing to the seduction of easy universality. The point here is not that universal norms are altogether unattainable.²⁹ It is rather that out-

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 4.

²⁹ In matters of human rights generally, I am an unrepentant universalist myself. See, e.g., Samuel K. Murumba, *Cross-Cultural Dimensions of Human Rights in the Twenty-First Century*, in LEGAL VISIONS OF THE TWENTY-FIRST CENTURY: ESSAYS IN HONOR OF CHRISTOPHER WEERAMANTRY (forthcoming May 1998) (manuscript on file with author); Samuel K. Mu-

side certain contexts, universality is extremely difficult to attain, and without satisfying some rigorous pre-conditions, a complete impossibility.

The allure of universal intellectual property norms that do not vary with change in place or local circumstance is, in the final analysis, the seduction of what Sir Isaiah Berlin once referred to as “a system of propositions so general, so clear, so comprehensive, connected with each other with logical links so unambiguous and direct that the result resembles as closely as possible a deductive system.”³⁰ It is at bottom a utopian aspiration, though the world of markets in which intellectual property rights operate is a rather curious abode for utopian ideas. Nevertheless, the “global market” and its accouterments, including intellectual property rights, has been invested with some utopian characteristics by those who see in it the panacea for all the ills of the post-cold war world.³¹ Indeed, it is not unusual these days to encounter discussions linking intellectual property, especially copyright, with “democracy,”³² and global copyright with “a vision of global de-

rumba, *The Cultural and Conceptual Basis of Human Rights in International Law* (1986) (Unpublished Ph.D. thesis, Monash University (Melbourne, Australia) on file with the Monash University Library).

³⁰ ISAIAH BERLIN, *THE SENSE OF REALITY* 21 (Henry Hardy ed., 1996).

³¹ The kind of utopianism associated with the global market is sometimes referred to as a version of “high modernism” which previously used to idolize the state. See JAMES C. SCOTT, *SEEING LIKE THE STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED* (1998); John Gray, *The Best-Laid Plans*, N. Y. TIMES BOOK REV., Apr. 19, 1998, at 36.

As I finished this book, I realized that its critique of certain forms of state action might seem, from the post-1989 perspective of capitalist triumphalism, like a kind of quaint archaeology. States with the pretensions and power that I criticize have for the most part vanished or have drastically curbed their ambitions. And yet, as I make clear . . . large-scale capitalism is just as much an agency of homogenization, uniformity, grids, and heroic simplification as the state is As we shall see, the conclusions that can be drawn from failures of modern projects of social engineering are *as applicable to market-driven standardization as they are to bureaucratic homogeneity*.

SCOTT, *supra*, at 7-8 (emphasis added).

³² See Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 288 (1996) (arguing that “copyright is in essence a state measure that uses market institutions to enhance the democratic character of civil society”); see also Neil Weinstock Netanel, *Asserting Copyright’s Democratic Principals in the Global Arena*, 51 VAND. L. REV. 217, 220 (1998) [hereinafter

mocracy, not merely global markets,”³³ or with what sounds like an oxymoron, “freedom imperialism.”³⁴

Whether a global intellectual property system can have such profound socio-political implications remains to be seen. What that lofty inquiry should not obscure, however, is the more modest question of whether such a global system is capable of achieving the more traditional goal of all intellectual property systems—the balancing of incentives and rewards to authors and inventors against the public’s right of free access to works and information.

We have seen that global intellectual property rules are generally abstracted from domestic spheres, leaving behind their sustaining contextual information. In place of these sustaining contexts, the global system of rules has relied more and more on linkages in order to persuade countries that would otherwise be reluctant to protect intellectual property (because such a protection is a net loss to them) to come on board. For instance, a country may accede to the global intellectual property system because that is a condition of its obtaining access to markets for its manufactured products. Bargain linkages of this sort may create a system of rules, but they are unlikely to sustain it. Moreover, such bargain linkages tell us nothing about the content of the global rules they helped create. They do not tell us much, for instance, about the meaning of “weasel” words like “fair use” and “originality” in copyright law, “novelty” and “non-obviousness” in patent law, or “distinctiveness” and “deceptive similarity” in trademark law. They are, in other words, only creating what Neil MacCormick calls “rule-texts,” but hardly any “rule-content.”³⁵ The trouble lies in the content of all these expansively indeterminate terms. For global intellectual property, the devil lurks in the details.

Netanel, *Democratic Principals*] (“Copyright law serves fundamentally to underwrite a democratic culture.”).

³³ Netanel, *Democratic Principals*, *supra* note 32, at 221.

³⁴ See Marci A. Hamilton, *The TRIPs Agreement: Imperialistic, Outdated, and Overprotective*, 20 VAND. J. TRANSNAT’L L. 613, 615-20 (1996).

³⁵ See Neil MacCormick, *On “Open Texture” in Law*, in *CONTROVERSIES ABOUT LAW’S ONTOLOGY* 72, 79-82 (Paul Amselek & Neil MacCormick eds., 1991).

4. GLOBAL INTELLECTUAL PROPERTY AND POSTMODERN CULTURISM

Glib universalism, as just observed, involves the use of controversial naturalist or positivist-universalist foundations to underwrite a global intellectual property system. Its nemesis, the postmodern-culturalist camp, holds that the universality of norms espoused in the global law-making enterprise is, at best, an exercise in futility, and at worst, a fraud.

The basis for this rather startling claim can be found in a complex arsenal of ontological, epistemological, and ethical tenets of various strengths. The general target of this arsenal is a set of related notions generally attributed to the Enlightenment, the most important of which are: rationality, objectivity and universality. Postmodern culturalism insists that these notions are implausible because there is no Archimedian perspective—no view from above, or from the sidelines, that transcends the particularities of culture, space, and history. Rather, this camp insists that every perspective is made from *within* some cultural perspective. Instead of pretensions of rationality, universality, objectivity, (for some even philosophy itself) this movement proposes that we substitute the language of emotions and poetry.³⁶ These claims have profound implications for the whole project of creating a system of global intellectual property rules. Without rationality, we could not have any rules or principles at all,³⁷ or at any rate, rules and principles that are not simply “resources and instruments that individuals manipulate to get what they want or think good” or that “exert no power . . . of their own over individual thought, desire, and action”—in other words, rules that are not “mere words,” as one strand of postmodernism, the Critical Legal Studies Movement, might regard them.³⁸ Without objectivity, we would have trouble talking about the ontology of law as a set of social practices that do really exist in the way illustrated earlier with the example of Searle’s visit to a French café.³⁹ Without universality, we could not talk about the possibility of having a

³⁶ See RICHARD RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* 373-94 (1979).

³⁷ See ROBERT NOZICK, *THE NATURE OF RATIONALITY* 40 (1993) (discussing the role of principles in rationality and arguing that “to act and think rationally, one must do so in accordance with principles”).

³⁸ ALTMAN, *supra* note 22, at 151.

³⁹ See SEARLE, *supra* note 23, at 3-4.

system of universal intellectual property at all. So if postmodern claims about rationality, objectivity, or universality are true, then those trying to globalize intellectual property are truly whistling in the wind.

That seems bad enough. The postmodern project, however, is not simply about ontology (or what exists) nor simply about epistemology. It is, above all, about ethics in the broadest sense. It tells the story of what ought to be done, and much of the attack on the rationality, objectivity, and universality that it has attributed to the Enlightenment is really strategic. The ethical claim here is that these lofty Enlightenment notions are really the building blocks of an ideology that makes injustice invisible and thus allows it to thrive by masking endemic inequality in the general allocation of burdens and benefits. In the present context there is a growing body of literature known as anti-colonial scholarship⁴⁰ which sees the global economy, and everything from global intellectual property rules to global human rights principles, as a neo-liberal attempt to adapt the traditional colonial legacy of North-South inequality to the Information Age, a role previously performed by the notion of an international division of labor in the Industrial Age.

As a counter to this perceived deleterious import of an absolute, monistic system of norms, postmodernism proposes the competing vision of “legal polycentricity” which rejects the single value approach to questions of law and morals.⁴¹ Legal polycentricity is predicated upon an acceptance, indeed a celebration, of cultural pluralism.

Like the universalist one, the postmodern vision contains valuable lessons for the global law-making enterprise. Most of these lessons can be gleaned from some of the deficiencies of the universalist vision already observed. However, the postmodern vision has some serious problems. One of these is that its anti-universalist stance glosses over the reality of the increasing proximity among cultures at the end of the twentieth century. With proximity comes cross-cultural exchange, a routine feature of all cultures and value-systems, which tends to homogenize the landscape. It has been suggested that, historically, this proximity be-

⁴⁰ For an excellent review of this scholarship see James Thuo Gathii, *International Law and Eurocentricity*, 9 EUR. J. INT'L L. 182-209 (1998).

⁴¹ See SURYA PRAKASH SINHA, LEGAL POLYCENTRICITY AND INTERNATIONAL LAW 1-14 (1996).

tween cultures has tended to lead to the dominant culture seeking to swallow up the minority cultures.⁴² In response to this threat, the minority cultures developed, as a defensive mechanism, a deliberate “counter identity” that resists translation. This defensive non-translatability is sometimes referred to as “secondary pseudo-speciation” and results in an identity based on normative self-definition. But today, mutual translation among cultures into larger networks of communication is inevitable. In any event, the cultural “heterotopia,” which some versions of postmodernism espouse, is implausible because it is predicated upon strong pluralism which entails the very overarching normative universe that postmodernist culturalism had initially hoped to repudiate. Consequently, postmodern culturalism does not, in the end, negate the possibility of global intellectual property, though it does alert us to some pitfalls we might be able to avoid along the way.

5. A JUSTICE-CONSTITUENCY FOR GLOBAL INTELLECTUAL PROPERTY?

We have just described two rival visions fighting for control over the project of globalizing intellectual property: The positivist-universalist vision of disembodied, *sui generis* norms floating awkwardly in global space; and the postmodern-culturalist vision of a “heterotopia” of cultures that is anathema to the very possibility of a universal law. I suggested that both are delusions: the first because of its naturalistic intuitionism or excessive faith in legalism without regard to the context that makes law possible; the second because of what we might call a kind of cultural solipsism.

Both visions are flawed for another reason. They are predicated upon a world that is rapidly unraveling, a world of autonomous, discrete entities, whether one calls these states or cultures. The universalist vision derives global rules from “a trade paradigm,” the language of trade being a kind of “pidgin” that makes communication across the void between sovereign states possible. It is this paradigm which makes excessive reliance on legal rules so attractive. The postmodern-culturalist vision speaks the language of cultures rather than states, but it also relies upon statism more than it realizes: For, in practice, the constructs of states and cul-

⁴² See Jan Assman, *Translating Gods: Religion as a Factor of Cultural (Un)Translatability*, in *THE TRANSLATABILITY OF CULTURES: FIGURATIONS OF THE SPACE BETWEEN* 25, 29 (Sanford Budick & Wolfgang Iser eds., 1996).

tures tend to collapse into each other. Thus both universalist and culturalist visions share a common premise of global law as *international* law—as law *between* nations—and more specifically as public international law. In this paradigm, the only other version of a global order would be that of a supra-national order in the form of a world government. Although states have not withered away, their influence has diminished considerably while the private sphere's influence continues to expand. This is the globalization of the market, of the private sector, for which states increasingly only play the role of facilitator.

Within national jurisdictions, linkages between law and other disciplines, such as economics or psychology or sociology, operate upon a pre-existing sub-stratum of socio-ethical facts. Since there is no corresponding contextual equivalent of these at the global level, linkages here cannot play this (their usual) role. At the global level, linkages, instead, tend to play the role of bargaining tools as in the case of the linkage between trade and intellectual property epitomized by the TRIPS Agreement. Or, they play the role of surrogate “contexts” for global intellectual property, precariously inhabiting the intermediate space between the two rival visions above.

I suggest, however, that this is not the most profitable role for linkages. First, whatever little “context” linkages might give global laws here occurs at the same delirious level of abstraction as to be of little practical value. Second, they share most of the pathologies of the rational choice theories in which they are grounded.⁴³ But in any event their role here is premised upon a false dilemma: The view that we are doomed to choose between the futility of disembodied norms and the intransigence of post-modern culturalism. I suggest that the contextual problem for global intellectual property norms, however, is really that of a “justice-constituency.”⁴⁴ As I use it here, the phrase “justice-constituency” signifies something more “contextual” than natural-

⁴³ See DONALD P. GREEN & IAN SHAPIRO, *PATHOLOGIES OF RATIONAL CHOICE THEORY: A CRITIQUE OF APPLICATIONS IN POLITICAL SCIENCE* (1994); see also CASS R. SUNSTEIN, *FREE MARKETS AND SOCIAL JUSTICE* 3-8 (1997).

⁴⁴ See JULIUS STONE, *VISIONS OF WORLD ORDER: BETWEEN STATE POWER AND HUMAN JUSTICE* 95-101 (1984). On Stone's general approach to international law, see generally James Crawford, *Realism, Scepticism and the Future World Order: Some Thoughts on Julius Stone's Contribution to International Law*, 13 SYDNEY L. REV. 475 (1991).

ist or legalist universalism but less all-embracing than culture. It refers to that consensus and those articulated or implicit understandings that make law's allocation of benefits and burdens, as well as its designation of claimants and beneficiaries, acceptable, or at least tolerable. Delineating and articulating a justice-constituency for world-wide intellectual property laws is admittedly no easy task: It is indisputably harder than the currently popular game of launching into orbit de-contextualized norms strung on thin bargain linkages; but it is also much less daunting than a complete creation of an all-embracing global culture. A global justice-constituency recognizes the embeddedness of law without engaging in all-embracing models of such embeddedness.

A few short years ago, the possibility of a global justice-constituency might have, with good reason, been described as the craziest delusion of them all. A world of private rights and duties stretching across state boundaries, rights, and duties not belonging to states would have been almost inconceivable. This is because barriers to "communication across state frontiers and the related operations of the state entity in inhibiting, molding, and distorting the formation and articulation of human claims, aspirations, and expectations as well as the transmission and reception of communications"⁴⁵ would have made the sociological and other inquiries necessary for articulating such a global justice constituency impossible. But the world on the threshold of the twenty-first century looks increasingly different. It is a world where state boundaries, though by no means non-existent, have lost much of their effectiveness across a wide-range of human communication, especially trade and the movement of capital. It is also a world which is ripe for the principled construction of a justice-constituency. This is a pre-condition for the kind of "deep integration" which notions such as a "global market" entail.

The first step in the construction of that justice-constituency is the abandonment of "naturalistic" language now predominant in universal intellectual property discussions. As we saw at the beginning, naturalistic claims ultimately rest on the grounds of intuition or self-evidence. But as already mentioned, protection of intellectual property is notoriously counterintuitive, especially because it involves non-rivalrous consumption. When use or "consumption" of a novel or song by one person, or a billion

⁴⁵ STONE, *supra* note 44, at 41; Crawford, *supra* note 44, at 487.

people does not leave any less novel or song for the enjoyment of the other four billion people on the planet, intellectual property protection looks suspiciously like depriving people of something to which they should have unfettered access. As Justice Brandeis said, in his dissenting opinion, in *International News Service v. Associated Press*, “The general rule of law is, that the noblest of human productions—knowledge, truths ascertained, conceptions, and ideas—become, after voluntary communication to others, free as the air to common use.”⁴⁶ But no one could say it more eloquently than Thomas Jefferson:

If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of every one, and the receiver cannot dispossess himself of it. Its peculiar character, too, is that no one possess the less, because every other possess the whole of it. He who receives an idea from me, receives instructions himself without lessening mine; as he who lights his taper at mine, receives light without darkening me. 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, seems to have been peculiarly and benevolently designed by nature, when she made them, like fire, expansible over all space, without lessening their density in any point, and like the air in which we breathe, move and have our physical being, incapable of confinement or exclusive appropriation.⁴⁷

Yet, as already mentioned, it is equally true that the subject matter of intellectual property is plagued by “inappropriability” by its author: The author needs to disseminate her work in order to profit from it, but once released, she cannot control its exploi-

⁴⁶ *International News Service v. Associated Press*, 248 U.S. 215, 250 (1918).

⁴⁷ THIRTEEN WRITINGS OF THOMAS JEFFERSON 333-34 (Lipscomb ed., 1904) (Letter to I. McPherson, Aug. 13, 1813), *quoted in* RALPH BROWN & ROBERT DENICOLA, COPYRIGHT 9 (6th ed. 1995).

tation. Moreover, with the advent of modern technology, duplication produces copies of perfect quality at almost no cost; there now exists the means to distribute them to the whole world at the click of a mouse. There is thus little economic incentive for authors to take the trouble to create works, and every incentive to wait and duplicate those created by others. An intellectual property system is needed to strike a careful balance between the public's rights of access to works and the intellectual property owner's incentive and reward for giving society something of value. This is the utilitarian or economic basis for our intellectual property law mentioned earlier. The utilitarian basis is memorably enshrined in the United States Constitution which gives Congress the power "[t]o 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."⁴⁸ This provision provides the back-drop for our elaborate system of copyright and patent concepts—such as originality, idea-expression dichotomy, and “fair use” in copyright laws, and “novelty” and “non-obviousness” in patent law, as well as an array of limitations on the scope of rights and compulsory licenses. The same balance between private rights and public benefits is struck in a different way for trademarks using such notions as deception and distinctiveness—which reflect the nature of the trademark as an information device—but that also rests principally on a utilitarian premise, not a natural rights one. The economic or utilitarian rationale has often been reiterated by the courts at the highest level as in *Sony Corp. of America v. Universal Studios, Inc.*:

The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward⁴⁹

⁴⁸ U.S. CONST. art. I, § 8, cl. 8.

⁴⁹ *Sony Corp. of America v. Universal Studios, Inc.*, 464 U.S. 417, 429 (1984).

The first challenge for a global justice-constituency is to clearly articulate what that public purpose is at the global level, instead of simply transposing ready-made purposes and rules from national jurisdictions; the second is to formulate rules, norms, and concepts that are carefully calibrated to achieve that public purpose.

It is quite conceivable that both the goals and the rules may, with appropriate modification, be closer to the traditional ones of increasing production of valued works. For developing intellectual property importing countries, however, it is equally plausible that the public purpose may also embrace encouragement of importation of appropriate technology.⁵⁰ This, for instance, was the principal role of the English patent system at its inception. It was designed to encourage importation of crafts from overseas, and the teaching of these to the locals; under both early English and Venetian patents, validity of the patent was premised on the condition that the patented invention be worked in the country and taught to local workmen. Indeed, the original patent term consisted of the normal period of apprenticeship—seven years—or multiples of that period.⁵¹

6. CONCLUSION

The formulation of global intellectual property goals suggested here—namely, the articulation of a justice-constituency—should be a top priority for rule makers. It is a project uniquely amenable to multiple linkages. Once the basic structure is in place, invisible hand effects⁵² may well step-in and configure the deep integration, founded upon the concept of a justice constituency, into the greater complexity required of a modern global market in products and information.

I do not remember all the stories from my Sunday school class, but one that left an indelible impression on my mind is the parable of the two builders: one wise, the other foolish. The wise

⁵⁰ See, e.g., UN TRANSNATIONAL CORPORATIONS AND MANAGEMENT DIVISION OF THE DEPARTMENT OF ECONOMIC AND SOCIAL DEVELOPMENT, *INTELLECTUAL PROPERTY RIGHTS AND FOREIGN DIRECT INVESTMENT* (New York: United Nations, 1993) (documenting an apparent positive link between effective intellectual property laws and the flow of foreign investment).

⁵¹ See STANFORTH RICKETSON, *THE LAW OF INTELLECTUAL PROPERTY* 861 (1984).

⁵² As to the invisible hand effects, see the interesting account in ROBERT NOZICK, *SOCRATIC PUZZLES* 191 (1997).

builder labored long and hard to build a foundation for his house on a rock. Not so the foolish one: Wanting to build quickly and with minimum effort, he built his house on the sand, and for a moment seemed the wiser of the two. But then the rain came down, the streams rose and the winds blew and beat against the houses. The wise man's house remained standing, but the foolish man's fell and great was the fall of it. In building a global system of intellectual property law, we might want to heed the parable of the builders. We should not be afraid to engage in a little map-making, to stand back from the breathtaking manufacture of global intellectual property rules in order to get a sense of perspective of the landscape upon which these rules are being planted. A preliminary map-making of this kind is the only assurance that the global legal structure, now going up at such a brisk pace, will have a firm foundation.