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978-1-107-06552-9 - Diversity in Intellectual Property: Identities, Interests, and Intersections

Edited by Irene Calboli and Srividhya Ragavan

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Introduction: Recognizing Diversity in Intellectual Property

Irene Calboli^{} and Srividhya Ragavan^{**}*

I. Recognizing Diversity: The Ongoing Challenge

Diversity is arguably one of the most prominent features of globalization. Indeed, the integration of markets and the changes brought by the large-scale diffusion of information and communication technologies have brought the debate on diversity to the forefront. As diversity has permeated into a more prominent social phenomenon, awareness of the diverse segments of society – based on different races, genders, religions, nationalities, and much more – and the profound socioeconomic impact of diversity has grown. In several parts of the world, diversity is portrayed by politicians and legislators as a powerful hallmark of political, economic, and social integration. “Unity in diversity” and “racial harmony” are examples of slogans that positively portrays diversity and highlight the importance of diversity in a multi-cultural society.

Despite the rise of diversity to an internationally relevant topic of attention, however, one cannot ignore that a disturbing trend of denial of resources continues to be commonplace with respect to minorities and certain marginalized groups. In particular, racial, gender, and religious-based minorities or groups of people from specific countries or regions of the world continue to have limited access to resources, opportunities, or simply knowledge and information. This lack of true inclusiveness manifests itself primarily as differences in entitlements, which

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We would like to thank the contributors to this volume for insightful conversations on the content and structure of this Introduction. In addition, we are particularly grateful to Ahmed Abdel Latif and Margaret Chon for reading and offering comments on a previous draft and, in general, for their support during the editing process of the book. Any mistakes or omissions are our own.

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work to either exclude or not fully include minorities and diverse groups in the access to and allocation of economic and social power. Not surprisingly, minorities and marginalized groups have denounced these differences throughout the years, both directly and through their advocates. More specifically, they have requested that diversity-related issues play a more dominant role – at times individually and other times more comprehensively – in the national and international debates leading to norm setting and in the application and interpretation of these norms.

In response to these requests, often times the postulated solution is to integrate diversity with the prevailing mainstream. Alternatively, tolerance is preached as the solution to embrace diversity. Unfortunately, none of these postulated solutions has proven, so far, to be sufficient to build a truly inclusive system. Even avowed and celebrated legal norms that are targeted to promote acceptance of diversity are frequently not carefully weighed alongside concerns of inclusiveness in the balance, nor are they always sufficient to counter the inherent balance of power parities. In this context, one more optimal solution could be, instead, building a progression toward a fuller appreciation and acceptance of diversity. In particular, legal norms could be interpreted to promote such appreciation and acceptance. Such interpretation in a specific area of law – intellectual property – is the precise scope of the narratives of this book, which, we hope, will reinvigorate the debate in this important area.

II. Recognizing Diversity in Intellectual Property

This book specifically focuses on intellectual property rights to showcase the gap between legal norms and the existing entitlements in access and allocation of economic and social power. The focus on intellectual property rights is because the rights involved therein can serve as an important tool to achieve some of the goals of promotion and protection of diverse interests. Forms of intellectual property rights are critical, for instance, to the creation and wide dissemination of knowledge and information. Further, intellectual property rights' economic potential can serve the interests of diverse groups at several levels. In this context, this book particularly analyzes how existing intellectual property norms and the current culture revolving around these norms impact questions related to equality, access, personal freedoms, privacy, wealth distribution, and allocation and exercise of social and economic power.

At the outset, it is important to note that the recognition and promotion of diversity is not generally a part of the inherent design of the intellectual property system. Indeed, the traditional narratives related to intellectual property law rarely address issues and interests related

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to diversity.¹ Instead, the intellectual property debate has been historically informed by theories based on law and economics as well as property rights.² Scholars and lawmakers commonly invoke utilitarian explanations to justify granting exclusive intellectual property rights as a necessary societal bargain to incentivize innovation and creativity or to promote fair competition in the marketplace.³ Economic efficiency, competition-driven concerns, and concepts such as market failure are similarly invoked to justify limitations to these exclusive rights.⁴ In several instances, property-based assertions are also raised to promote rights over inventions, creative works, and established business goodwill.⁵ Further, intellectual property norms heavily rely on the marketplace and are driven by harmonization tendencies in particular since their inclusion in the trade regime.

As a consequence, the concept of diversity has not been a central concern of what may be defined as the mainstream international intellectual property agreements characterized by the World Intellectual Property Organization (WIPO), the World Trade Organization (WTO), as well as regional and national intellectual property regimes. Rather, diversity has been a concern that the intellectual property system accommodated and composed only to a minimum, and with certain reluctance. For instance, the concepts of “morality” and “public order,” which are relevant in protecting a subset of diversity-related interests, have historically been included in several international intellectual property agreements⁶ and, consequently, domestic legislation primarily as an expression of national

¹ For leading contributions in this respect, see Rosemary J. Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 TEXAS L. REV. 1853 (1991); ROSEMARY J. COOMBE, *THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORITY, APPROPRIATION AND THE LAW* (1998) (hereinafter COOMBE, *CULTURAL LIFE*).

² For a detailed summary of the various theories used by intellectual property scholars, see William Fisher, *Theories of Intellectual Property*, in NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 168 (Stephen P. Munzer ed., 2001).

³ See, e.g., WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* (2003). See also Robert P. Merges, *Economics of Intellectual Property Law*, in OXFORD HANDBOOK OF LAW AND ECONOMICS (Francesco Parisi ed., forthcoming 2015).

⁴ See Wendy Gordon, *Fair Use as Market Failure*, 82 COLUM. L. REV. 1600 (1982).

⁵ See, e.g., ROBERT P. MERGES, *JUSTIFYING INTELLECTUAL PROPERTY* (2012); Adam Mossoff, *Who Cares What Thomas Jefferson Thought About Patents: Reevaluating the Patent “Privilege” in Historical Context*, 92 CORNELL L. REV. 953 (2007).

⁶ See, e.g., Art. 6 *quinquies*, Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, 21 U.S.T. 1583, 828 U.N.T.S. 305; Art. 27(2), Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 (1994); THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 320 (1999).

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sovereignty of the signatories rather than as an exemplar for the protection for diverse interests. Furthermore, individual countries and regions have only sporadically adopted legal measures to streamline the protection of diversity. For example, New Zealand has considered the interests and the rights of its Māori citizens as part of its national intellectual property system;⁷ India, Thailand, and Indonesia have resorted to national provisions on compulsory licenses to permit access to pharmaceuticals to their populations;⁸ and the European Union has been actively resorting to the concept of morality with respect to the patentability of certain types of biotechnological inventions.⁹ Still, none of these initiatives built a comprehensive framework that considers diversity as a core component of the national or regional intellectual property law and policies within these jurisdictions.

To the contrary, issues relating to the protection of diverse identities and diverse interests have traditionally been addressed primarily outside the intellectual property system both at the international and national level – for example, cultural diversity-related interests have been addressed at the international level under the cultural development agenda sponsored by the United Nations Educational, Scientific, and Cultural Organization (UNESCO)¹⁰ whereas additional diversity interests have been pursued under the auspices of other United Nations agencies.¹¹

Against this background, minorities, indigenous peoples, and advocates for these groups have repeatedly called for more consideration to be paid to their interests by the mainstream. For many years, these calls went unanswered. Perhaps due to the factors of globalization, or the changes in geopolitics and power shifting in the international

⁷ See, e.g., Susy Frankel, *A New Zealand Perspective on the Protection Traditional Knowledge*, in *INTERNATIONAL TRADE IN INDIGENOUS CULTURAL HERITAGE: LEGAL AND POLICY ISSUES* 439 (Christoph Graber et al. eds., 2012).

⁸ See James P. Love, *Recent Examples of the Use of Compulsory Licenses on Patents*, KNOWLEDGE ECONOMY INTERNATIONAL (updated March 2007), available at http://www.keionline.org/misc-docs/recent_cls.pdf.

⁹ See, e.g., Case C-34/10, *Oliver Brüstle v. Greenpeace eV*, 2011 E.C.R. I-0981. See also Convention on the Grant of European Patents, October 5, 1973, 13 INT'L LEGAL MATS. 268 (1974); Directive 98/44/EC, of the European Parliament and of the Council of 6 July 1998 on the Legal Protection of Biotechnological Inventions, 1998 O.J. (L 213).

¹⁰ See UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, Oct. 17, 2003, 2368 U.N.T.S. 1; UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, Oct. 20, 2005, in force 18 March 2007, in UNESCO, RECORDS OF THE GENERAL CONFERENCE, 33d sess., Paris, Oct. 3–21, 2005 (2 Vols., 2005), Vol. I, at 83.

¹¹ See, e.g., United Nations Convention on Biological Diversity, June 5, 1992, S. TREATY Doc. 20 (1993), reprinted in 31 I.L.M. 818 (entered into force Dec. 29, 1993).

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(intellectual property) arena or other reasons, recently questions of diverse interests have benefitted from rejuvenated attention. Certainly, the creation of new regional groups – such as the Southern Common Market (MERCOSUR) or the Association of East Asia Nations (ASEAN) – the rise of the “BRIC” countries (Brazil, Russia, India, and China), and the proliferation of bilateral and plurilateral free trade agreements across many continents have all added new voices to the debate on intellectual property norm setting and considerably changed the landscape compared to the previous decades. Not surprisingly, these newer voices have highlighted the importance of appreciating diversity in the intellectual property context.¹² Equally important has been the role of the Internet, which has dramatically re-balanced the bargaining powers of traditionally dominant actors – primarily governments and the corporate world – and instead empowered a new set of actors such as individuals and civil society to voice their opinions and concerns, to mobilize and organize using social media as well as online platforms.¹³

Following these renewed calls for more attention to diversity, there have been movements that have worked to improve the inclusiveness of those that, so far, were excluded. The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled adopted under the auspices of WIPO in 2013 is an important example of an international effort in this direction.¹⁴ The ongoing negotiations for the recognition and protection of traditional knowledge, which are conducted as part of the WIPO Development Agenda largely promoted by developing countries, is yet another example of an international effort at inclusiveness.¹⁵ At

¹² See, e.g., Peter K. Yu, *The Rise and Decline of the Intellectual Property Powers*, 34 CAMPBELL L. REV. 525 (2012).

¹³ To a large extent, opposition from civil society contributed to derail the enactment of the Anti-Counterfeiting Trade Agreement (ACTA) in 2011. For details about ACTA, see OFFICE OF THE U.S. TRADE REP., ANTI-COUNTERFEITING TRADE AGREEMENT (2010), <http://www.ustr.gov/acta>. Similarly, online protests (including the famous “blackout” of Wikipedia on January 18, 2012) contributed to the defeat of the Stop Online Piracy Act, H.R. 3261, 112th Cong. (2011) (SOPA) and the PROTECT IP Act, S. 968, 112th Cong. (2011) (PIPA) in the United States in 2012.

¹⁴ See Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled, available at <http://www.wipo.int/treaties/en/ip/marrakesh/>.

¹⁵ Proponents are currently lobbying WIPO for a treaty on traditional knowledge. *Traditional Knowledge*, WIPO, <http://www.wipo.int/tk/en/> (last visited June 18, 2014). See also WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, *Traditional Knowledge, and Folklore*, 27th sess. Mar. 21, 2014, WIPO/GRTKF/IC/27/INF/2 Rev.2.; Intergovernmental Committee (IGC), WIPO, <http://www.wipo.int/tk/en/igc/>.

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the national and local levels, diverse interests have also gained momentum essentially because causes that were historically promoted by minorities and civil rights activities are now supported by a wider percentage of the population. Many of these causes have also entered the mainstream political debate. For example, the cancellation of several of the Washington Redskins' trademarks by the United States Patent and Trademark Office in June 2014 after almost two decades of litigation,¹⁶ and the growing societal support against the use of the "R word" in sports related activities and elsewhere, is a recent expression of the ongoing attention and sensitivity to diversity.

Yet, also within this changing landscape, intellectual property law's impacts on diversity continue to be viewed primarily from the vantage point of the market. In particular, intellectual property norms continue to capture, diffuse, and incentivize diversity-related interests within the contours of its historically western philosophical boundaries. Diversity concerns, if weighed, continue to be primarily from the perspective of the cost and efficiency calculus from a utilitarian perspective, rather than as one of the many balancing factors within the intellectual property framework.

Hence, the dominant notion of intellectual property protection strictly bounded by norms finalized to capture economic incentives, by commercialization and monetization of intellectual property rights as intangible assets, is no longer sufficient to comprehensively explain the multifaceted complexity of diversity-related interests. As we indicated earlier, this increasingly integrated world demands a more nuanced and balanced approach to the diversity debate within the intellectual property framework, internationally as well as nationally. Through various themes, this book delves into the debate of whether and how prevailing intellectual property norms can comprehensively encapsulate today's diversity-related narratives and could be effectively used to protect and promote a host of diversity-related identities and interests. In doing so, we, the editors, hope that this book becomes a catalyst to create conducive conditions to recognize and better understand the interface between intellectual property norms and diversity-related issues and reconcile the underlying tension between them.

¹⁶ *Blackhorse, et al. v. Pro-Football, Inc.*, Cancellation No. 92046185 (June 18, 2014). The Trademark Trial and Appeal Board (TTAB) had cancelled the Redskins' marks also in 1999, but the decision was overturned by the DC District Court in 2003. The Court of Appeals for the DC Circuit affirmed the district court in 2009. See *Harjo v. Pro Football, Inc.*, 50 U.S.P.Q.2d (BNA) 1705 (T.T.A.B. 1999; *Pro Football, Inc. v. Harjo*, 284 F. Supp. 2d 96 (D.D.C. 2003); *Pro-Football, Inc. v. Harjo*, 565 F.3d 880, 880–81 (DC Cir. 2009).

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III. Introducing the Book: Diverse Perspectives in Intellectual Property

The recognition and exhaustive examination of diversity-related issues in intellectual property remains, nonetheless, a challenging task. As a practical matter, the spectrum of issues that could be explored is certainly wider and more complex than the number of contributions that can be published in a single volume, or perhaps a whole series of volumes. With this book, we primarily intend to provide a representative sample of crucial diversity-related issues in the context of intellectual property. We also remain aware that the notion of diversity is a dynamic concept, which can evolve and vary based on specific surroundings, geography, or historical moments. In particular, we hope to achieve two main objectives with this book. First, we would like to contribute to the academic debates that are currently taking place with respect to selected diversity issues and which we believe would benefit from further discussion and analysis. Second, we hope to start similar debates with respect to issues that have only sporadically been explored by intellectual property scholars, and thus contribute toward meaningful actions and solutions in these contexts. Hence, we use the terms “identities, interests, and intersections” in addition to “diversity” in the title of this book precisely to create a broad(er) platform and, in turn, capture a larg(er) array of issues within the theme of diversity.

Within this broad platform, we offer two distinct trajectories in this book. First, we offer a different view of diversity-related issues embedded within the larger area of intellectual property by identifying areas where the current regimes of intellectual property norms either do not fully account for, or merely exclude or even neglect diverse elements. In this respect, the book presents contributions that promote disruptive thinking by either questioning existing premises or by using a different framework that showcases the lacunae in existing intellectual property norms. Second, we address the extent to which protection should be given to creations of minorities and diverse groups in general. These questions become particularly important when the nature of these creations does not perfectly fit the traditional model of protection currently available – for example, in the case of works or inventions created or invented by local communities as a whole and not solely by defined authors or inventors. In doing so, the book presents contributions addressing whether and how protection should be given to these creations or inventions as well as whether and how it should be denied to third parties who appropriate knowledge and materials from these groups and adapt them to fit within the traditional model of protection.

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This book also offers an analysis of diversity-related issues through different yet not comprehensively explored lenses, such as critical race theories, gender theories, law and religion, law and development theories, and cultural analysis of the law.¹⁷ Such an offering is meant to add new dimensions, or trajectories, to the existing repertoire of challenges offered by intellectual property norms. Still, while supporting broader access, equality, and the protection of diversity in general, some of the presented contributions also question the feasibility of addressing the realization of such protection as part of the goals and objectives to be achieved through intellectual property norms. Ultimately, the distinguishing feature of this book is its attempt to offer alternative readings of issues that impact diversity in a manner that transcends the traditional economic and utilitarian-driven intellectual property theories. Yet, it is neither our intention nor that of our contributors to override the application of the traditional theories. Instead, with the various themes presented in the book, we aim at bringing to focus and reconciling different sets of theories – market-oriented theories based on economic efficiency as well as critical theories, which we believe remain complementary – to fully appreciate the meaning of, and accept the large(r) dimension that applies to, diversity.

In particular, the book's accomplishment is that it creates a conference of leading scholars who have converged to contribute on issues hitherto generally excluded from the mainstream debate on intellectual property, but which, instead, should be included as important elements forming a part of the intellectual property framework. The accomplishments of our authors thus form the most important highlight of this book. In converging to write for the book, and in several instances in their previous scholarship, each one of the authors has pioneered alternative methodologies to the traditional intellectual property narrative and has embraced a more diverse approach to legal scholarship in intellectual property law. These authors offer new trajectories to traditional thought process. Through

¹⁷ Critical legal theories “offer IP scholars a solid yet nuanced framework from which to excavate areas that may benefit from further study.” Sonia Katyal, *Panel 1, Critical Legal Studies in Intellectual Property and Information Law Scholarship*, 31 CARDOZO ARTS & ENT. L. REV. 610, 610–11 (2013, Symposium “Critical Legal Studies and the Politicization of Intellectual Property and Information Law”). For examples of structural critiques of the intellectual property framework using critical legal theories, see COOMBE, *CULTURAL LIFE*, *supra* note 1 (Coombe’s groundbreaking work pioneered the use of critical legal theory in intellectual property law and was highlighted by the other scholars cited in this footnote); LAWRENCE LESSIG, *FREE CULTURE: THE NATURE AND FUTURE OF CREATIVITY* (2004); JESSICA LITMAN, *DIGITAL COPYRIGHT: PROTECTING INTELLECTUAL PROPERTY ON THE INTERNET* (2001); SIVA VAIDHYANATHAN, *COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY* (2001).

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their contributions, this book now hopes to promote awareness about a host of issues that may be of lesser importance from a traditional law and economics standpoint, but remain highly relevant in order to create a constructive forum in which to discuss workable intellectual property regimes for the future, both on an international and national scale.

IV. Issues Addressed in the Book: Identities, Interests, and Intersections in Intellectual Property

Finding the perfect organization for a collective volume can be a challenging task, even more so for a book covering multiple important themes. As editors, we have structured this book around six specific themes, each offering a rich range of views about a specific subset of diversity-related identities, interests, and intersections.

In particular, Part I opens with a section dedicated to the theme “Recognizing and Supporting Diversity in Intellectual Property Norm Setting,” which includes a delineation of the diversity goals and lays the foundation of the book. At the outset, Susy Frankel explores how the rules of international treaty interpretation could support, at least indirectly, an interpretation of the existing international intellectual property agreements that consciously recognizes diverse interests (Chapter 1). Danielle Conway then presents an example of such recognition in international treaties in recounting the story of the adoption of the Marrakesh Treaty, which facilitates access to copyrighted works to an underserved population – the blind and visually impaired (Chapter 2). Importantly, the treaty’s journey was fraught by resistance from the developed world, due to its implication for future intellectual property negotiations – primarily because the agreement limits intellectual property rights rather than expanding them. This resistance reiterates the difficulties in serving a multiplicity of interests, particularly those that are less economically relevant. Yet, the interests of the less privileged should be considered as part of the intellectual property debate. This is precisely what Doris Estelle Long recounts in her contribution about “deviant globalization,” where she discusses the significance of the underground economy (Chapter 3). Another issue that affects the less privileged – access to medicines – is addressed by Yogesh Pai in the chapter that concludes this part by recounting India’s experience in balancing intellectual property rules and access to pharmaceuticals (Chapter 4).

Building on this foundation, Part II addresses “The Influence of Morality, Race, and Ethnicity-Related Interests on Intellectual Property.” Christine Haight Farley opens this part with the analysis of the role that morality, racism, and disparagement toward certain groups play in the

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decision-making process in trademark registrations (Chapter 5). Starting from the well-known dispute on the Washington Redskins' trademark, she surveys several decisions, which seem to indicate an increased attention by the trademark examiners in the United States to "immoral, scandalous, or disparaging trademarks." Similarly, Malte Hinrichsen focuses on the use of racial stereotypes in advertising and as identifiers for commercial products in Europe and the United States (Chapter 6). Presented from a historic perspective, the analysis examines how racial stereotypes continue to persist in today's commodity culture in these countries. Next, Enrico Bonadio considers the impact of morality on patent protection, particularly in biotechnologies, by examining the European Patent Directive to showcase how no patent system can ultimately be neutral to these issues (Chapter 7). Relevant to the question of morality and patents is Shubha Ghosh's concluding chapter for this part, which focuses on the notion of genetic identity and personalized medicine (Chapter 8). In analyzing Myriad's United States patents for a method of diagnosing predisposition to breast cancer among women of Ashkenazi Jewish ancestry, he acknowledges the possible benefits of genetic studies about ethnically, racially, or culturally defined populations, but also questions the validity of patents granted for the genetic tests developed based on such studies.

Focusing on issues related to "Framing Intellectual Property through the Lenses of Religions and Philosophies," Part III opens with Roberta Rosenthal Kwall's reflection on the role of the Jewish religion over human creativity – in particular, how a mandatory break, or incubation period, as the one mandated by the Shabbat, benefits the flourishing of human creativity, and how this process has long been embodied in the narratives of the Torah (Chapter 9). Taking an analogous approach, Margo A. Bagley analyzes the text of two of the parables of the New Testament – the Wheat and the Tares, and the Persistent Widow – to offer important insights on the interpretation of the recent decision on biotech patents, *Organic Seed Growers & Trade Association v. Monsanto Co* (Chapter 10). Along the same lines, Retired Justice Prabha Sridevan reviews ancient Indian (primarily Hindu) texts and highlights the points of conflicts and convergence between the modern Western approach to intellectual property – based on private ownership and the right to exclude – with the traditional approach to knowledge in the Indian philosophy (Chapter 11). Notably, she examines the Vedic traditions during the BC era and recounts how these ancient texts describe the idea of knowledge in ancient India. Peter K. Yu then concludes this part with an exploration of the relationship between intellectual property and Confucianism

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(Chapter 12). He suggests that, rather than be considered as a barrier to the establishment of intellectual property rules, Confucianism may instead offer important insights in the intellectual property development of China and other parts of Asia.

Addressing a contemporary theme, Part IV focuses on “Gender-Related Interests and Challenges: Feminist Theories and Intellectual Property.” Carys J. Craig opens this part with a critical feminist perspective of the copyright system and highlights how the framework that drives the conception and definition of aesthetic value in copyright law seems to fundamentally reflect a notion of male authors, which marginalizes women and female creativity (Chapter 13). Substantiating that notion is Rebecca Tushnet, who takes the “heavily female-dominated area of media fandom” as an example to showcase how women’s creativity is often derided (Chapter 14). She thus advocates for an expansive approach to copyright fair use in this area to provide legal certainty to female fan authors, “who have historically been reluctant to ... claim cultural legitimacy” for their works.¹⁸ Sonia Katyal raises a similar argument using the example of “slash” fan fiction, which while predominantly featuring works of women remains a misfit within copyright fair use (Chapter 15). Given that slash fan fiction facilitates “greater female audience interactivity,”¹⁹ she asserts that the law should evolve to promote greater gender equality in the production of media. The concluding chapter by Ann Bartow presents a powerful argument to deny copyright protection, and thus economic incentives, to pornography due to its abysmal effects on women and society in general (Chapter 16). In addition, she highlights the harmful effects of pornography on (American) culture in general – commodifying sex, which perpetuates stereotypes of females as sexual objects.

Still looking at creative industries, Part V analyzes issues related to “Diversity, Creative Industries, and Intellectual Property.” Olufunmilayo B. Arewa begins the discussion here by recounting the entry of Nollywood, Nigeria’s film industry, on the global scene (Chapter 17). In detailing how digital technologies catalyzed Nollywood’s cultural products despite practical difficulties, she advocates for the development of a more flexible model to create and disseminate such works. Next, Johanna Gibson analyzes the impact and opportunities that the “digital” offers as a cultural and social transformation in innovation and communication with respect to fashion and design (Chapter 18). As she aptly observes “[t]he challenges of the digital is the location of meaning, of identity, of ‘fashion,’ in a digital sea of

¹⁸ See Chapter 14, p. 314.

¹⁹ See Chapter 15, p. 337.

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diversity.”²⁰ Next, using the artistic work of Indonesian artist R. Sumantri MS, whose paintings feature transformative uses of Captain America, Superman, and Wonder Woman, David Tan continues with a contribution on cultural recoding in the context of copyright fair use (Chapter 19). He advocates that, although commercial in nature, these works provide critical commentary on social identities and qualify as fair use. Haochen Sun concludes this part with a provocative theory to balance trademark protection for luxury brands with social responsibility (Chapter 20). In particular, he recounts the Louboutin red sole mark litigation, and details how nontraditional marks, such as colors, may foreclose competition on such aesthetic product features, and in turn prevent the production of cheaper similar products for ordinary people and the less rich.

The book concludes with “The Ongoing Debate on Intellectual Property and (Traditional) Cultural Diversity.” Issues relating to cultural diversity and the protection of intangible cultural heritage (ICH) have been long debated by anthropologists and sociologists, and socio-legal scholars, who nonetheless continue to disagree on the scope of the protection that intellectual property law can offer to these interests. At the outset, Christoph Antons reflects on the difference between intellectual property and cultural property. In doing so, he demonstrates how intellectual property instruments are generally not a good fit for the safeguarding of culture-related interests (Chapter 21). This remains true despite the intense activities by international lawyers, scholars, and lawmakers to enable intellectual property laws to offer ad hoc protection to culture-related interests. Similarly, Tomer Broude criticizes the relationship between ICH, as defined under the UNESCO Convention on the Safeguard of Intangible Cultural Heritage, and intellectual property protection (Chapter 22). Taking the recent inscription of the Mediterranean Diet as protected ICH under the UNESCO Convention as an example, he questions the appropriateness of protecting culinary elements as ICH, even beyond the possibility of protecting these elements with intellectual property laws. Peter Jaszi concludes this part, and the entire book, by considering the important question of whether a *sui generis* regime can assist traditional art communities to protect their interests (Chapter 23). Drawing from the experience of his research in Indonesia, he concludes that any applicable intellectual property rights should be contextualized to the specific needs of traditional communities, and that *sui generis* protection cannot effectively offer protection without additional support from national authorities and the international community.

²⁰ See Chapter 18, p. 401.

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“A lot can happen over coffee,” says the famous slogan in the advertisement for Coffee Day, the largest café franchise in India.²¹ And, this book is our personal testament to a coffee connection. Indeed, many important milestones have boasted of coffee beginnings. Coffee is a powerful catalyst that can bring people together from the most diverse parts of the world, give new energy, and create new bonds. For instance, the story of modern biotechnology is attributed to a conversation at a delicatessen in Waikiki in the early 1970s. Stanley Cohen, a professor of genetics and medicine at Stanford University, was intrigued by a presentation made by Herbert Boyer, then a professor at the University of California, San Francisco.²² During their meeting, the two scientists decided to collaborate and combine their scientific expertise – this collaboration would eventually open the world to recombinant DNA technology, then widely criticized as “tinkering with life.”²³

This book is also a testament that much can happen over coffee. Coffee indeed was the initial catalyst for this book – we, the editors, conceived the seeds of this book while meeting over coffee at a Coffee Day in Bangalore, India, in May 2013. Soon the idea brewed, slowly but steadily. The support of, and the themes explored by our contributors lent a unique flavor and percolated the idea into reality with the creation of the outline for this book. During the many months that followed, much like coffee, the process of creating this volume and editing its contributions has rejuvenated us. We hope that this book can contribute to reinvigorating the debate in this area and in turn shape a more balanced intellectual property system. Furthermore, like it often happens with coffee flavors, working on this book permitted us to explore several diversity-related issues of which we initially lacked full awareness and which are nonetheless fundamentally relevant not only as part of the intellectual property debate, but also in everyday life. In particular, thanks to our contributors, this book expands to include important diversity-related issues that have only been sporadically addressed in the literature – such as the relations between religions and gender theories and intellectual property norms.

²¹ See *A Lot Has Happen Over Coffee!*, <http://www.scion.co.in/work/cafe-coffee-day/>

²² See *Biotech at 25: The Founders*, UC BERKELEY LIBRARY, <http://bancroft.berkeley.edu/Exhibits/Biotech/25.html> see also *Doomsday: Tinkering with Life*, TIME, Apr. 18, 1977, <http://www.time.com/time/magazine/article/0,9171,914901,00.html>.

²³ *Biotech at 25*, *supra* note 22 (noting that Genentech, incorporated in April 1976 by Herbert Boyer and venture capitalist Robert Swanson, was the first company founded on the basis of recombinant DNA technology. The company name, Boyer’s invention, is a contraction of Genetic Engineering Technology).

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Ultimately, to us and our contributors, this book represents a tribute to something that we hold dear, both professionally and personally. It is our hope that the book will serve as an energizing forum – an equivalent of the coffee catalyst that brought us together for this exciting project – and an important milestone in the long road that we hope will lead to a new(er) infrastructure, supported by intellectual property, in which diversity can find a renewed appreciation and inclusiveness.

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Part I

Recognizing and Supporting Diversity
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1 Interpreting International Intellectual Property Agreements and Supporting Diversity Goals

Susy Frankel[★]

I. Introduction

International intellectual property rules can be characterised as creating a degree of uniformity which is not necessarily supportive of cultural diversity. The same rules can also be interpreted as providing the framework for a variety of ways in which culturally diverse approaches and responses can be made to intellectual property law. In order to achieve this diversity, the methods of interpretation of international agreements, which embody the rules of intellectual property, will be important. Ideally, interpretation should support culturally diverse approaches to intellectual property, which in turn should support cultural diversity. This chapter is about how the internationally agreed rules of interpretation of international treaties can be used to support intellectual property laws which reflect opportunities for cultural diversity.¹ Intellectual property rules are one set of laws relevant to cultural diversity.² A preliminary question is how concern for cultural diversity has arisen in connection with intellectual property law.

As international intellectual property protection increases, in both depth and breadth, a corresponding concern about protecting national cultural interests and national identity has emerged. While correlation is not causation, an analysis of the relationship between intellectual property as a key instrument of the regulation of cultural products, knowledge and information, and the concern for cultural diversity in relation to those very things is revealing. One might say, for example, that one

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¹ I say “reflect” because laws ought to be tools that support creative endeavors, not mechanisms that unduly inhibit or dictate the way in which those endeavors occur.

² Other rules include, for example, those in the UNESCO Convention for the Safeguard of Intangible Cultural Heritage, Oct. 17, 2003, 2368 U.N.T.S. 1. See also Francesco Bandarin, *International Trade in Indigenous Cultural Heritage: Comments from UNESCO in Light of its International Standard-Setting Instruments in the Field of Culture, in INTERNATIONAL TRADE IN INDIGENOUS CULTURAL HERITAGE: LEGAL AND POLICY ISSUES* (Christoph Graber et al. eds., 2012).

Cambridge University Press

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of the purposes of intellectual property is to encourage the proliferation of creativity.³ Arguably the more creativity there is, the more culturally diverse that creativity ought to be. In addition, one of the requirements of treaty interpretation is that the object and purpose of the treaty is given effect to. One pathway, therefore, to supporting cultural diversity is to interpret and implement international obligations in light of their object and purpose. Section II of this chapter discusses the agreed rules of international treaty interpretation. Section III looks at how the concern for cultural diversity has arisen in connection with some aspects of intellectual property, in particular geographical indications, traditional knowledge protection and copyright law. Section IV uses examples from Section III to explain how the rules of international treaty interpretation support an approach to intellectual property that is conscious of and sometimes supportive of cultural diversity. Section V concludes.

II. The Rules of International Treaty Interpretation

International treaty interpretation, like all legal processes, has rules. The rules are found in the Vienna Convention on the Law of Treaties (VCLT).⁴ The World Trade Organization (WTO) has explicitly adopted these rules for its dispute settlement process,⁵ and the rules also apply to the interpretation of the treaties adopted under the auspices of the World Intellectual Property Organization (WIPO).⁶ These rules are the customary international law of treaty interpretation and as such apply to interpretation of all international agreements.⁷ There is disagreement

³ This often stated justification for copyright law is part of the utilitarian rationale that creativity will flourish if there is appropriate reward to incentivise it. See William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325 (1989).

⁴ Vienna Convention on the Law of Treaties arts. 31–32, May 23, 1969, 1115 U.N.T.S. 331 [hereinafter VCLT].

⁵ Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994) [hereinafter DSU].

⁶ This is the case for both of the WIPO treaties that are incorporated in the Agreement on Trade-Related Aspects of Intellectual Property Rights, Jun. 1, 1995, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 300 [hereinafter TRIPS Agreement] as well as for any WIPO treaties that are not incorporated in the TRIPS Agreement. The main WIPO treaties incorporated into the TRIPS Agreement are the Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, 21 U.S.T. 1583, 828 U.N.T.S. 305 [hereinafter Paris Convention] and the Berne Convention for the Protection of Literary and Artistic Works, Sep. 9, 1886, 1161 U.N.T.S. 30 [hereinafter Berne Convention].

⁷ See DSU, *supra* note 5, art. 3(2):

The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to

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over some aspects of how the rules apply and different institutions tend to place varying emphasis on different parts of the rules.⁸

The nature of dispute settlement brings the rules into close scrutiny in a way that general treaty interpretation, outside of disputes, does not necessarily do. Consequently, the way in which the WTO, in particular, interprets intellectual property can have direct impacts on related issues of cultural diversity. The impacts are not necessarily only confined to the disputes, but also affect those who rely on the outcome of disputes to guide their national law making.⁹

The core treaty interpretation rule is Article 31(1) of the VCLT, under the heading “General Rule of Interpretation,” provides: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”¹⁰ This rule has the appearance of simplicity. Its multiple parts have led, however, to some complexities. It is well established that Article 31 is a “logical progression” rather than a “hierarchy of legal norms,”¹¹ and that interpretation should be a holistic process.¹² Put differently, the interpreter needs to tackle the

preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.

See also DSU art. 19(2), which states that “[i]n their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements.”

⁸ There can be varying reasons for this. See generally Joost Pauwelyn & Manfred Elsig, *The Politics of Treaty Interpretation: Variations and Explanations Across International Tribunals* (October 3, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1938618.

⁹ See SUSY FRANKEL, TEST-TUBES FOR GLOBAL INTELLECTUAL PROPERTY ISSUES: SMALL MARKET ECONOMIES (forthcoming 2015).

¹⁰ VCLT, *supra* note 4.

¹¹ ANTHONY AUST, MODERN TREATY LAW AND PRACTICE, 187 (2000).

¹² Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, ¶ 269, WT/DS350/AB/R (Feb. 4, 2009) stated:

The principles of interpretation that are set out in Articles 31 and 32 are to be followed in a holistic fashion. The interpretative exercise is engaged so as to yield an interpretation that is harmonious and coherent and fits comfortably in the treaty as a whole so as to render the treaty provision legally effective. A word or term may have more than one meaning or shade of meaning but the identification of such meaning in isolation only commences the process of interpretation, it does not conclude it ... Instead, a treaty interpreter is required to have recourse to context and object and purpose to elucidate the relevant meaning of the word or term. This logical progression provides a framework for proper interpretative analysis. At the same time, it should be kept in mind that treaty interpretation is an integrated operation, where interpretative rules or principles must be understood and applied as connected and mutually reinforcing components of a holistic exercise.

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steps in some kind of order, but the order is not a ranking of the weight of each step.

As Article 31 begins, all interpretation must be done in good faith. This is a substantive principle which is directed to avoiding absurd outcomes.¹³ In particular, ordinary meaning should not be used to create a meaning contrary to context or object and purpose.

The process of interpretation often begins with the ordinary meaning. Importantly, ordinary meaning of any treaty terms must be analysed in their context. As Article 31 makes clear, the analysis of ordinary meaning in context must also be in light of the treaty's object and purpose. The VCLT refers to subsequent agreements about interpretation and subsequent practice as being relevant to interpretation.¹⁴ In addition, the surrounding articles on the same topic and other articles in the treaty will also be relevant context.¹⁵

Some interpreters, particularly those advocating for a "side," suggest that a particular country's laws can explain the meaning of terms in an international agreement.¹⁶ National regimes will be informative, but when several countries enter into an international agreement and those countries have differing regimes using similar terminology, a principle of treaty interpretation is that one country's law is not determinative of the

¹³ See Susy Frankel & Daniel J. Gervais, *Plain Packaging and the Interpretation of the TRIPS Agreement*, 46 VAND. J. TRANSNAT'L L. 1149, 1167 (2013).

¹⁴ VCLT, *supra* note 4, arts. 31(2) and (3) expand on what context includes and what in addition should be considered. They provide:

(2). The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

(3). There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties.

¹⁵ In the case of the TRIPS Agreement, the WTO setting will be context as the TRIPS Agreement is not a standalone agreement; it is part of the WTO package, which is a single undertaking. The WTO context, which is a trade-related context, will also be relevant to interpreting the treaty's object and purpose.

¹⁶ See, e.g., North American Free Trade Agreement, 32 I.L.M. 289 (1993); *Eli Lilly v The Government of Canada*, Notice of Intention to Submit a Claim under NAFTA, available at <http://italaw.com/sites/default/files/case-documents/italaw1172.pdf>, where the statement is made that the correct interpretation of Article 27 of TRIPS is the interpretation that is provided under U.S. and EU law, because the U.S. and the EU are the WTO members who proposed the introduction of Article 27 in the draft of TRIPS. In addition to this not being a correct approach to international treaty interpretation, the U.S. and EU do not have the same law relating to the patentability criteria in Article 27.