

Journal of Technology Law and Policy
June, 2005

Note

***155** THE DIALECTIC RELATIONSHIP BETWEEN DIFFERENT CONCEPTS OF PROPERTY RIGHTS AND ITS SIGNIFICANCE ON INTELLECTUAL PROPERTY RIGHTS

Vincenzo Vinciguerra [\[FNa1\]](#)

Copyright (c) 2005 Journal of Technology Law and Policy; Vincenzo Vinciguerra

***156** I. Introduction

The purpose of this Article is to facilitate an understanding of the nature of Intellectual Property Rights (IPRs) through an analysis of different ideas of property rights, as enshrined and elaborated by law and political literature.

In the second part of the Article, peculiarities of IPRs and their main differences from property rights are sketched out. Furthermore, a methodological approach is briefly drawn. The third part takes into account the rationale and the purposes of property rights according to the main philosophical and political mainstreams in the United States in the twentieth century. The fourth, and last part, is devoted to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), in the light of the previously analyzed theories, and draws a brief conclusion.

It is suggested that the particular relationship existing between two different conceptions of property rights may also be found in the framework of IPRs. It is also argued that this kind of relationship may shed light on the actual shape of IPRs and promote a proper construction of them.

II. Intellectual Property Rights and Property Rights

Intellectual property represents a particular form of ownership. [\[FN1\]](#) It represents a property right in an intangible, abstract idea expressed in tangible form. [\[FN2\]](#) An essential feature of property rights in general, is the "right of exclusion." It is the power that "may be exercised to the ***157** exclusion of all others, freely and without restrictions." [\[FN3\]](#) This is an attribute of IPRs as well. In fact, in defining a patent, one of the most representative IPRs, the United States International Trade Commission states that a patent is "a grant issued by a national government conferring the right to exclude others from making, using, or selling the invention. . . ." [\[FN4\]](#) However, a peculiar characteristic of intellectual creations, from an ontological point of view, is "non-exclusivity." This means that intellectual creations can be at many places at once and are not consumed by their use. On the other hand, it is very different when the object of ownership is a res, such as a parcel of land. [\[FN5\]](#) The pure possession or use of that parcel by one person prevents others from possessing or using it. [\[FN6\]](#) Land, like almost every other resource, is limited and thus, private property rights are needed to "fence" the land in order to ensure

peaceful possession by the owners and to avoid the dreaded "tragedy of the commons." [FN7]

Irrespective of the verity of the latter hypothesis and, generally, leaving aside all the moral and legal justifications for property rights, it must be noted that intellectual creation, as opposed to the object of private property rights, is not limited in nature; that is, once the intellectual creation is born it is potentially available, without limits, to everyone. Listening to a song does not preclude others from listening to the same song at the same time for all time (this characteristic of IPRs is called "non-rivalry"). [FN8] Therefore, the state must step in and protect the rights holder, giving him the power to prevent others from using his creation, thereby making it artificially scarce. Indeed, without the state's intervention the rights holder could do nothing to prevent unauthorized use of his creation.

***158** To be sure, there are some means available to the IPRs holder, such as contracts and other self-help means (e.g., encryption), but they are either imperfect substitutes of the state protection or only limited to some IPRs (encryption, for instance, can serve only the interest of a copyright holder and only for limited "works of authorship"). Hence, the state must step in to ensure the protection of the right holder that he or she cannot otherwise obtain. A clear example is the strong protection accorded to a patent holder, who can rely on the strict liability [FN9] that would occur whenever someone uses (or sells, offers to sell, etc.) the inventor's device without his or her permission. [FN10] Such a strong defense against infringement is almost unthinkable without legislative and judicial (i.e., state) intervention.

Usually, economics and law face, as fundamental problems, the scarcity of resources and their subsequent cost. With IPRs the problem becomes how "to measure out" the scarcity (i.e., the scope of the power of exclusion) between the owner (the rights holder) and society (the community). The "scarcity" created by the granting of IPRs is modulated by different constructs of property rights, which inevitably affect the relation between the values at stake.

III. Different Values and Different Approaches

The frame of reference in which the IPRs are encompassed is the international legal framework and, in particular, that of World Trade Organization (WTO). The values that are enshrined in that framework could be certainly defined as liberal. [FN11] When analyzing liberal thought, whether truly liberal (stricto sensu) or not, the author is aware of his own partiality in terms of commonly accepted abstract principles, such as ***159**"rights, majority rule, the rule of law, Judeo-Christian morality." [FN12] However, when discussing the various forms that property rights may take, the interests and values shared by other approaches [FN13] will be taken into account. Different views are critical when "shaping" the scope and structure of property rights, since the satisfaction of interests is the starting point for the process that leads to the "rule of law." [FN14] As an example, the interests of industrial exploitation of intellectual capital (the objective of any patent) should be considered in connection with the different interests of nonindustrial uses of intellectual property. [FN15]

A. Two Different Ideas of Property

Different concepts of property exist in different legal systems as well as in legal theory. [FN16] Attention here will be focused on two, in a sense, opposite ideas of property: property as a commodity and, on the other hand, property open to "social needs." [FN17] In the construct of property rights, the social aspect, even though it

never completely fades away, [FN18] can range ***160** from a very limited incidence to a large, broad influence. When the social aspect is almost nonexistent, property rights are deemed a “commodity” and what is stressed is the “power” of the owner. Conversely, emphasis on the social aspect of ownership stresses the interests of society as a whole, as opposed to those of the owner alone. [FN19]

In an effort to simplify a very complex reality, one can argue that different theories, with different contexts and premises, can be reduced, as far as the construction of property rights is concerned, to either of the two ideas mentioned above. For example, some scholars [FN20] who are sensitive to the social function of property rights surprisingly recognize that “the ability to alienate is the most fundamental stick in the property bundle.” [FN21] Interestingly, this is exactly what F. Von Hayek argued in the 1940s. [FN22] For Von Hayek, who was very much skeptical about the “social function” of property rights and highly hostile about IPRs, [FN23] the commodification of property to its maximum extent is a necessary prerequisite for individuals to pursue their own ends and in so doing, to pursue individual liberty. [FN24] In other words, notwithstanding the deep political and philosophical differences among the aforementioned scholars, it seems, prima facie, that the result in regard to the “shape” of property rights is the same.

B. Law and Politics

There is no way to articulate political theory without affecting the concept of property and impacting, in some way, the relationship between the two elements (single owner versus society) always in constant tension. [FN25] Indeed, the idea and the content of the “rule of law” are an outcome of the philosophical and political thought that underpin any given society at any given time and space. [FN26]

Since “law is politics,” it will be interesting to examine the way property rights are “shaped” and interpreted according to liberal thought from the twentieth century to the present. Since property rights serve as a model for intellectual property rights, then each political view will influence (or presuppose) their construct and scope. In fact, it is posited ***161** here that a “general theory of property illuminates [mutatis mutandis] intellectual property.” [FN27] The focus will be on the political debate that has occurred during the twentieth century in the United States and its consequences on the function and rationale of property rights.

This approach may promote a better understanding of both the premise of the current concept of IPRs and the rationale behind international agreements concerning IPRs. This paper will specifically focus on the Trade Related Aspects of Intellectual Property Rights agreement (TRIPs) [FN28] within the legal framework of the WTO, [FN29] because of its relevance in international law. [FN30]

1. The Classical Idea of Property

The classical idea of property rights and ownership derives from the idea of property as an “absolute” [FN31] dominion. This is the idea of property rights that were in use in Roman law that the scope of property rights extends “usque ad sidera et usque ad inferos” (from the underworld to the stars). However, it must be made clear that, as far as the social control of property rights is concerned, ownership has never really been absolute. Even in the most individualistic age of Rome, ownership could have a social aspect, such as the liability for the execution of a debt and the possibility of expropriation by the public authority. [FN32]

Sir William Blackstone, whose influence was strong in the United States, describes the idea of property rights as a simple and nonsocial relationship between a person and a thing. [FN33] His main point is that the function of private property is to secure

freedom and autonomy for individuals. Blackstone writes, at the beginning of the nineteenth century, that property rights are conceived as the “[s]ole and despotic dominion which one man claims and exercises over the external things of the world, *162 in total exclusion of the right of any other individual in the universe.” [FN34] Under this idea, property links only the owner to the object; there is no relationship with any other person. The owner could do anything he wants with his property. In fact, the right to own property is defined by Blackstone as an absolute right that “pertains to particular men merely as individuals or single persons,” [FN35] whereas a relative right is “one which is incident to men as members of society and standing in various relations to each other.” [FN36] Indeed, Blackstone's idea of property is much more “absolute” than the one conceived by the Romans.

2. The Legal Realist and “The New Property”

At the beginning of the twentieth century in the United States, there arose a shift from the Blackstonian person-thing conception of ownership to a social, or relational, conception of ownership. [FN37] The legal realist movement illuminated for the first time in the United States the complex and relational character of ownership. [FN38] By this time, the metaphor of property as a “bundle of rights” was being used to describe ownership. [FN39] In this new stream of thought, ownership was interpreted as a complex set of legal relations in which individuals are interdependent. Some degree of social interference with one person's ownership interest was deemed inevitable, but the real question was which interferences should be legally *163 prohibited and which should be permitted. [FN40] The most important point is that there is no analytical or deductive answer to that question; it depends strictly upon which policies a society decides to promote at a given time. [FN41]

Other scholars [FN42] worked on the implications of the relational conception of ownership. “[T]he truth is, there are two sides to private property, the individual side and the social side. . . .” [FN43] They did not consider the social aspect to be an exception, but rather an essential part of the institution of property.

[T]he social side of property might be lost or deteriorate if it were not enforced, especially in cultures whose ideologies emphasized the individual aspect of property ownership. While individuals have incentives to maximize control over their own property, they lack incentives to monitor the use of property interests that they share in common with others. For each individual, the costs of policing the social side of property greatly exceed the individual gains, so each individual chooses to neglect the social side. As a result, aggregate social welfare diminishes unless the state, as society's agent, acts to protect the social side. [FN44] It was the first time in American history that a social function of property was put forth in such a vigorous way.

The prominent role that the legal realists' view played was to promote the idea that the social side of private ownership supersedes the individual side. [FN45] This assertion of the social function has deeply changed the structure of property rights ever since. It represents the basis for the construct of property rights in many national contexts and usually is guaranteed by a state's constitution. [FN46] At the international level, however, *164 the problem remains how to promote this social side. Since there is no central government in the international arena to act as a state and safeguard the social interest, how can the social function be protected? [FN47] The problem is to find a via media between absolute private property and “socialized property.”

Classical liberals define freedom negatively: individual liberty is freedom from interference by the state. In this view, individuals act independently of each other.

Within this model, the role of property is to protect the individual's liberty by creating for each owner a zone of autonomy. [FN48] The state's sole legitimate role is to protect that zone by preventing others from unauthorized invasion. [FN49] Among legal realists as well, private ownership confers certain negative rights to individual owners (e.g., freedom from the state), but it is also subject to positive duties in the public interest. [FN50] In the legal realist view for every right there must be a duty; there is no right without duty [FN51] and duty is owed to the society as a whole. This framework seems to be reproduced in all intellectual property rights systems. For example, patent laws usually provide the rights holder with both negative rights (e.g., he or she can prevent others from using his or her invention, etc.) and "positive duties" such as the duty to implement the idea covered by the patent (otherwise he or she will be subject to the compulsory license). [FN52]

***165** This new idea of property was ushered into the legal framework by legal statutes and judicial decisions [FN53] only with the emergence of the "welfare state." [FN54] Social welfare programs undermined the "commodity conception." [FN55] Various types of property, which were traditionally regarded as market assets, came to be seen as serving other, non-market functions. Moreover, the law began to protect the "noncommodified" aspects of property arrangements. Landlord and tenant law provides a clear example. [FN56] A "New Property" was born. [FN57]

C. An Italian Scholarship Approach: An Example of a Civil Law Attitude [FN58]

In the civil law system, and, above all, in those countries where Roman influence was strong, private property rights are the essential core of the "Droit Subjectif" (the Italian "Diritto Soggettivo") as developed by the French and, later on, by German and Italian scholarship. [FN59] The droit subjectif intends to express the liberty of the human being. [FN60] It constitutes the absolute freedom of the subject from everything that constrains him, and it grants him the power to do something, to concretely act and modify the "legal reality." [FN61] The droit subjectif is construed as an "agere licere," which means that the holder of the right has the power and the possibility ***166** to achieve and fulfill his interests. In this context, there is no room for any duty. Duties would contradict the natural freedom of the right.

In construing anew the droit subjectif, it seems that some Italian scholarship sustains the legal realistic approach. [FN62] This approach affirms that the diritto soggettivo lives within the reality of the social context and is subject to that reality's constraints. It supports the view that there are other values that limit the fulfillment of the individual's interests. Indeed, like the legal realists at the outset of the twentieth century in the United States, this scholarship takes into account values and interests that are different from the exclusive interest of the single owner. It acknowledges the legitimacy of the social function of property rights [FN63] set forth by the Italian Constitution. [FN64]

As far as the international arena is concerned, whether a constitution exists is a matter of controversy, [FN65] one may argue, as already stated, [FN66] that an array of principles exists that acts like a "form of international constitution." [FN67] Indeed, rules and principles that provide for "rights of solidarity" (such as social and economic development) can also be found in the international framework [FN68] and they can be used to support a different way of thinking about property rights, and consequently IPRs.

1. Libertarian and Egalitarian Liberals

In the 1950s Friedrich Von Hayek strongly opposed the premise and consequences of the “new property.”[\[FN69\]](#) He opposed the whole idea of welfare states and, generally, the intervention of the state in the market. Within the framework of his theory, property only has the role of satisfying individual preferences.

To fulfill that role, property must be free from collective constraints on use, possession, and, most important of all, transfer. . . . The ***167** state's core legitimate function is to facilitate individual attempts to satisfy personal preferences, which will ordinarily occur through market transactions. Property, then, must always (or nearly always) be available as market property, or commodity. [\[FN70\]](#)

The same idea of property is the basis of the political thought of Robert Nozick in the very different context of the 1970s. For Nozick, rights are not invented by the state, but rather, the state is a human invention that is founded upon pre-existing rights. For Nozick, the primary task of the state is to secure individual property rather than interfere with it. The result is a “market-oriented” idea, an “ultra-minimum state.” If certain rights are so important, the state cannot step in and abridge them in any way. For example, redistributive policies that tax the rich to help the poor violate individual rights. [\[FN71\]](#) Egalitarian liberals [\[FN72\]](#) like John Rawls disagree: “government should therefore assure each person, as a matter of right, a decent level of such goods as education, income, housing, health care and the like.”[\[FN73\]](#)

The relationship between Nozick and Rawls resembles, mutatis mutandis, the political debate that occurred during the New Deal between the defenders of the market economy and the advocates of the welfare state. [\[FN74\]](#) Two different ideas of property came out of that debate and, interestingly, the same two ideas emerged from the debate between the libertarian and egalitarian liberals.

2. Communitarian Liberals

A strong attempt to challenge egalitarian liberalism comes from the communitarians. [\[FN75\]](#) It challenges one of the aspects endorsed by liberals (both egalitarian and libertarian): the idea that “rights are prior to the ***168** good,” that is, the “neutrality” of the state. [\[FN76\]](#) Communitarians maintain that justice cannot be detached from any conception of the “good life,” and that rights depend for their justification on the moral importance of the ends they serve. [\[FN77\]](#) This is the central critique of the communitarians against the liberal's creed of “neutrality” of the state. [\[FN78\]](#) Michael J. Sandel, one of the major exponents of communitarian scholarship, criticizing egalitarian liberals, asks “[w]hy should our political identities not express the moral and religious and communal convictions we affirm in our personal lives?” [\[FN79\]](#) and again states that “rights cannot be neutral with respect to that moral and religious controversy.” [\[FN80\]](#)

These ideas led to a concept of property rights that is “permeable” to public and social values. Since communitarians are sensitive to emerging values and interests, and because they recognize the influence of the good life in the lawmaking process, they can spur a “social-oriented view” of the property that takes into account, inter alia, the demand for a more equitable distribution of wealth [\[FN81\]](#) and for, more generally, “non-western” approaches. For example, IPRs in the international arena are tailored to enhance the interests of industrial exploitation of intellectual capital by highlighting the role of the rights owner and underplaying the role of other needs. [\[FN82\]](#) The communitarian idea of property would take into account those other needs, such as the nonindustrial uses of intellectual property (e.g., like food security and conservation) [\[FN83\]](#) and would be very useful in counterbalancing the continuing trend in the expansion of IPRs. [\[FN84\]](#)

***169** 3. The Public Domain Debate

The theories that argue for a commodity perspective are usually those that presuppose a marginal role of the state, like Von Hayek's. When the focus shifts to intellectual property rights, those who argue for strong, "impermeable" property rights hold that IPRs ought to be limited as much as possible. [FN85] It is, indeed, a coherent corollary of the libertarian premise. [FN86] For libertarian liberals, the state must avoid interfering with the private rights of citizens and intellectual property rights, because of their nature (i.e., non-excludable and non-rivalrous), require a strong intervention by the state.

In the same way, the contemporary "public domain" school of thought argues for limiting the scope and the expansion of IPRs. [FN87] It assumes that the public domain [FN88] must be protected against a "new enclosure movement." [FN89] This scholarship opposes the creation of strong IPRs because it believes that the purpose of intellectual creation to serve all humankind is better fulfilled by allowing intellectual creation to remain in the public domain.

In the same stream of thought, some scholars [FN90] have demonstrated the economical efficiency of safeguarding the public domain. They also have lamented the undue expansion of protection of intellectual ownership in cyberspace and claim that, as far as domain names are concerned, a "new, new property" has been created. This is a strong new property right that serves the interests of western countries and is similar, to a certain extent, to a colonialist movement. [FN91]

D. Reifying the Public Domain

In legal thought, the general idea of right revolves around a specific subject [FN92] who has an interest (that the rule of law considers worthy of *170 protection) [FN93] and who is granted the power enshrined in the right. James Boyle, however, attempts to shift that perspective by suggesting another approach to broaden the scope of the public domain. [FN94] He tries to reify the concept of public domain by shifting attention away from the interest of the single subject to the common interest of all subjects considered as a unit. To accomplish this, all "scattered" interests must be fused into one single but shared interest, thus creating a new concept of public domain. In this way Boyle gives conceptual autonomy to the social aspect of property and is able to "both clarify and to reshape perceptions of self-interest" [FN95] in a way that can lead to a new and more solidaristic idea of property right.

IV. The TRIPs Agreement

The dialectic tension between the two ideas of property rights, when applied to IPRs, is manifest in the TRIPs agreement. [FN96] Administered by the World Trade Organization the TRIPs agreement "together with the 1968 Stockholm Conference that adopted the revised Berne and Paris Convention . . . is undoubtedly the most significant milestone in the development of intellectual property in this century." [FN97] For industrialized regions, such as the United States and Europe, "intellectual capital" has become both an important asset to protect and a field of comparative advantage to withhold. [FN98] For that reason, the TRIPs agreement has been clearly embedded with western interests by defining IPRs only in terms of their industrial application. [FN99] Indeed, it is an evident example of an *171 agreement based on western values and approaches. [FN100] The TRIPs agreement imposes a strong form of IPRs, which protect the rights holder, and provides very limited room for exceptions; [FN101] the dominant construction of the agreement has been, since a few years ago, to foreground the logic of property as a commodity. [FN102]

However, through a deeper analysis of the agreement, it is possible to see that the commodity conception of IPRs is not the only vision of private property embedded in the TRIPs agreement (even though it is undoubtedly the dominant one). In the TRIPs agreement, a public policy strand (including human rights concerns, environmentalism and public health) stands in tension with the commodity logic of IPRs. Indeed, the regulatory framework of the TRIPs agreement does allow an interpretation consistent with a public policy perspective. [FN103] For example, Article 6 makes a provision [FN104] for international exhaustion which allows parallel importations. [FN105] Article 30 permits states to provide limited exceptions to the exclusive right conferred by a patent to the holder of the rights. [FN106] Article 7 strikes a balance between the interests of the owner of an IPR and consumers. In general, the text of the TRIPs agreement, read in conjunction with the Doha Declaration, permits an interpretation of the TRIPs agreement which is more permeable to the public policy perspective. [FN107]

This tension, in the pre-TRIPs era, was mitigated by international agreements that provided mechanisms (such as rules requiring compulsory license) to strike a balance among the competitive interests. [FN108] With the *172 adoption of the TRIPs agreement the tension has dramatically increased between rights owners, [FN109] interested in maximizing their profits, and the consumers of IPRs interested in receiving a fair price and accessibility to products. [FN110]

V. Conclusion

The two ideas of property discussed above are the outcome of different political perspectives. The idea of property as a market commodity is based on the belief that free individuals in a society will act in a free market through contractual instruments in order to maximize their interests. This is the basic idea enshrined in the legal system WTO and in the TRIPs agreement: the neoliberal creed, [FN111] a form of "market fundamentalism." [FN112] The dialectic relationship between the two concepts of property rights pervades every level of the debate about IPRs. Indeed, it can be found in legal texts, such as the TRIPs agreement, legal discussion, [FN113] and judicial decisions. [FN114]

It seems that the transition from one conception to the other is continuing even though uneven and not periodic. It is a dialectic relationship that sheds light on why and how intellectual property rights are at present shaped. This may help in understanding the present flaws of IPRs, and consequently, it may aid to correct them according to new emerging needs that otherwise would probably be underestimated and put in the shade. In fact, the dialectic relationship illuminates the actual existence of IPRs and puts in evidence the imbalance (in terms above described) of values and may spur lawmakers and, generally, the legal debate to consider solutions aimed to strike a line in the continuous effort to find a "fair" point of equilibrium. What "fair" means cannot be said, but the simple awareness of this kind of relationship might help in this regard.

[FNa1]. J.D., University of Pisa, Italy. Ph.D. candidate, Institute for Advanced Interdisciplinary Studies (ISUFI), University of Lecce, Italy. Visiting scholar at Fredric G. Levin College of Law, University of Florida, Gainesville, Florida, U.S.A., Fall 2004. I would like to express my thanks to Professors F.D Busnelli and G. Comande without whose support I could not have undertaken my experience as visiting scholar in the United States. My thanks go also to Professor J.T. Gathii for his patience during my stay at Albany Law School, New York and to whom I owe the writing of this Article. Deep thanks go to Professors M.C. Malaguti and T.F. Cotter who helped me, with their insightful comments and suggestions, to improve this work. Last but not least, my

deepest and heartfelt thanks go to Maestro Professor A. de Nitto who, among the countless things he taught, encouraged me to know to think rather than to think I know.

[FN1]. See [35 U.S.C. § 261 \(1988\)](#) ("Subject to the provisions of this title, patents shall have the attributes of personal property."). For a discussion of similarities and differences between intellectual property and personal-real property, see Harold Einhorn, Patent Licensing Transactions, § 1.01 (2002) (many of the aspects of patent rights are closer to those of real rather than personal property. For example, an action of infringement is similar to an action of trespass and there is an established system of use by permission of the owner); Edwin C. Hettinger, Justifying Intellectual Property, in Intellectual Property 17 (Adam D. Moore ed., 1997); Peter Drahos, A Philosophy of Intellectual Property, § 7 (1996) (intellectual property in abstract objects "equals" information and information in turn "equals" knowledge as described by Karl Popper); Karl Popper, Objective Knowledge, a Realistic View of Logic, Physics and History, ch. 2 (1972) (Popper's analogy between knowledge and honey bees may also be enlightening.).

[FN2]. Such as literary and artistic works, symbols, names, images, designs, and inventions used in commerce.

[FN3]. See generally Henry John Roby, An Introduction to the Study of Justinian's Digest (1886).

[FN4]. See Anthony D'Amato & Doris Estelle Long, International Intellectual Property Law 3 (1997) (emphasis added). The same power is granted by all international agreements that deal with IPRs. See, e.g., Paris Convention for the Protection of Intellectual Property, Mar. 20, 1883, [21 U.S.T. 1583 \(as revised on July 14, 1967 in Stockholm\)](#); see also Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments - Results of the Uruguay Round vol. 31, 33 I.L.M. art. 28 (1994) [hereinafter TRIPs Agreement].

[FN5]. It would be the same if the property were personal and not real.

[FN6]. See, e.g., Garrett Hardin, The Tragedy of the Commons (1968); Jules L. Coleman, Readings in the Philosophy of Law (Garland Pub. ed. 1999).

[FN7]. See Hardin, *supra* note 6, at 552.

[FN8]. See Patrick Croskery, [Institutional Utilitarianism and Intellectual Property](#), 68 *Chi.-Kent L. Rev.* 631, 631-33 (1993).

[FN9]. Strict liability is that particular liability that does not depend on actual negligence or intent to harm, but that is based on the breach of an absolute duty to make something safe. It is also termed absolute liability or liability without fault. See

Black's Law Dictionary (8th ed. 2004).

[FN10]. See [35 U.S.C. §§ 154\(d\)\(1\)\(A\)\(I\), 271\(a\)-\(c\) \(2004\)](#).

[FN11]. See Michael P. Scharf, *The Law of International Organization* 654 (2001); see also the definition of "liberal" in *The Encyclopedia of Philosophy* 3 (Paul Edward ed., 1972). In a very broad sense, the word "liberal" describes one of several ideologies that asserts the liberty of the individual to dissent from orthodox tenets or established authorities in political or religious matters. It attempts to circumscribe the limits of political power and to define inalienable individual rights. It is often seen as being the ideology of the Industrial Revolution and the subsequent capitalist system. Ideas such as freedom of speech, freedom of religion, and freedom of thought were first proposed by classical liberal scholars.

[FN12]. See James T. Gathii, *Neoliberalism, Colonialism and International Governance: Decentering the International Law of Governmental Legitimacy*, [98 Mich. L. Rev. 1996, 2016 \(2000\)](#).

[FN13]. For an outlook on a different approach such as the third world approaches to international law, see [James T. Gathii, *Alternative and Critical: The Contribution of Research and Scholarship on Developing Countries to International Legal Theory*, 41 Harv. Int'l L.J. 263 \(2000\)](#); James Gathii, *Third World Approach to International Law Vision Statement*, at <http://www2.als.edu/faculty/jgathii/twail.html> (last visited Dec. 2, 2004).

[FN14]. Bigliuzzi Geri et al., *Private Law* 288 (1986); see also A.M. Honor, *Ownership*, in *Readings in the Philosophy of Law*, supra note 6, at 557 (that is a very important lesson that must be kept in mind, for example, in analyzing emerging IPRs like those concerning "traditional knowledge"); cf. Mark Ritchie, Kristin Dawkins, & Mark Vallianatos, [Intellectual Property Rights and Biodiversity: The Industrialization of Natural Resources and Traditional Knowledge](#), [11 St. John's J. Legal Comment. 431 \(1996\)](#).

[FN15]. See James Gathii, *Research Agenda*, at <http://www2.als.edu/faculty/jgathii/research.html> (last visited Dec. 2, 2004).

[FN16]. Different conceptions exist in the considered legal-framework as well. For some distinctions, see generally James Boyle, [The Second Enclosure Movement and the Construction of the Public Domain](#), [66 Law & Contemp. Probs. 33 \(2003\)](#) (Boyle starts his analysis by asking whether public domain is "the opposite of property," and stating that it is impossible to think about the public domain or commons without considering the two basic ideas of property).

[FN17]. For an explanation of "social function" and the "social relation approach," see Joseph William Singer, [The Reliance Interest in Property](#), [40 Stan. L. Rev. 611, 614-750 \(1988\)](#). For our purposes, "social function" equals "public function." See also

Jeremy Waldron, [From Authors to Copiers: Individual Rights and Social Values in Intellectual Property](#), 68 Chi.-Kent L. Rev. 841 (1993).

[FN18]. See Honore, Ownership, in Readings in the Philosophy of Law, supra note 6, at 594-95.

[FN19]. To expand on this subject, see, e.g., id.

[FN20]. See Boyle, supra note 16, at 22.

[FN21]. Usually the social function imposes a reduction of the right of disposition to guarantee the interest of the counter-party. See id.

[FN22]. See generally Frederic Von Hayek, The Road to Serfdom (1944).

[FN23]. See infra Part III.D.

[FN24]. See Gregory S. Alexander, Commodity & Propriety 366 (1997).

[FN25]. See Singer, supra note 17, at 9.

[FN26]. See Gathii, supra note 12, at 1997 (“Law is politics!”).

[FN27]. Cf. Drahos, supra note 1, at 1.

[FN28]. See TRIPs Agreement, supra note 4.

[FN29]. See id.

[FN30]. See, e.g., Gabriella Venturini, The World Trade Organization (2000).

[FN31]. “Absolute” is used “to deny the temporary, intransmissible or determinate character of an interest; sometimes to deny the defeasible character of an interest, . . . ; sometimes to emphasize its exemption from social control.” See Honore, Ownership, in Readings in the Philosophy of Law, supra note 6, at 594.

[FN32]. See, e.g., Francesco De Martino, Individualism and Roman Private Law, in Law and Society in Ancient Rome (Giuffrè ed., 1979) (showing how the pater familias' property rights were limited by the public interest).

[FN33]. See generally Sir William Blackstone, Commentaries on the Laws of England, in Blackstone's Commentaries 16 (St. George Tucker ed., 1969).

[FN34]. Id. at 1.

[FN35]. See Jerome C. Knowlton, Questions and Answers in Blackstone 261 (1922).

[FN36]. Id.

[FN37]. For a better understanding of this shift, one should contextualize and remember that at the outset of the twentieth century there was tremendous economic, political, and social upheaval. It was a period of boom in capitalism and industrialization with deep economic changes that widened the gap between the haves and have-nots. The boom was followed by a deeply economic recession that hit the United States and, after a while, all the other industrialized countries. That social and economical turmoil fostered the idea that adjustments in the relationship between governments and the private sphere were necessary to adapt American law and politics to changing economic and social conditions. With a great wave of poverty and unemployment, a reform that could achieve social and political justice was necessary. Achieving that goal was indeed crucial to change the way of thinking about some basic "social structure" like the idea of property rights (without any revolution, however).

[FN38]. Wesley Newcomb Hohfeld is deemed to be the father of so-called "legal realism." See generally Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions* (W.W. Cook 1978) (1919).

[FN39]. See Alexander, *supra* note 24, at 352-77 (pointing out that this metaphor indicates, for the first time, three aspects of the ownership: "first, it indicates that ownership is a complex legal relation. Second, the metaphor illuminates the fact that the constitutive elements of that relationship are legal rights. Third, . . . it underscores the social character of that relationship").

[FN40]. Id. at 323.

[FN41]. This is another strong critique made by the legal realists. There is no neutral procedure to construct a law or a norm or, in general, a legal rule. It is always a matter of ideology or policy which is often hidden behind the shield of a formal, logical deduction or reasoning. Id.

[FN42]. See generally Richard T. Elyin, *Property and Contract in Their Relations to the Distribution on Wealth* (1914).

[FN43]. Id. at 136.

[FN44]. See Alexander, *supra* note 24, at 326.

[FN45]. Although this affirmation is highly controversial when speaking of real property, it might be different in the arena of intellectual property rights. In fact, the reason why the IPRs were established was to promote the spread of knowledge and thus for a social purpose. See, e.g., [U.S. Const. art. I, § 8, cl. 8](#).

[FN46]. See Geri et al., *supra* note 14, at 290 (discussing the Italian legal

framework).

[FN47]. For a first attempt in that direction, see James T. Gathii, [Construing Intellectual Property Rights and Competition Policy Consistently with Facilitating Access to Affordable AIDS Drugs to Low-End Consumers](#), 53 Fla. L. Rev. 727 (2001) (suggesting a particular construction of the TRIPs agreement that would let the “social function” of the intellectual property rights emerge). It must be noticed, however, that the problem is much larger. Some of the fundamental international organizations like the World Bank or the WTO pretend to act neutrally, i.e., on the basis of the mere economic or trade policy. See *id.* Another possibility might be to use the International Economic Constitution, once we agree it exists, to assert the influence of the social function. See generally Gathii, *supra* note 15.

[FN48]. See Alexander, *supra* note 24, at 341.

[FN49]. This is the idea of the minimal state. See Robert Nozick, *Anarchy, State, and Utopia*, Introduction (1974).

[FN50]. See Joseph William Singer, *The Edge of the Field: Lessons on the Obligations of Ownership* (2000); see generally Singer, *supra* note 17 (pointing out the duties that owners have toward the society, and arguing that even corporate power should not be exercised for the exclusive benefit of shareholders but for the benefit of society as a whole).

[FN51]. This is a very powerful idea from a political point of view that tends to change the former idea of the social relation. However, it must be kept in mind that from a rigorous legal point of view, property rights (*stricto sensu*) in the civil law system have no “duty” but only limits. See Geri et al., *supra* note 14, at 288.

[FN52]. The legal institution of “compulsory license,” provided for in many countries and fundamental IPRs’ international treaties, is not included in the U.S. law.

[FN53]. See generally Alexander, *supra* note 24, § XII.

[FN54]. The welfare state in the United States refers to the New Deal program enacted by President Roosevelt in response to the Great Depression.

[FN55]. The “commodity conception” is a concept used by Alexander to underscore the classical idea of property (and reintroduced in the 1970s by neoliberals like Nozick) as an exclusive link between a person and an object, a property with no constraints whatsoever. According to this idea, the property’s function is to help the human being to satisfy personal preference through market transactions. Hence, property must always be available as market property, precisely, as a commodity. See generally Alexander, *supra* note 24.

[FN56]. See Alexander, *supra* note 24, at 362 (showing how the landlord by now has

an increased array of duties toward the tenant and how this was a radical reversal in judicial decision and theory). The basis for this change was, in summary, the shift from the idea of the ownership of a house as an investment (commodity conception) to an idea of house ownership as a tool to satisfy a basic human need. The interest that underpins the property is no longer fungible. *Id.*; see also Margaret Jane Radin, *Residential Rent Control*, 15 *Phil. & Pub. Aff.* (1986).

[FN57]. See generally Alexander, *supra* note 24, § XII.

[FN58]. The comparison between American legal thought and the Italian is arbitrary and does not take into account other possible approaches existing in other civil countries and traditions.

[FN59]. See Riccardo Orestano, *Subjective Right and Subject Without Right*, in *Jus, Vita e Pensiero* 150 (1960).

[FN60]. See generally *id.* (for the historical-ideological context).

[FN61]. See Geri et al., *supra* note 14, at 288.

[FN62]. *Id.* § VI; see also Singer, *supra* note 17, at 618-21.

[FN63]. See Geri et al., *supra* note 14, at 288.

[FN64]. See Italy Const. art. 42, § 1.

[FN65]. Cf. Paolo Picone, *International Economic Law and Economic Constitution in the International Framework* (1982) (arguing for the existence of an economic constitution in the international environment).

[FN66]. See *supra* text accompanying note 47.

[FN67]. See, e.g., Ingrid Detter, *The International Legal Order* 30 (1994).

[FN68]. See, e.g., *The Universal Declaration of Human Rights adopted and proclaimed by General Assembly of the United Nations, Resolution 217 A (III), Dec. 10, 1948*, available at <http://www.un.org/Overview/rights.html> (last visited Oct. 15, 2004); see also Scharf, *supra* note 11, at 671-90.

[FN69]. See generally Hayek, *supra* note 22.

[FN70]. Alexander, *supra* note 24, at 366-67. Following this thought, it should be admitted as a necessary consequence that property rights should be disseminated as much as possible. See *supra* text accompanying note 50.

[FN71]. See Michael J. Sandel, Book Review, [Political Liberalism](#), 107 *Harv. L. Rev.*

[1765, 1765 \(1994\)](#).

[FN72]. These labels are very common: a first distinction is between utilitarian and rights-oriented liberals. The words “right-oriented” underscore the respect for individual rights as opposed to the utilitarian consideration.

[FN73]. Sandel, *supra* note 71, at 1765.

[FN74]. *Id.* at 1765-66.

[FN75]. See Michael J. Sandel, *Liberalism and the Limits of Justice*, at XI (1998) (The communitarian critique “holds that principles of justice depend for their justification on the moral worth or intrinsic good of the ends they serve.”).

[FN76]. See Sandel, *supra* note 71, at 1766. “Rights are prior to the good” has two meanings; first, in the sense that certain individual rights (education, income, housing, etc.) “trump,” or outweigh, considerations of the common good. *Id.* Second, the “rights are prior to the good” means that the state (*rectius*, the government) should be neutral (i.e., impartial, unbiased) among competing conceptions of the good life and, hence, principles of justice that specify our rights do not depend for their justification on any particular conception of the good life.

[FN77]. See *id.* at 1766-68.

[FN78]. See Michael J. Sandel, *The Political Theory of the Procedural Republic*, in *The Power of Public Ideas* (Robert B. Reich ed. 1988).

[FN79]. See Sandel, *supra* note 71, at 1774.

[FN80]. *Id.* at 1778.

[FN81]. See generally Gathii, *supra* note 12.

[FN82]. See TRIPs Agreement, *supra* note 4, arts. 27, 30, 31.

[FN83]. See generally Gathii, *supra* note 12.

[FN84]. See Boyle, *supra* note 16, at 38-39; see also World Trade Organization, Ministerial Declaration, adopted at the WTO Doha Ministerial Conference held in Doha, Qatar, Nov. 20, 2001 WT/MIN(01)/DEC/1 [hereinafter Ministerial Declaration], available at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm (last visited Oct. 15, 2004).

[FN85]. See Friedrich Von Hayek, *The Fatal Conceit: the Errors of Socialism* 37 (1988).

[FN86]. Contra Drahos, *supra* note 1, at 53, 56.

[FN87]. See generally Boyle, *supra* note 16.

[FN88]. Part of “public domain” consists of works “free for appropriation, transfer, redistribution, copying, and performance.” See, e.g., *id.* at 68.

[FN89]. See generally *id.* The first enclosure movement refers to the process that began in England in the fifteenth century of fencing off common land and turning it into private property. See *id.* at 33-36.

[FN90]. See, e.g., Aunpam Chander, The [New, New Property](#), 81 *Tex. L. Rev.* 715 (2003).

[FN91]. See generally *id.* at 779.

[FN92]. See Orestano, *supra* note 59.

[FN93]. See Geri et al., *supra* note 14, at 287.

[FN94]. See generally Boyle, *supra* note 16.

[FN95]. *Id.* at 71.

[FN96]. See *supra* text accompanying note 4. It covers copyright and related rights, trademarks, geographical indications, industrial design, patents, and layout-designs of integrated circuits. See TRIPs Agreement, *supra* note 4, arts. 9, 15, 22, 25, 27, 35.

[FN97]. See Daniel Gervais, *The TRIPs Agreement. Drafting History and Analysis* 3 (1998).

[FN98]. A proof of the paramount importance of “intellectual assets,” in the United States, is the “Special 301” section in the U.S. Code. See § 182 of the Trade and Tariff Act of 1974, [19 U.S.C.A. § 2411 \(2004\)](#), as amended by Section 1303 of the Omnibus Trade and Competitiveness Act of 1988. It requires the United States Trade Representative to regard as an “unreasonable” trade practice - and hence to impose retaliation measures - the denial by a foreign government of fair and equitable “provision of adequate and effective protection of intellectual property rights notwithstanding the fact that the foreign country may be in compliance with the specific obligations of the TRIPs agreement.” *Id.*

[FN99]. See TRIPs Agreement, *supra* note 4, art. 27 (1); see also Gathii, *supra* note 47, at 762.

[FN100]. See, e.g., Jayashree Watal, *Intellectual Property Rights in the WTO and Developing Countries* (2001).

[FN101]. See TRIPs Agreement, *supra* note 4, arts. 30, 31.

[FN102]. See Gathii, *supra* note 47, at 747.

[FN103]. This is particularly true after the Declaration on the TRIPs Agreement and Public Health. See Ministerial Declaration, *supra* note 84.

[FN104]. See TRIPs Agreement, *supra* note 4, art. 6.

[FN105]. Under a regime of international exhaustion, the patent owner's right to control the use and resale of product embodying the patented invention is exhausted, in a given country, once the patent owner sells, or authorizes the sale of, that product anywhere in the world. Hence, it is possible to import that product from another country (parallel importation). See [Thomas F. Cotter, Market Fundamentalism and the TRIPs Agreement, 22 Cardozo Arts & Ent. L.J. 43 \(2004\)](#).

[FN106]. See TRIPs Agreement, *supra* note 4, art 30.

[FN107]. See generally James T. Gathii, The Legal Status of the Doha Declaration on TRIPs and Public Health Under the Vienna Convention on the Law of Treaties, 15 Harv. J.L. & Tech. (2002).

[FN108]. See generally Paris Convention for the Protection of Intellectual Property, Mar. 20, 1883, [21 U.S.T. 1583 \(as revised on July 14, 1967 in Stockholm\)](#); Berne Convention for the Protection of Artistic and Literary Works, Sept. 9, 1886, [25 U.S.T. 1341 \(as revised on July 24, 1971 in Paris\)](#).

[FN109]. As a matter of fact, the TRIPs agreement incorporates most of the Paris and Berne Conventions. Nonetheless, Article 31 of TRIPs set forth so many requirements in order to allow "Other Use Without Authorization of the Right Holder" that the tension, in a way mitigated by the incorporation of the aforementioned agreements, is still existing in all its breadth.

[FN110]. See Gathii, *supra* note 47, at 759.

[FN111]. See *id.* at 737.

[FN112]. See Joseph E. Stiglitz, Globalization and Its Discontent 73-74 (2002) ("Market Fundamentalism" is the idea that markets are a priori the solution to all problems, without taking into account the defects that sometimes besets market.).

[FN113]. See Cotter, *supra* note 105.

[FN114]. See, e.g., United States - Import Prohibition Of Certain Shrimp and Shrimp Products, AB 1998-4, Report of the Appellate Body, available at <http://>

www.wto.org/english/tratop_e/dispu_e/ab_reports_e.htm (last visited Oct. 15, 2004).